



**Australian Government**  
**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA19/07369

Date and time of decision: 20 November 2019 16:33:00  
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 is a Tamil Hindu from Sri Lanka who also lived most of his life in refugee camps in India. He arrived in Australia by boat [in] November 2012.
2. On 10 May 2017 he applied for a safe haven enterprise visa. His claims revolved around fear of harm from authorities due to his family political or LTTE (Liberation Tigers of Tamil Eelam) connections.
3. On 21 October 2019 the delegate refused the visa because she was not satisfied he was a refugee or faced a real risk of significant harm upon return 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).

#### *Obtain new information*

5. The delegate's decision was made on the basis of the 2018 DFAT report which was current at that time. I note there has been a more recent report in November 2019, regarding treatment of Tamils, asylum seekers, and returnees. The information is publicly available and reliable general information. Given that the report is a more recent version of that before the delegate and has been produced specifically for the purposes of protection status refugee determination, I am satisfied there are exceptional circumstances to justify considering the information.

#### *Applicant's submissions and new information*

6. On 4 November 2019 the applicant's representative provided submissions and new information.
7. The submissions revolved around cumulative circumstances and harm relating to his illegal departure from Sri Lanka, being questioned at the airport and linked with his previous LTTE links, recent events in Sri Lanka, harm to Tamils, being detained for a short period amounts to significant harm and the improvements in Sri Lanka which he says cannot be equated to safety. It was submitted there was slow progress that has ground to a halt. It was submitted there was religious unrest in 2016 and 2017 in Muttur and the situation was worse by the recent bombings. It was submitted the applicant would be denied mental health services because of its scarcity and as a Tamil.
8. While the applicant had not specifically claimed to fear harm on the basis of his mental health, he had provided a clinical psychologist letter at his protection interview which indicated he had received counselling and concern about return given his mental health vulnerabilities. He had also claimed (in 2013) he had mental agony for years as a refugee in India. I consider the applicant's mental health claims arose on the material before the delegate, and is not new information.
9. While the applicant had not claimed to fear harm on the basis of his religion, the applicant provided Buddhist articles and unrest and the delegate considered the applicant's Hindu

religion and referred to country information about 2016 and 2017 religious unrest and the 2018 DFAT report about Hindus. I do not consider the submissions about 2016 and 2017 riots therefore new information as it was in the referred material in the delegate's decision. However, the applicant had not previously claimed to fear harm from the Buddhists or BBS and as such I consider it is a new claim and new information.

10. Apart from the matters mentioned below, the submission otherwise canvasses matters that were before the delegate.

*New information*

11. The new information in the submission was that the applicant claimed to fear harm from:
  - a. the Buddhists or BBS and
  - b. people returning from rich countries have amassed money and are seen as easy targets for extortion by police and other authorities and are subject of false charges to pay large sums of money. It will be assumed he will have access to money earned in Australia and will be an easy target for such extortion bids.

*New country information*

12. There was new country information which predated the delegate's decision. The information was about Easter bombings in April 2019 and UN special rapporteur excerpt (2017) about slow progress and the darker side of Buddhism.
13. I consider the information could have been provided earlier as the applicant was warned about the need to provide all his information in correspondence he received from the department, which he confirmed at interview he understood. He also provided news articles and supporting documents himself, which indicated he understood the importance of supporting documentation and knew how to obtain his own country information. Further, the country information is general country information and not credible personal information in the relevant sense and I have more recent information before which about these incidents and issues. I am not satisfied there are exceptional circumstances to justify considering the country information or that s.473DD(b) is met.
14. I have not considered the information.
15. Similarly, the applicant could have provided the information about extortion concerns and fear of harm from Buddhists previously. He was offered many opportunities in the protection interview to add anything further both at the beginning and end of the interview. The applicant did not mention any such concerns or claims. I note in particular, the applicant had provided Buddhist articles in the protection interview. However, when the delegate asked about them the applicant denied they had anything to do with his family or were specific to him, but was evidence of the situation in Sri Lanka generally. Given his failure to make such a claim give at that time I find it difficult to believe his new claim that he fears harm from the Buddhists. Further, the applicant did not provided any reasons why the information could not have been provided earlier or any exceptional circumstances as to why it should be considered. Further, I do not consider the extortion claims are anything more than a general claim of speculative nature and he did not provide any independent information supporting these assertions. I am not satisfied there are any exceptional circumstances to consider the information.

16. I have not considered the information.

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

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

- According to his arrival interview the applicant left Sri Lanka due to ethnic violence and Tamil lives being under threat and went to India when he was [age] years old with his family. When he returned to Sri Lanka for three months he was scared as he was Tamil and his mother's brother's wife was put in jail. He was scared so did not go anywhere and returned to India.
- According to his 2017 statement in 1987/88 his uncle was taken away by Sinhalese military and beaten because he was suspected to have LTTE links. In 1988 when relatives visited their home, neighbours told the military their relatives were LTTE, so the applicant's father was questioned and the family was monitored. The family decided to leave and went to India in 1990.
- In 1991 after the assassination of the Indian prime minister, Indian police arrested 100 people in their camp, including his older brother, "P" who was held in an Indian prison for five years without trial and released in 1996.
- In 1992 they moved to [Location] refugee camp, which had very poor conditions and facilities. The father worked as a labourer, but died when the applicant was [age]. His older brothers supported the family.
- In 2005 the applicant's brother P returned to Sri Lanka to stay with an uncle, who was influential who could protect him and provide him work.
- In 2007 the applicant left the refugee camp and found work illegally in Chennai. In 2009 he decided to return to Sri Lanka and arrived in April 2009. At the time the uncle was a candidate for local elections in Trincomalee. The army received information the uncle had weapons buried on his property, so searched it and found weapons. The uncle was not home, so they arrested imprisoned the aunty for one year. While in prison, someone came to the home and killed the uncle. Police have not been able to identify the perpetrator, but he is worried it was the army.
- The applicant was staying with his brother's friend when the uncle was killed. He was fearful so decided to return to India, but it took two months to raise the money to return and he did not leave the house. He returned to Indian refugee camp and resumed work illegally in Chennai.
- He is scared the army will come after him because of his links to his uncle. He will be subject to illegal departure laws and put in jail before he sees a judge and have to provide bail and personal guarantee to be released. He does not know if his brother would be in a position to do this for him and there is no one else to ask. He is worried he will be detained because he is a Tamil and due to his family's perceived LTTE association.

### **Refugee assessment**

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18. 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**

19. 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.
  
20. I accept the applicant is a Tamil Hindu Sri Lankan citizen. I accept Sri Lanka is the receiving country. I accept he lived in an Indian refugee camp, his family having fled Sri Lanka in 1990. The applicant has consistently claimed this and has documentation to support his claims.
  
21. I accept the applicant and his family left Sri Lanka in 1990 to escape the conflict and communal conflict and lived in refugee camps. The applicant provided a copy of his family’s Tamil Nadu refugee identity card which included him. According to the country information before me, this was not uncommon during the conflict and many thousands of Sri Lankans have resided in these refugee camps in Tamil Nadu, India. I accept that conditions in the camp may have been poor when he was child.
  
22. I accept he has worked in Chennai and lived outside the camp as an adult. However, I do not accept that he would have been imprisoned if found outside the camp or working. Many also lived freely outside the camps. According to the DFAT report before the delegate while refugees in a special camp in Tiruchirappalli managed by the prisons department (holding 44 persons) were not permitted to leave, work or receive benefits, that was not the case for other camps. I note also that the applicant completed high school in India and had an Indian bank account and confirmed he received monthly rations. Further, country information indicates that 95,000 Sri Lanka Tamil refugees live in Tamil Nadu most having fled the war in the mid-1980s. The majority (60,000) resided in 107 camps, the remainder in host communities outside. Those living outside the camps are generally better off than those in the camps and often run successful businesses.
  
23. The remainder of the applicant’s claims have not been consistent and his account has changed over time and lacked any details. His claims have evolved from nothing other than being a Tamil and his aunt having been in jail, to his father had political connections, to his brother was imprisoned for five years in India, his uncle was killed due to LTTE suspicions and aunt was in jail after weapons were found on their property, to the uncle was a candidate for

the Tamil National Alliance TNA, to his uncle and two (or three) others were killed by authorities.

24. For instance, in his arrival while he claimed his aunt was (mother's brother's wife) was put in jail, he made no mention of his uncle being killed as a result of political or LTTE connections or weapons being found on the property. Further, he made no claims that anyone in the family had any political connections or involvement and in fact when directly asked about that, denied it. It was not until his 2017 statement that the applicant claimed his uncle had been killed (while the aunt was in prison) because weapons had been found on his property.
25. Further, in May 2013, after the applicant had been screened out of engaging any protection obligations, the applicant added a new claim and told his case manager that his father had politically connections and the family had to leave Sri Lanka due that. However, there was no such claim in his 2017 statement or in his protection interview in 2019.
26. In his 2017 statement, the applicant claimed his uncle was a candidate for local elections in Trincomalee and the army received information that there were weapons on the property. When they investigated they found weapons and because the uncle was not there they arrested the aunty and held her for a year. In his protection interview, he claimed one day people knocked on the uncle's door at 10 pm and shot him.
27. However, I find it difficult to believe that he would not mention such an incident at his arrival interview and again in May 2013 when he added new claims after he was screened out. I am mindful of observations in *MZZJO v MIBP* [2014] FCAFC 80 and *DWA17 v MIBP* [2019] FCAFC 160 about reliance on omissions in arrival interviews. The applicant said he did not know what to say when he arrived and had not been advised and only thought of his family. However, I do not accept this explanation, as it was the key incident of his claims later and he claimed the person was his uncle (on mother's side). Further, he had mentioned his aunt being in jail in the arrival interview, so it is not credible that he would not also have mentioned his uncle being killed, if true. Further he was asked specifically about the reasons for his departure and what he feared upon return to Sri Lanka.
28. Further at the protection interview the applicant claimed another two people were also killed in the house, but they were not relatives. The applicant had not claimed this previously. He provided no details about who they were or why or the circumstances.
29. Further, the applicant's account lacked any meaningful details. While I acknowledge it would have been a second hand account and he was young at the time the events are said to have taken place, this was the applicant's key claim. Further, the applicant claimed to live with his cousin (the son of the uncle who he says was killed) in Australia (the cousin having come in 2013). Even if the cousin was upset talking about it, I do not accept that the applicant would not have more information about what happened. Further, the applicant had no information about what his cousin did or what happened to him after the claimed killing of his father and imprisonment of his mother in 2009 or since then.
30. Further, it is not credible in my view that if his aunt had been taken to prison in December 2008 and his brother had warned him not to return that he would return to Sri Lanka in 2009 to see if it was safe.
31. Further it is not credible that if weapons had been found on the uncle's property and his wife had been arrested, that the uncle would return to and continue to remain at the home so that authorities or someone could, *some months later*, 'knock on his door at 10pm after

dinner and shoot him' (according to his protection interview). If weapons had been found and he was suspected LTTE, it is difficult to believe the uncle would not have also been quickly taken into custody as well.

32. Further, the applicant's sister's claims were not the same as the applicant's. For instance, the applicant claimed (at protection interview) that the uncle was shot and as were two others. However, the sister had claimed the uncle and five other relatives were killed. When the sister's claims were put to him by the delegate, the applicant did not appear to know that. Further, he did not appear to be concerned or questioned who might have been the other relatives who had been killed. The applicant said his sister knew more about than he did. Even if an older sister, I find it incredible that they would have such different accounts and that the applicant did not appear concerned or see the need to have found out or have the full story of who was killed (as claimed by the sister). Further, they travelled by boat to Australia together and he was still in contact, so it is difficult to believe that they would have such different accounts of how many of their relatives had been killed in the one key incident of their refugee claims.
33. Further, I note when the inconsistency was put to him the applicant added another account, saying he thought there were three additional people who were killed. I consider this is another example of the applicant making up his account as he went and in response to concerns raised.
34. While the applicant provided a death certificate for 'AK' (who he claimed was his uncle), which indicated fire arm injuries as cause of death ([April] 2009), the applicant provided no documentary evidence to show that that person was related to him. Further, when asked the name of AK's parents, (ie applicant's grandparents) the applicant did not know and had to refer to the death certificate. The applicant said he was young when they left Sri Lanka and his parents did not talk about their parents. However, I do not accept that he would not know his grandparents names or any part of their name. Further, I note when the delegate asked if the mother's birth certificate would show she had the same parents, the applicant indicated his mother did not have a birth certificate. Having listened to the interview, I consider the applicant was making this up to respond to the delegate's concerns. I do not accept the death certificate relates to the applicant's uncle or relative.
35. Further, I note the applicant's brother returned to Sri Lanka in 2005 and he continues to live there with his own family in Trincomalee without harm. The applicant said this was because the brother's mother in law knew politicians. However, the applicant had no information about who they were, what party they were from or the nature of any such connection. Further, given the conflict and changing political landscape between 2005 and presently I do not accept that knowing a politician would keep a family safe if they were suspected LTTE or of LTTE links (ie to LTTE uncle). The country information reports that Tamils were widely targeted during this period, including being rounded up and sent to rehabilitation camps, and it does not indicate that a family member knowing politicians would make a difference.
36. I consider the applicant has added to and manufactured his claims over time. His account lack details and credibility and was not consistent with his sister's claims. Further, his own account was not internally consistent. I do not accept that now knowing what to say or not being advised explains his changing and emerging account as the claims are about his and his family's personal circumstances.
37. I do not accept any of the applicant's family (father, brother, aunt or uncle) were monitored, questioned, beaten, imprisoned or killed. I do not accept any were politically connected, with

political organisations or that his uncle was a candidate in elections. I do not accept that any of the family were suspected or perceived LTTE or that the applicant is or will be of adverse interest to authorities upon return.

38. I accept that during the conflict Tamils faced harassment and harm. While the situation has improved considerably since the end of the conflict, I accept there are continuing human rights abuses, including torture of some Tamils and reports of continuing risk of harm for persons suspected of LTTE involvement or involved in seeking a Tamil unitary state or resurgence of the LTTE.
39. However, I do not accept the applicant has or will have suspected LTTE profile, links or associations or involved in seeking a Tamil unitary state or resurgence of the LTTE.
40. Further, the credible country information before me is that the security situation has improved considerably (while not perfect) since the end of the conflict in 2009, particularly for the Tamil population. 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 more recent credible country information in the material before me (DFAT, UK Home Office) confirms this is the case and has continued to be the case in subsequent years.
41. I accept the applicant has lived in Tamil Nadu refugee camps for many years and therefore spent extensive periods overseas. According to the country information before the delegate there are many thousands of Sri Lankans who fled to Tamil Nadu during the conflict and have returned without harm. Further, I note the applicant's brother returned to Sri Lanka in 2005 without harm.
42. I have considered the submissions and country information about lack of real progress, recent political upheaval in Sri Lanka politics in October 2018, Easter bombings in April 2019, and attack on Tamil prisoners in Boosa jail in February 2019. I have considered the communal unrest in 2016 and 2017.
43. However, I do not accept there is a real chance the applicant will be detained in Boosa jail or elsewhere (other than briefly at the airport as a consequence of his illegal departure as discussed below). I do not accept he faces a real chance of interrogation or of coming to be known by Tamil militant groups regarding past LTTE links as I do not accept he has any or will be perceived as having any. I do not accept the applicant faces any harm as a result of heightened security or use of PTA given April 2019 bombings. According to the DFAT report since the Easter bombings Muslims face a moderate risk of violence and discrimination (and Christians a low risk of discrimination). However, the applicant is not a Christian or Muslim. Further, the authorities have arrested and killed those responsible for the April 2019 terrorist bombings. I do not accept the applicant has or will have a profile of interest or at risk of detention or harm in that regard.
44. I accept he is a Tamil Hindu and attends temple once a year, when friends visit. Country information indicates that Hindus practise their faith freely in the north and elsewhere in Sri Lanka. I do not accept the applicant faces a real chance of harm on the basis of his religion or due to communal unrest or security situation.
45. I have considered the applicant's mental health and letter from his psychologist. The applicant only received counselling when in immigration detention (prior to July 2013) and



then again recently (referred July 2019) when he started to drink more heavily and was concerned about return to Sri Lanka and his uncertain situation. He had not been diagnosed with any mental or physical illness and confirmed his drinking was not a problem, but just was told by the doctor to reduce it as it was better for his kidneys.

46. The report noted the applicant struggled with his long standing separation from his family and uncertainty of his situation and therapy was being carried out to help him process traumatic memories. It stated he experienced trauma during the first years of his life in Sri Lanka where he witnessed bomb blasts and bloodshed. However, the applicant had not made any such claims.
47. While I accept the applicant has sought some counselling about the stress of uncertainty about his situation and separation from his family, I do not accept he witnessed bloodshed and bomb blasts as he has not claimed that. While the letter was written to support his request to stay in Australia and referred to his mental health vulnerabilities, they were not detailed and there was no diagnosis of a mental health condition. Further, I place little weight on the report as it seeks to assess the applicant's return to Sri Lanka and states he will be lost and unsafe if he were to return as a Tamil speaking minority, which is not the role of clinical psychologist. Given the applicant's sporadic engagement with counselling, its timing, and lack of diagnosis I am not satisfied the applicant has an ongoing need for treatment or will seek it.
48. According to the DFAT report, while mental health services are scarce in Sri Lanka, this has improved. Further, and in any event, I note the applicant did not seek or need assistance for nearly six years while in Australia and only recently sought in relation to separation from his family and his uncertain situation assistance (according to the report). I am not satisfied that he would seek or need assistance upon return. I do not accept the applicant faces a real chance of harm due to mental health issues as I do not accept he has a mental illness or condition. Further, I do not accept he will need or seek mental health assistance. I do not accept he faces a real chance of harm for mental health reasons.
49. Further and in any event, even in the remote chance of seeking mental health or counselling assistance in the future, I do not accept the applicant faces a real chance of harm or refusal of treatment or assistance for any s5J reasons. Country information indicates the government is devoting greater attention and resources to mental illness. A state run hospital treating mental illness has 1200 full time staff and 1500 beds. There is a national mental health helpline. Improving access to mental health services, including at the community level, is a government priority. The have deployed mental health workers and district level hospitals have mental health facilities and some NGOs provide psychosocial support services, including in Tamil areas. Despite improvements, overall services are considered inadequate particularly in former conflict areas where demand is greatest, particularly for former combatants, families of missing persons and those affected by the 2004 Tsunami. Country information does not indicate that services are denied or unavailable for one or any of the s.5J reasons.
50. Further, I note the applicant presented well at the protection interview, was able to find his own employment and worked full time. While I accept the applicant may have to make some adjustments upon return to Sri Lanka, I do not accept that he faces a real chance of any harm in that regard
51. I have considered potential adjustment difficulties given he grew up in India, as he departed Sri Lanka when he was [age] years old. However, I do not accept he faces a real chance any

harm in that regard. He has shown he is resourceful in adjusting to Australia. Further, the applicant returned to Sri Lanka in 2009 for three months, so it is not entirely unfamiliar. He claimed he stayed with his brother's friend at the time. Further, his brother lives in Sri Lanka with his family and they are in contact. The applicant has completed year 12 and has been employed as [an Occupation] in India and in various jobs in Australia and earned an income.

52. Even considering the current circumstances in Sri Lanka and foreseeable future, I do not accept the applicant faces a real chance of harm upon return to Sri Lanka.
53. I do not accept the applicant faces a real chance of harm upon return on the basis of his ethnicity, race, religion or as a Tamil male from the north, who lived in refugee camps in India, spent considerable periods overseas (India and Australia) in diaspora, or who sought counselling.

*Failed Asylum seeker*

54. I accept that if the applicant returns to Sri Lanka, he would do so as a returning asylum seeker on a temporary travel document. I accept that he may face questioning at the airport as a returned asylum seeker.
55. The DFAT reports indicate 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 or perceived as such. I have not accepted that he is or will be of interest to authorities or anyone.
56. Credible country information in the DFAT reports indicates that there is returnees are not mistreated 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.
57. While not claimed, I note country information in the more recent DFAT reports about failed asylum seekers reporting social stigma from their communities upon return 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 harm as a returnee resettling, finding employment or accommodation. I consider the applicant has family in Sri Lanka, has completed high school, previously worked in India and Australia, visited Sri Lanka as an adult and is in contact with his family. I am not satisfied the applicant will be precluded from employment and accommodation. On the evidence, I am not satisfied that he faces a real chance of social stigma or other difficulties as a returnee. Further and in any event, I do not consider social stigma amounts to serious harm.
58. 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 he was or will be of adverse interest to authorities or anyone. 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 police, army, CID, the authorities or anyone.

59. I do not accept he faces a real chance of any harm upon return, as I do not accept that he is or will be of interest to authorities or anyone even if returning from overseas from extended periods of residence in Indian refugee camps and in Australia (a western country).

*Illegal departure*

60. While he left as a child in 1990 illegally, given it was remote in time, he was a child and during the conflict when many fled, I do not consider he faces a real chance of any consequences in respect of that departure. Further, country information indicates that children are not subject to illegal departure penalties.
61. While the submissions referred to the applicant's illegal departure by boat from Sri Lanka to Australia, the applicant departed from India to Australia. I accept the applicant may have departed Sri Lanka without a passport and therefore illegally, in 2009 when he returned to India. For that reason, he has committed an offence under Immigration and Emigration Act (IAEA) and will very likely face questioning at the airport and may be charged and fined.
62. The country information before me, including from DFAT, 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.
63. While there may be a penalty for illegal departure, country information indicates a guilty plea attracts a fine of LKR 3000 (approximately \$25AUD) for a first offence to LKR 200,000 (AUD\$1670) and if a guilty plea is made, the returnee is free to go and the fine can be paid by instalments. If a plea of not guilty is made he would be bailed pending a court date for hearing.
64. The applicant claimed he would be jailed before he could see a judge, would have to provide bail and a personal guarantee, but he did not know if he brother would be in a position to do this. However, I find it difficult to believe that the applicant has not asked his brother about this, given he is in contact with him. Further and in any event, I note if he pleads guilty he is free to go and the fine can be paid in instalments. Therefore he would not need to be bailed. The applicant has not said he planned to plead not guilty. In the remote chance that the applicant pleaded not guilty, given his contact with his brother in Sri Lanka, that the applicant has been working in Australia and earning an income, I am not satisfied that there is a real chance the applicant would not be bailed and released.
65. I reject submissions that a brief period in remand or detention means he will face serious or significant harm. Firstly, I do not accept that there is a real chance he will be in imprisoned. I note from country information that if the applicant arrives over the weekend he may be briefly held in airport holding cell until he can appear before a magistrate. Country information confirms that there is no mistreatment. I do not accept the applicant faces a real chance of torture, interrogation or mistreatment upon arrival, during questioning or possible brief detention at the airport.
66. 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.

67. I am not satisfied, that questioning, arrest, and being held in airport holding cell, travel or possible costs for court appearances and the application of a penalty for illegal departure amount to systematic and discriminatory conduct as required by s.5J.
68. I have had regard to all of the evidence before me including the totality of the personal circumstances of the applicant. I am not satisfied the applicant has a well-founded fear of persecution from anyone, now or in the reasonably foreseeable future, if he returns to Sri Lanka.

#### **Refugee: conclusion**

69. 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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70. 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**

71. 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.
72. 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 and may incur additional costs. I do not accept that there is a real risk he would not be bailed. 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. However, 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. Nor am I satisfied that there is an intention in connection with these processes and penalties to inflict severe pain or suffering, pain or suffering that could be reasonably regarded as cruel or inhuman, or an intention to cause extreme humiliation such that it could be said that he faces cruel or inhuman treatment or punishment or degrading treatment or punishment (as defined) or significant harm as defined under s.36 and s.5 of the Act.
73. As to treatment and any questioning upon return as a failed asylum seeker or returnee I am not satisfied there is a real risk of significant harm. I note his brother and his family are in Sri

Lanka and the applicant's education, past employment and resourcefulness in employment and adjustment in the past in India and Australia on the evidence, I am not satisfied that he faces a real risk of social stigma or other difficulties as a returnee. Further and in any event, I do not consider social stigma amounts to significant harm.

74. I am not satisfied that, individually or cumulatively, any processes or penalties the applicant may encounter under the IAEA, would constitute significant harm as defined under ss.36(2A) and 5 of the Act.
75. I have not accepted the applicant faces a real chance of harm in relation to his mental health or accessing mental health services as I do not accept that he or has a mental health condition, any diagnosis or requires or will seek assistance. Further, and in any event, even with difficulties regarding mental health services resourcing, I do not accept that there is any intention in connection with resourcing difficulties to inflict harm.
76. In relation to the remainder of applicant's claims, which I have accepted, I have found that the applicant does not have a real chance of harm on any of these bases. 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 any harm, including significant harm on any of those bases if removed to Sri Lanka.

#### **Complementary protection: conclusion**

77. 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.