



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA20/07807

Date and time of decision: 17 February 2020 12:48:00
C Wilson, Reviewer

Decision

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

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 473EC(2) of the Migration Act 1958 and replaced with generic information which does not allow the identification of a referred applicant, or their relative or other dependant.

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Tamil from the Northern Province of Sri Lanka. He arrived in Australia as an unauthorised maritime arrival [in] November 2012. He applied for a Safe Haven Enterprise Visa on 22 February 2016.
2. A delegate of the then Minister for Immigration and Border Protection (the delegate) refused the application on 23 August 2016. The delegate did not accept the applicant would be of adverse interest for his low level support for the Liberation Tigers of Tamil Eelam (LTTE), or that he would face harm for departing Sri Lanka illegally.
3. A reviewer of the IAA affirmed the decision on 5 December 2016.¹ The applicant sought judicial review and by consent order dated 29 January 2020 the decision was quashed and remitted to the IAA for reconsideration.

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 21 September 2016 the applicant's then representative provided written submissions containing new information. They were erroneously told the submissions did not meet the Practice Direction and were told to re-submit. Further submissions containing new information were provided on 23 November 2016. I have taken both sets of submissions into account, and considered whether the new information provided 21 September and 23 November 2016 meets s.473DD.
6. In both sets of submissions the applicant provided new information that his sister and her family had recently fled Sri Lanka for [Country 1]. She had allegedly fled to [Country 1] after coming to the adverse attention of the Sri Lankan Army (SLA) from the family's reputation as an LTTE family. In support of this the applicant also provided a 'medical card' which he said had been issued by the International Organization for Migration (IOM) in [Country 1]. The representative submitted this is credible personal information which was not previously known and could not have been provided earlier as the applicant just learnt of it. They also submitted there were exceptional circumstances to consider the information because if another family member has fled Sri Lanka this will put the applicant on a watch list should he be returned.
7. The new information regarding the applicant's sister is vague, lacking in detail and lacking in evidence. There is no detail about the date the sister left Sri Lanka, or whether she left by plane or boat, or whether she entered [Country 1] legally. The medical card in support of the claim contains limited information, and nothing to indicate when it was issued. There is nothing on the card to indicate it was issued by IOM or even that it was issued in [Country 1]. Even if the applicant did not know his sister had left Sri Lanka, there is no explanation why the applicant did not tell the delegate in his SHEV interview that any of his family members in Sri Lanka were receiving 'adverse attention'. The representative stated the applicant would provide a letter from UNHCR in [Country 1] as evidence, but no such letter was ever provided. I consider the information about his sister and her family is too vague and

¹ IAA16/00675

undetailed to be credible information. I have considered the submissions that there are exceptional circumstances to consider this information, because a member of the family escaping Sri Lanka will put the applicant at risk because he'll be on a watch list. However, there is no evidence before me that the applicant 'escaping' Sri Lanka put the rest of his family on a watch list. There are no claims before me of any harm coming to his family since he left in 2012, and no information that the rest of the family have suffered adverse consequences since the sister allegedly left. I consider the information about the sister is not credible information, and therefore I am not persuaded it impacts on the applicant's profile. In all the circumstances I am not satisfied there are exceptional circumstances to justify considering the claim about his sister or the medical card. I find s.473DD(a) is not met and therefore I must not consider this information.

8. In both sets of submission the applicant provided new information that he had participated in Tamil diaspora activities in Sydney, and as evidence of this he provided two photographs of himself purportedly at the Tamil event Hero's Day in Silverwater, NSW in 2015. It is submitted he did not provide this information earlier as he did not know it was relevant to his protection claims. The representative argued there are exceptional circumstances to take this information into account, because the applicant did not have a migration agent representing him at the SHEV interview. I acknowledge he did not have representation at that time, but I consider it was within the applicant's power to obtain one, as he did when his matter was before the IAA. I also note he was directly asked at the SHEV interview if he had ever been involved in Tamil separatism or ever taken part in a protest against the Sri Lankan government, and he answered no. He did not raise that he had been involved in an activity honouring the LTTE who died, which may be seen by the Sri Lankan authorities as Tamil separatism or political protest. The evidence of his involvement consists of two undated photographs, and it is not evident from the photographs exactly where or when they were taken. I consider the evidence in the photographs is of limited use without further context or detail. There is a paucity of evidence to support the new information that the applicant participates in Tamil diaspora activities, and no statement from the applicant himself on this topic. I consider the evidence and detail provided in regards to this new information is too vague and lacking in evidence for me to be satisfied there are exceptional circumstances to justify considering it. In all the circumstances, I find s.473DD(a) is not met and therefore I must not consider this new information, consisting of the photographs and the claim the applicant participate in Tamil diaspora activities such as Hero's Day.
9. The applicant provided a bundle of reports and articles on Sri Lanka with the submissions dated 21 September, and small extracts from reports from the International Truth and Justice Report Project in the submissions dated 23 November 2016. The representative argued there were exceptional circumstances to take these reports into account, because the applicant did not have a migration agent representing him at the SHEV interview. All of the reports pre-date the delegate's decision. As noted above, I consider it was within the applicant's power to obtain a representative to assist him at the SHEV interview and to provide the Department with any more information he wished to before the decision was made. There is a lack of explanation as to how these reports relate specifically to the applicant's claims, apart from some highlighting in some reports, and the extracts contained in the submissions dated 23 November 2016. The reports contain information regarding human rights abuses and torture in Sri Lanka, treatment of Tamils and returnees, and monitoring of Tamils including monitoring of diaspora activities. I consider I already have similar information before me²,

² For example: Human Rights Watch, Rape of Tamil Detainees, 26 February 2013; Agence France Presse, Sri Lanka still torturing suspects after end of war, 7 May 2016; Immigration and Refugee Board of Canada, Sri Lanka: Treatment of suspected members or supporters of the LTTE, including information about how many are in detention, whether the

and more up to date information in the 2019 Department of Foreign Affairs and Trade (DFAT) report that I have obtained (for the reasons given below). Taking into account that these reports and articles pre-date the delegate's decision, do not contain information that is not already before me, and are not directly about the applicant or his family, I am not satisfied there are exceptional circumstances to justify considering them. I find s.473DD(a) is not met and therefore I must not consider these reports, articles, and extracts.

10. In the circumstances where the country information before me is more than 3 years old, I have considered whether to exercise my discretion to bring in more recent country information, particularly on the treatment of Tamils and returnees to Sri Lanka. I have considered in particular whether to get the 2019 DFAT Country Information Report Sri Lanka.³ This report replaces the earlier 2015 report that the delegate relied upon in their decision. I consider this is an exceptional case where the review now before me is of a decision made by a delegate more than 3 years ago. In these circumstances I am satisfied there are exceptional circumstances to justify considering more recent country information contained in the 2019 DFAT report. As the information is about a class of persons of which the applicant is a member, I have not needed to invite him to comment on it.

Applicant's claims for protection

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

- The applicant is a Tamil of Hindu religion born in the Northern Province of Sri Lanka. He is married with [number] children, and his wife and children live in Colombo. His mother and siblings live in the Northern Province. His father passed away in 2014.
- Due to the civil conflict the family were displaced 5 or 6 times between 1995 and 2003. His father ran [businesses], but one was burnt down in the conflict.
- The applicant's father provided food to the LTTE between 1996 and 1999 from his [business], when requested to do so by the LTTE. Because of this his father was under suspicion from the Sri Lankan Army (SLA) and on occasion was taken for questioning and tortured between 1996 and 1999. His father died in 2014 as a consequence of injuries sustained from this torture.
- The applicant and his cousin ran the [business] from 2001. Between 2001 and 2003 the applicant provided support for the LTTE in providing food, washing their clothes, allowing them to stay and leave weapons at the house. After 2003 the LTTE no longer asked for his support.
- In 2007 the applicant's cousin was shot dead. He believes his cousin was killed because he supported the LTTE.
- The applicant feared he would be killed like his cousin. He went into hiding in Colombo, obtained a passport, and went to [Country 2] for work. However he did not like the company he worked for and left his job. He was deported by the [Country 2] authorities and travelled home on an emergency passport issued by Sri Lanka, as his company held his original passport and would not return it to him.

government continues to screen Tamils in an attempt to identify LTTE suspects, 11 February 2015; Report of the High Commissioner for Human Rights, Investigation on Sri Lanka, 16 September 2015; Human Rights Watch, "We live in constant fear": Lack of Accountability for Police Abuse in Sri Lanka, 23 October 2015; Sri Lanka Mirror, Another Tamil returnee arrested, 1 July 2015; Amnesty International, report 2014/2015 – Sri Lanka, 25 February 2015.

³ 4 November 2019.

- When the applicant returned to Sri Lanka in 2010 he was detained and questioned for 7 hours at the airport before being released. They took a photograph of him and recorded his personal details. About three months later the Criminal Investigation Division (CID) called him and questioned him for 30 minutes. They said he would have another interview with them in 2 weeks, but he did not attend it.
- In 2012 he relocated to Colombo with his wife and child. Six months later he left for Australia.
- The applicant fears returning to Sri Lanka because the authorities will harm him for his support for the LTTE, and because his family were known LTTE supporters. He fears he will be killed as his cousin was. He will also face harm because he is a failed asylum seeker who left Sri Lanka illegally and is a Tamil from the Northern Province.

Refugee assessment

12. 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

13. 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.
14. I accept the applicant is a citizen of Sri Lanka, based on the identity documents he provided to the Department. The applicant was born and grew up in the Northern Province, but moved to Colombo prior to leaving Sri Lanka. His wife and [children] have remained in Colombo, where his wife’s mother lives. I find Sri Lanka is his receiving country and Colombo is the place he is likely to return to.

Tamil from the north with suspected LTTE links

15. The applicant claims his family have been targeted, and he will be individually targeted, for help they gave to the LTTE during the civil conflict in Sri Lanka. He claims he and his family

are imputed to be LTTE supporters and this gives him an imputed political opinion as pro-LTTE.

16. The civil conflict in Sri Lanka began in July 1982 when full-scale conflict broke out between the LTTE and the Sri Lankan military. The LTTE were a separatist Tamil militant group, advocating for an independent Tamil state in the north and east of Sri Lanka. The conflict ended in May 2009 when the Sri Lankan government declared victory over the LTTE and complete territorial control over Sri Lanka. At its peak in 2004 the LTTE had an armed force of approximately 18,000 people and an extensive administration, political and intelligence support structure. Towards the end of the conflict large numbers of LTTE members were arrested and detained by government forces in 'rehabilitation' centres. At one time the government managed 24 such centres, housing around 12,000 people. Any association with the LTTE could be grounds for arrest, and many civilians were questioned or monitored by the authorities. As the LTTE were almost exclusively Tamil, the security forces imputed LTTE membership or support in a discriminatory way, based on Tamil ethnicity. This was particularly so for Tamils from the LTTE areas in the north and east of Sri Lanka. The authorities also knew that Tamil civilians living in the LTTE areas of the north and the east were required to interact with the LTTE as a matter of course. By December 2019 only 1 rehabilitation centre remained open, with only 1 former LTTE member detained. The LTTE no longer exists as an organised force in Sri Lanka.⁴
17. The applicant claims he and his family are known to be LTTE supporters for support given during the civil conflict. He does not claim he or his father or brothers were ever members of the LTTE. He says his father gave food to the LTTE in the period 1996 to 1999. The applicant says between 2001 and 2003 he gave support to the LTTE by giving them food, washing their clothes, allowing them to leave weapons at his house and also allowing them to occasionally stay at his house. The applicant says he did not give support after 2003, because the LTTE stopped calling on them for support. I accept that as a Tamil family in an LTTE area they were called upon for help such as providing food, and possibly washing clothes. I consider the claim the family also stored weapons or allowed LTTE members to stay was an embellishment at the SHEV interview.
18. The applicant claims that during the conflict, and particularly during the period 1995 and 2003, he and his family moved about 5 or 6 times. Their family house was damaged in 2000 and one of his father's [businesses] was burned down. His father sought compensation from the authorities for the damage to the family home, as evidenced by a complaint document provided by the applicant. In his written claims he says the [business] and home were damaged because they were known to be associated with the LTTE. I do not accept his father would have sought compensation in such circumstances. I consider the damage to the properties was due to collateral damage in the conflict rather than deliberate targeting as known LTTE premises.
19. The applicant says his father was sometimes questioned by the SLA at an army camp, between 1999 and 2003. He says his father was tortured during interrogations. They stopped doing this in 2003 because his father was too disabled by this time, due to the torture. As put to the applicant by the delegate, the claim that his father was rendered disabled by mistreatment from the SLA appears inconsistent with the applicant's evidence that his father worked as [an Occupation 1]. He had claimed to work with his father in his [business] after the applicant returned from [Country 2] in 2010. In response the applicant

⁴ DFAT, Country Information Report Sri Lanka, 18 December 2015; DFAT, Country Information Report Sri Lanka, 4 November 2019.

said his father was only a supervisor and didn't do manual work. I consider it is plausible his father was called in for questioning if there were suspicions he was supporting the LTTE, and as noted above, mere ethnicity as a Tamil could be suspicion enough for the authorities at that time. I accept that if his father was questioned at an army camp, it is plausible he was physically mistreated or even tortured, as such mistreatment has been documented by various sources.⁵ I do not accept however he was rendered disabled by such mistreatment, given he continued working as [an Occupation 1], even if such work was mostly supervisory. Further, there is no medical evidence before me to support the applicant's allegation that his father suffered ongoing health issues related to torture or that he died in 2014 from injuries sustained when he was questioned by the SLA between 1999 and 2003. I accept the applicant's father was questioned by the SLA, and may have been mistreated during such questioning. However the fact that his father was never detained during the war, or questioned after 2003, or placed in a rehabilitation camp post conflict, indicates the authorities did not view his father as having an association with the LTTE.

20. The applicant says his cousin was killed in 2007 by the SLA because the cousin gave support to the LTTE. The applicant was unable to articulate what that support was, whether it was similar to what the applicant claims he and his family had done or whether the cousin had greater involvement with the LTTE. He provided a death certificate for his cousin and a newspaper article (not in English) reporting on the death. At the SHEV interview the interpreter did a quick translation of the article and confirmed it referred to the cousin by name and that he had been shot dead by unknown persons. The applicant admits he does not know who shot his cousin, but believes it must have been the SLA. He says the newspaper would not openly say it was the SLA, nor would the authorities openly admit it was them. Taking into account his cousin was shot during the conflict, I accept it is plausible he was shot by the SLA because he was Tamil with an actual or imputed association with the LTTE.
21. The applicant says he left his home in the Northern Province because he feared he would be harmed as his cousin was. In 2007 the applicant moved to Colombo where he obtained a passport and organised a job in [Country 2]. He left Sri Lanka in 2008 for [Country 2]. Taking into account the monitoring of Tamils during the conflict, including the maintenance of stop and watch lists and the need to register internal movement⁶, I do not accept such travel would have been possible were he and/or his family of adverse interest. At an entry interview on 21 December 2012 the applicant had claimed he was detained by the CID in Colombo for 4 days before he departed for [Country 2]. However, there was no mention of this in his SHEV application. At the SHEV interview when asked if he was ever detained or ever spent any time in a Sri Lankan jail or detention centre he answered no. He also said the first time he was ever questioned by the CID was on his return to Sri Lanka from [Country 2]. When he was reminded by the delegate at the SHEV interview that he had said at his entry interview he was detained by the CID for 4 days in Colombo before he went to [Country 2], the applicant did not give any explanation of why he did not mention this in his SHEV application, nor give a convincing account of the alleged detention. Given he did not raise the claim of being detained for 4 days in his SHEV application, and positively stated in the SHEV interview he was never detained in Sri Lanka, I do not accept he was detained for 4 days in Colombo.

⁵ Report of the High Commissioner for Human Rights, Investigation on Sri Lanka, 16 September 2015; Human Rights Watch, Rape of Tamil Detainees, 26 February 2013; Human Rights Watch, "We live in constant fear": Lack of Accountability for Police Abuse in Sri Lanka, 23 October 2015; UK Home Office, Sri Lanka: Tamil separatism, May 2016; DFAT, Country Information Report Sri Lanka, 18 December 2015.

⁶ DFAT, Country Information Report Sri Lanka, 18 December 2015. UK Home Office, Country Information and Guidance Sri Lanka Tamil Separatism, 28 August 2014.

22. When the applicant was in Colombo, his father wrote to a local official in their home area to advise the applicant had temporarily relocated to Colombo and was preparing to leave for work in [Country 2]. The purpose of the letter was to record the family address in [Northern Province] as the applicant's permanent address. This letter is dated 2008-06-04. I do not accept his father would have written such a letter if the applicant was in hiding. I consider that his father advising the authorities of the applicant's movements is evidence the applicant was not in hiding in Colombo, but had merely moved there on his way to finding employment outside of Sri Lanka.
23. When the applicant returned to Sri Lanka in 2010 he says he was detained at the airport for 7 hours and questioned. I accept this happened, as it is consistent with country information that Sri Lankan returnees are questioned by police at the airport.⁷ I accept that during the questioning he had his photograph taken and identifying information recorded. The applicant was a young Tamil man from the north who left Sri Lanka during the conflict. In the aftermath of the civil conflict, merely being a young Tamil man from the north could be enough reason for detention. In addition to this, the applicant had been deported from [Country 2] after leaving his employment contract, and returned on emergency travel documents. In all the circumstances it is not surprising he was interviewed by the police on arrival. Yet after being interviewed and processed the applicant was free to go. I consider the fact he was not detained then, or shortly thereafter, indicates he was not of adverse interest and was not viewed by the authorities as associated with the LTTE. I acknowledge the applicant claims he was called about 3 months later and interviewed for about 30 minutes. He says he was told he would have another interview in 2 weeks but did not attend any such interview. Yet he remained in the Northern Province until 2012 and was not bothered by the authorities again. The applicant claims his family heard the SLA was looking for him, and that was when they decided to send him to Australia. There is no claim however that they ever came to the family house to look for him. They did not stop him when he relocated to Colombo in 2012. He has said he lived in hiding, but after returning to Sri Lanka in 2010 he worked, got married, and had his first child. I do not accept he was in hiding, but was in fact living a normal life. I consider that were he of interest to the authorities he would have been detained or actively monitored after his return from [Country 2]. That he was not indicates that he was not of adverse interest to the authorities.
24. In the aftermath of the conflict the Sri Lankan authorities detained and rehabilitated around 12,000 persons associated with the LTTE, including combatants and civilians.⁸ However no one in the applicant's family was arrested, detained or rehabilitated. If the applicant was providing food and washing clothes for the LTTE, and allowing them to stay or leave weapons at the house, such activity occurred from his family house. His father and brothers would also be implicated and imputed as LTTE supporters if this activity occurred and was known and of adverse interest to the authorities. Yet there have been no consequences for the family post-war. Even if his cousin was killed by the SLA as a suspected LTTE supporter, I do not accept the suspicion extended to the applicant given the lack of monitoring or harassment he experienced, his ability to move freely in Sri Lanka, and his ability to obtain a passport and to exit and re-enter Sri Lanka. Taking into account the past treatment of the applicant and his immediate family, I find they are not known or imputed as LTTE supporters or imputed with a political opinion of being pro-LTTE.

⁷ DFAT, Country Information Report Sri Lanka, 18 December 2015. UK Home Office, Country Information and Guidance Sri Lanka Tamil Separatism, 28 August 2014.

⁸ DFAT, Country Information Report Sri Lanka, 18 December 2015.

25. The Sri Lankan authorities remain sensitive to the issue of Tamil separatism, even though the LTTE is a spent force. The authorities continue to monitor the Tamil community, although such monitoring is more likely to occur for targeted individuals and around public protests or gatherings.⁹ There is no evidence the applicant was monitored, and he was certainly never prevented from internal relocation (twice to Colombo). There is no evidence the applicant has engaged in pro-Tamil separatist activity, and nor have any of his family members engaged in such activity. I consider he is an ordinary young Tamil man from the Northern Province. Tamils have suffered discrimination in Sri Lanka, for example in accessing employment and education, however the applicant has not suffered such discrimination in the past. Tamils comprise around 93% of the population in the Northern Province, but live elsewhere in Sri Lanka, including in Colombo. DFAT assesses the overall situation for Tamils in Sri Lanka has improved considerably since the end of the conflict.¹⁰ The UNHCR assessed in 2012 that in post-conflict Sri Lanka there was no longer a presumption of a requirement for protection simply for being of Tamil ethnicity.¹¹
26. For the reasons given above, I do not accept the applicant or his family are imputed with an association to the LTTE or pro-LTTE political opinion for any activity they did during the conflict or their association with the cousin who was killed in 2007. I do not accept that more than 10 years after the war ended, and 17 years since the applicant last had any contact with the LTTE, that his low level support would be known or would now be of adverse interest. I find the chance of the applicant facing harm because of low level support he provided to the LTTE from 2001 to 2003, or for any support any family member provided to the LTTE, or because his cousin was killed during the conflict, or any imputed political opinion as pro-LTTE, or because he was a young Tamil from the Northern Province, is too remote to amount to a real chance.

Returning failed asylum seeker who left illegally

27. I accept the applicant's claim that he left Sri Lanka illegally by boat in 2012. It is an offence under Sri Lankan law to depart other than via an approved port of departure: ss.34 and 45(1)(b) of the Immigrants and Emigrants Act 1949. The penalty for doing so can be up to 5 years imprisonment and a fine of 200,000 Sri Lankan rupees (LKR). DFAT reports that for mere passengers who departed illegally the penalty is only a fine. Custodial sentences have only been imposed on persons facilitating or organising the boats.¹²
28. DFAT reports the following procedures occur when an illegal departee returns to Sri Lanka: they are questioned at the airport and may be charged under the Immigrants and Emigrants Act; the police take their photograph, fingerprints, and a statement; checks are undertaken for any outstanding criminal matters; the police may make further enquiries if the returnee is a former LTTE member; returnees can be held at the Airport Criminal Investigation Department's office for up to 24 hours; the returnee is taken to the closes Magistrate's Court; if a magistrate is not available, because it is the weekend or public holiday, the returnee can be held for up to 2 days in an airport holding cell; if the returnee pleads guilty they are fined

⁹ DFAT, Country Information Report Sri Lanka, 18 December 2015; DFAT, Country Information Report Sri Lanka, 4 November 2019.

¹⁰ DFAT, Country Information Report Sri Lanka, 4 November 2019.

¹¹ UNHCR, Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka, 21 December 2012.

¹² DFAT, Country Information Report Sri Lanka, 18 December 2015; DFAT, Country Information Report Sri Lanka, 4 November 2019.

an amount usually between LKR15,000 and LKR 20,000 (approximately AUD122 to AUD163).¹³

29. The applicant was a mere passenger on the boat, not an organiser. He has no criminal record in Sri Lanka. He was not, and for the reasons given above I do not accept he is imputed as, a member of the LTTE. I acknowledge there may be a record with the Airport Criminal Investigation Department of his return from [Country 2] in 2010, when he says he was photographed by the police at the airport and his details were taken. His experience in 2010 is consistent with information from DFAT now about how returnees are handled. The applicant was returning on that occasion as someone who had departed legally on his own passport, but I accept as a young Tamil man who departed during the conflict and returned shortly after it concluded, and was deported by [Country 2], it is not surprising he was questioned at the airport. That he was released without charge after the questioning and processing indicates he was not of further interest. I do not accept the record at the airport that he has previously been questioned, and found not to be of adverse interest, would cause any issues for him when returning in the foreseeable future. I consider he would be treated as an ordinary returnee who departed illegally. DFAT reports there is nothing to indicate returnees are mistreated during processing at the airport. DFAT also reports returnees are processed according to standard procedures, regardless of ethnicity or religion.¹⁴ I acknowledge there is a chance the applicant may be detained for up to 2 days, should he arrive on a weekend. However I do not accept a short period of detention, even if the holding cell is unsanitary or uncomfortable, amounts to serious harm under s.5J(5) of the Act.
30. I have considered whether the applicant has a real chance of harm as a returnee who is a failed asylum seeker. DFAT advises thousands of Sri Lankans have returned from Australia and other western countries after unsuccessfully seeking asylum. The Sri Lankan authorities are reported to have said refugees and failed asylum seekers are welcome to return. There is no information before me that such returnees are targeted merely for seeking protection or being failed asylum seekers. There are occasional reports of mistreatment or arrest of returning failed asylum seekers, but they were in cases where persons had actual links to the LTTE or were Tamil separatists or involved in other anti-government activity.¹⁵ The applicant is one of many thousands of Sri Lankans who have sought asylum unsuccessfully and returned. I rely on DFAT's assessment that the risk of mistreatment of failed asylum seekers is low, even for those who left illegally. Tamil failed asylum seekers who returned to the Northern Province told DFAT they had no protection concerns, and had not experienced harassment or monitoring.¹⁶
31. I have considered the applicant's claim that he would be of greater interest to the authorities because he was deported from [Country 2] in 2010 and was questioned at the airport on that occasion. However, he was released and was not detained or harassed in the two years after that and before he left for Australia. For reasons already given, I find the applicant is an ordinary Tamil man from the Northern Province, and not of adverse interest to the Sri Lankan authorities. I find he does not have a real chance of harm as a returning failed asylum seeker who departed Sri Lanka illegally.

¹³ DFAT, Country Information Report Sri Lanka, 4 November 2019.

¹⁴ DFAT, Country Information Report Sri Lanka, 18 December 2015; DFAT, Country Information Report Sri Lanka, 4 November 2019.

¹⁵ Sri Lanka Mirror, Another Tamil returnee arrested, 1 July 2015; UK Home Office, Country Information and Guidance Sri Lanka Tamil Separatism, 28 August 2014; DFAT, Country Information Report Sri Lanka, 4 November 2019.

¹⁶ DFAT, Country Information Report Sri Lanka, 4 November 2019.

Refugee: conclusion

32. 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

33. 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

34. 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.
35. The expressions 'torture', 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' are in turn defined in s.5(1) of the Act.
36. I have acknowledged above that as a returnee who departed illegally there is a possibility the applicant may be detained in an airport holding cell for up to 2 days, should he arrive on a weekend or public holiday when a magistrate is not available. I rely on the country information referred to earlier to find that the applicant would not be mistreated during such detention. I do not accept the detention, taking into account the short deprivation of liberty and possibly uncomfortable or unsanitary conditions, would amount to significant harm. That is, I find he would not face torture, cruel or inhuman treatment or punishment or degrading treatment or punishment during detention. In the unlikely event the applicant is detained for up to 2 days, I do not accept he faces a real risk of significant harm during such detention.
37. I have found the applicant does not face a real chance of harm for reason of his low level support for the LTTE or any support given by his family, for his relationship to his cousin who was shot during the conflict, for any imputed political opinion as pro-LTTE, for being a young Tamil man from the Northern Province, or returning as failed asylum seeker who departed Sri Lanka illegally. 'Real chance' and 'real risk' has been found to equate to the same threshold. For the same reasons given above, I find the applicant does not face a real risk of harm for any of the reasons claimed, or at all.

Complementary protection: conclusion

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

Decision

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

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly

...

cruel or inhuman treatment or punishment means an act or omission by which:

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature; but does not include an act or omission:
 - (c) that is not inconsistent with Article 7 of the Covenant; or
 - (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

degrading treatment or punishment means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:

- (a) that is not inconsistent with Article 7 of the Covenant; or
- (b) that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

receiving country, in relation to a non-citizen, means:

- (a) a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or
- (b) if the non-citizen has no country of nationality—a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.

...

torture means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant; but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

5H Meaning of refugee

(1) For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a refugee if the person:

- (a) in a case where the person has a nationality—is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or
- (b) in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Note: For the meaning of ***well-founded fear of persecution***, see section 5J.

...

5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
 - (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
 - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
 - (c) the real chance of persecution relates to all areas of a receiving country.

Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.

Note: For effective protection measures, see section 5LA.
- (3) A person does not have a well-founded fear of persecution if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country, other than a modification that would:
 - (a) conflict with a characteristic that is fundamental to the person's identity or conscience; or
 - (b) conceal an innate or immutable characteristic of the person; or
 - (c) without limiting paragraph (a) or (b), require the person to do any of the following:
 - (i) alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith;
 - (ii) conceal his or her true race, ethnicity, nationality or country of origin;
 - (iii) alter his or her political beliefs or conceal his or her true political beliefs;
 - (iv) conceal a physical, psychological or intellectual disability;
 - (v) enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
 - (vi) alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.
- (4) If a person fears persecution for one or more of the reasons mentioned in paragraph (1)(a):
 - (a) that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and
 - (b) the persecution must involve serious harm to the person; and
 - (c) the persecution must involve systematic and discriminatory conduct.
- (5) Without limiting what is serious harm for the purposes of paragraph (4)(b), the following are instances of **serious harm** for the purposes of that paragraph:
 - (a) a threat to the person's life or liberty;
 - (b) significant physical harassment of the person;
 - (c) significant physical ill-treatment of the person;
 - (d) significant economic hardship that threatens the person's capacity to subsist;
 - (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
 - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.
- (6) In determining whether the person has a **well-founded fear of persecution** for one or more of the reasons mentioned in paragraph (1)(a), any conduct engaged in by the person in Australia is to be disregarded unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.

5K Membership of a particular social group consisting of family

For the purposes of the application of this Act and the regulations to a particular person (the **first person**), in determining whether the first person has a well-founded fear of persecution for the reason of membership of a particular social group that consists of the first person's family:

- (a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in paragraph 5J(1)(a); and
- (b) disregard any fear of persecution, or any persecution, that:
 - (i) the first person has ever experienced; or

- (ii) any other member or former member (whether alive or dead) of the family has ever experienced;

where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.

Note: Section 5G may be relevant for determining family relationships for the purposes of this section.

5L Membership of a particular social group other than family

For the purposes of the application of this Act and the regulations to a particular person, the person is to be treated as a member of a particular social group (other than the person's family) if:

- (a) a characteristic is shared by each member of the group; and
- (b) the person shares, or is perceived as sharing, the characteristic; and
- (c) any of the following apply:
 - (i) the characteristic is an innate or immutable characteristic;
 - (ii) the characteristic is so fundamental to a member's identity or conscience, the member should not be forced to renounce it;
 - (iii) the characteristic distinguishes the group from society; and
- (d) the characteristic is not a fear of persecution.

5LA Effective protection measures

- (1) For the purposes of the application of this Act and the regulations to a particular person, effective protection measures are available to the person in a receiving country if:
 - (a) protection against persecution could be provided to the person by:
 - (i) the relevant State; or
 - (ii) a party or organisation, including an international organisation, that controls the relevant State or a substantial part of the territory of the relevant State; and
 - (b) the relevant State, party or organisation mentioned in paragraph (a) is willing and able to offer such protection.
- (2) A relevant State, party or organisation mentioned in paragraph (1)(a) is taken to be able to offer protection against persecution to a person if:
 - (a) the person can access the protection; and
 - (b) the protection is durable; and
 - (c) in the case of protection provided by the relevant State—the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system.

...

36 Protection visas – criteria provided for by this Act

...

- (2) A criterion for a protection visa is that the applicant for the visa is:
 - (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee; or
 - (aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or
 - (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (a); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant; or
 - (c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (aa); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant.
- (2A) A non-citizen will suffer **significant harm** if:
 - (a) the non-citizen will be arbitrarily deprived of his or her life; or
 - (b) the death penalty will be carried out on the non-citizen; or
 - (c) the non-citizen will be subjected to torture; or
 - (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
 - (e) the non-citizen will be subjected to degrading treatment or punishment.

- (2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:
- (a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or
 - (b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or
 - (c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

...

Protection obligations

- (3) Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.
- (4) However, subsection (3) does not apply in relation to a country in respect of which:
- (a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.
- (5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:
- (a) the country will return the non-citizen to another country; and
 - (b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.
- (5A) Also, subsection (3) does not apply in relation to a country if:
- (a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country.

Determining nationality

- (6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.
- (7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.