



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA20/08271

Date and time of decision: 26 May 2020 12:35:00
L Hill, 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 citizen of Sri Lanka. He arrived in Australia in November 2012 and applied for a Safe Haven Enterprise Visa (protection visa) on 21 March 2017. A delegate of the Minister for Immigration (the delegate) refused to grant the visa on 20 April 2020.

Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act)(referred material).
3. On the 29 July 2019, the applicant attended a protection visa interview. This interview was recorded however according to delegate's decision the voice recorder malfunctioned. A recording of this interview does not exist. The delegate proceeded to make the decision on the notes taken at the time of the interview. I also note that the applicant's protection visa application and statement that he lodged with the Department is incomplete. His statement is missing pages 2, 4 and 6 (paragraphs 11-14, 20-23, 29-33). At the protection visa interview, the applicant was asked why he has submitted an incomplete application and statement. He stated that he had personal problems and could not comprehend thereafter.
4. At least nine months has passed since the applicant attended the protection visa interview and at least four weeks has passed since the applicant was advised of the delegate's decision, however to date the missing information from the application or statement has not been provided nor have any submissions been made about the basis on which the decision was made or why the applicant disagrees with the delegate's reasoning and findings been received. Nor have there been any requests to the IAA to obtain new information from the applicant. I am satisfied that the applicant was given an opportunity to remedy the issues relating to his incomplete application and statement. I am also satisfied that he has had an opportunity to provide oral evidence to the delegate at protection visa interview and that the notes in the referred material provide a contemporaneous record of this interview. I am satisfied the dispositive issues remain those that were before the delegate and I have decided not to seek further information or interview the applicant in this case.

Applicant's claims for protection

5. The applicant's claims can be summarised as follows:
 - He is a Muslim of Malay Tamil ethnicity from Hambantota district in the Southern province of Sri Lanka.
 - In 1996, he and his brother were accused of assaulting some Sinhalese men during a fight. They were detained in prison for fourteen days before being taken to the court. They were released on bail with the condition that they had to sign in at the police station each Sunday. The case was finalised three months later.
 - In March 2012, he became involved in an argument with a group of Sinhalese men. He had accused them of stealing his fishing nets. The Sinhalese men physically assaulted him. He was taken to hospital in Batticaloa but [he] was so [badly]. After two days, his family

came and took him back to his home area where he was admitted to [Hospital] for a further month.

- On release from hospital he went and stayed at his aunt's village, [Village 1]. He was scared that if he returned to his home village, the Sinhalese men who had physically assaulted him would come and do this again. While in [Village 1], the Sinhalese men made inquiries and sought his whereabouts. Arrangements were made for him to depart.
 - In November 2012, he departed Sri Lanka illegally by boat.
 - In 2018, when his wife went to town, one of the Sinhalese men who had attacked him saw his wife and asked her where he was. He also gave signal that harm will be done.
6. The applicant fears he will be harmed on return because of his religion, ethnicity and imputed political opinion and his past experiences when he was attacked by the Sinhalese men.

Refugee assessment

7. 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

8. Under s.5J of the Act 'well-founded fear of persecution' involves a number of components which include that:
- the person fears persecution and there is a real chance that the person would be persecuted
 - the real chance of persecution relates to all areas of the receiving country
 - the persecution involves serious harm and systematic and discriminatory conduct
 - the essential and significant reason (or reasons) for the persecution is race, religion, nationality, membership of a particular social group or political opinion
 - the person does not have a well-founded fear of persecution if effective protection measures are available to the person, and
 - the person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour, other than certain types of modification.
9. The applicant has provided a copy of his Sri Lankan Birth Certificate. I accept he was born in [Village 2], Hambantota district in the Southern province of Sri Lanka, and is a Sri Lankan citizen. I am satisfied Sri Lanka is the receiving country for the purpose of this assessment.
10. The applicant claimed and I accept the applicant is a Muslim of Malay Tamil ethnicity. I accept that his home village is [Village 2] in Hambantota district. I accept this is a small village with a majority Muslim Malay population and is surrounded by villages with Sinhalese populations.

This aspect has been detailed and consistent throughout his interactions with the Department and supported by the country information which confirms that [Village 2], is [details deleted].¹

11. The applicant claimed and I accept that in 1996, he and his brother were accused of assaulting some Sinhalese men during a fight and detained by the police. I accept while detained in prison he was physically assaulted. I accept after fourteen days they were taken to the court and told to accept what they had done or pay compensation to the Sinhalese men injured. I accept that they did not have the money to pay compensation so they accepted what they had done, even though he maintains that he and his brother had not been involved in the fight. I accept they were released on bail with the condition that they had to sign in at the police station each Sunday. I accept he attended a further two court hearings during which they negotiated with the Sinhalese men who were injured. I accept after three months the case was over (finalised). I accept approximately six months later he and his friend had the motorbike they were riding on cut off by one of the Sinhalese men who had been injured. This aspect has been detailed and consistent throughout his interactions with the Department including at his entry interview, in his incomplete protection visa statement and at the protection visa interview.
12. The applicant's evidence was that after three months the case was over. At least sixteen years passed between these events and his departure from Sri Lanka. Notably, approximately eight years after this event he was able to apply for and was issued a Sri Lanka government passport. It is not apparent on the information before me that on account of these events the applicant or his brother were of any ongoing interest or concern to the Sri Lankan authorities or groups or individuals including the Sinhalese men who were injured, and I do not accept that they were.
13. The applicant claimed, and I accept that in March 2012, while out deep sea fishing with his friends, an argument started with a group of Sinhalese men who were in two boats. I accept the argument was about a stolen fishing net, he had accused a Sinhalese man of stealing his. I accept as the argument intensified some of the Sinhalese men jumped onto his boat. I accept he pushed the Sinhalese men and they pushed him back. I accept the Sinhalese men verbally abused him and called 'koddiya', the Sinhalese word for tiger. I accept the Sinhalese men then physically assaulted him and he passed out. I accept his friends took him to a hospital in Batticaloa for treatment. I accept [he was injured]. I accept he was in hospital for two days. I accept his family then came and took him back his home area where he was admitted to [Hospital] for further treatment. I accept he stayed in hospital for a further month before being released. The applicant has provided generally consistent and detailed evidence regarding these particular events. He also referred to these events, albeit briefly and [his injuries] at his entry interview with the Department which was conducted approximately eight weeks after his arrival in Australia.
14. The applicant claimed and I accept that after he was released from the [hospital] he went and stay at his aunt's village, [Village 1] which is approximately [number] kilometres from his home village. I accept he stayed there until he departed for Australia. While the timeframe for his stay in [Village 1] has varied between his entry interview and protection visa statement, I am willing to accept that on the basis of the various explanations presented in the letter to the Department dated 27 March 2017, that this particular detail had been recorded incorrectly in his protection visa statement.
15. In the protection visa statement, the applicant claimed that he went and stayed in [Village 1] because he was scared that if he returned to his home village, the Sinhalese men who had

¹ [Source deleted].

physically assaulted him would come and do this again. While in [Village 1], the Sinhalese men who had attacked him made inquiries and looked for him. They asked his brother and friends where he was. They told the Sinhalese men that they did not know.

16. The applicant also claimed, that while he had been in hospital in Batticaloa his friends told him that the Sinhalese men had threatened to kill him and his friends if they made a complaint about the physical assault. This was why he was unable to make a complaint about the Sinhalese people with the police because he was afraid that they would kill him and his friends if he did.
17. At the protection visa interview, the applicant was asked to provide more detail about who the Sinhalese men were. He stated that he didn't know much about them as he did not have any personal interaction with them. He was asked if he had been involved in any other events with them, he stated "no". He was asked if he had reported this event to the police. He stated that he did not as he would have problems. They discriminate against them. The Navy supports the police. He did not report it. He indicated if he did, that there would be no safety for his life. The applicant further added that on one occasion when his wife had gone to town, one of the Sinhalese men (involved in the attack in 2012) saw his wife and told her that harm would be caused. This happened a year ago (July 2018). He was asked what his wife did. He stated she could not do anything. He was asked how his wife recognised this person. He stated that they asked her where he was and then gave the signal that harm will be done. He was asked if anything else happened, he stated "no".
18. It was put to the applicant that given the passage of time since this event in 2012, why he feared returning to Sri Lanka now. He referred to the problems that were being faced by Tamils and Muslims. He asked if there was any other reason he feared returning. He stated no other reason, but that he has no safety there, his life is under threat. He was asked who would threaten his life. He stated the gang that attacked him. He was asked why they would come for him now. He indicated he could not relax because he had argued with them.
19. I have considered the applicant's evidence however for the following reasons; I am not satisfied that he continued to be of any concern or interest to the Sinhalese men after they attacked him in 2012.
20. Firstly, the applicant's description of the Sinhalese men was ambiguous. His description at the protection visa interview that he knew the Sinhalese men, they were from the neighbouring village, operated as a team and had political power and backing of the police is difficult to reconcile with his other evidence at the same interview that he didn't know much about them as he hadn't previously interacted with them. I also find it difficult to accept that if the Sinhalese men had the type of power as claimed, that being political and police backing, the applicant would be able to evade them for such a significant period of time, that being at least five to six months by merely staying at his aunt's home in a village which was located in the same district.
21. Secondly, the applicant has not claimed that prior to the event in 2018 that his wife was ever approached by any of the Sinhalese men including at the family home; and I find it highly improbable that given the passage of time, that being at least five years one of the Sinhalese men would approach his wife, ask for his whereabouts and signal to harm him.
22. Thirdly, the applicant's evidence at the entry interview and the protection visa interview that he was working in Hambantota up until the time of his departure from Sri Lanka is difficult to reconcile with his claims that he was staying at his aunt's home in order to avoid the Sinhalese men who had the political power and backing of the police.

23. Finally, I found the applicant's evidence at the protection visa interview in relation these aspects of his claims to be vague, unconvincing and not reflective of a lived experience. The details he did provide were not presented in a spontaneous manner and appeared to be rehearsed.
24. I am not satisfied that the applicant has been a truthful witness regarding these aspects of his claims. I do not accept his claims that after the event in 2012 in which he was attacked he was of concern, interest, targeted, and threatened or his whereabouts sought by the Sinhalese men. Nor do I accept that his family members or friends were approached, threatened, told not to report the attack or that his whereabouts were sought on this basis. Rather, based on the evidence before me, which I have not rejected, I am satisfied that the event in 2012 was an isolated and opportunistic attack which had escalated from an argument over fishing nets and the identities of the perpetrators were and remain unknown.
25. I have found the applicant was not of any ongoing interest or concern to the Sri Lanka authorities or any groups or individuals after the events in 1996 or 2012. The applicant has not claimed that he was of interest the Sri Lankan authorities, groups or individuals for any other reason at the time of his departure in November 2012, and I am not satisfied that he was.
26. In the protection visa application, the applicant answered yes to the question; "have you been found guilty or convicted of a crime or any offence in any country". He stated that in 2015 (while residing in Australia) he had damaged property. The police were called and took him to the police station. The Magistrates granted an intervention order requiring him not to commit family violence against the protected person, not to intentionally damage any property of the protected person or threaten to do so and not to go within 200 metres of her address or any other place where she lives, works or attends school. He stated he has complied with the court order. The applicant has not claimed or suggested that arising from this event he will face any harm on return. Nor is there anything in the country information in the referred material which would indicate that this would be case. I am not satisfied the applicant will face any repercussions or harm on the basis of the court order on return to Sri Lanka now or in the reasonably foreseeable future.
27. The applicant has claimed that he fears on return to Sri Lanka he will be harmed because of his Islamic religion, ethnicity as a Malay Tamil and imputed political opinion and other matters which I have not found to be credible above. The delegate also considered whether the applicant would face harm on the basis of his illegal departure and return after he had lived for periods abroad and as a failed asylum seeker, while the applicant has not claimed that he fears he will be harmed on return on these bases, I have considered whether they give rise to a real chance or real risk of serious or significant harm on return.
28. I have accepted that he is a Muslim of Malay Tamil ethnicity from Hambantota district in the Southern province of Sri Lanka. In the protection visa statement, he claimed that there have been instances where the police have not protected Muslims from his home village. In the past, Sinhalese men have targeted his village and attacked married women. He indicated that the government has changed in Sri Lanka but at a local level, the religious tensions and attitudes of the police and local administrators have not changed. At the protection visa interview, the applicant referred to an event in 2019 in which he claimed that breast feeding mothers were taken away for investigation because they were Muslims. He stated there were no guarantees for the safety of Muslims.
29. DFAT reports that religion plays a significant role in daily life in Sri Lanka and strongly correlates with ethnicity: most Sinhalese are Buddhist and most Tamils are Hindu. Muslims are considered

a separate ethnic group and are the third largest religious group in Sri Lanka. The government has publicly declared its commitment to religious and ethnic reconciliation. However, Article 9 of the Constitution grants Buddhism a 'foremost place'. In 2003, the Supreme Court ruled that the state was constitutionally required to protect only Buddhism. The constitutional reform process has included discussion of amending Article 9. Attacking places of worship or religious objects is punishable with a fine and/or a maximum of two years' imprisonment.²

30. Muslims represent 9.3 per cent of the country's religious population and live throughout Sri Lanka, with larger communities in the east, north and northwest.³ Several political parties represent Muslims, and a number of Muslim politicians held ministries in the previous government of President Maithripala Sirisena.⁴
31. Various sources in the referred material indicate that there have been physical attacks on minorities, including Muslims in the past in Sri Lanka. In 2016 and 2017, local groups reported the construction of Buddhist shrines in the north and east in Hindu and Muslim areas with few, if any, Buddhist residents. In some locations in the north, the military was reportedly involved. In 2016, Sinha Le reportedly orchestrated protests against the construction of a mosque in Kandy.⁵ In 2017 and 2018, there was incidents of violence and hate speech directed towards Muslims perpetrated by extremist Sinhala Buddhist groups, including an outbreak of fighting in November 2017 in a town in Galle district and further incidents in Ampara, in Sri Lanka's east, and Kandy district in late February and early March 2018 which led to the deaths of at least two people.⁶
32. On 6 March 2018, the government declared a nationwide State of Emergency for 12 days in response to incidents of communal unrest between members of the Sinhalese Buddhist and minority Muslim communities in Kandy District, Central Province. Despite the deployment of high numbers of military and police, several arrests and extended curfews, violence continued in several towns around Kandy until 7 March, and four people (two Muslims and two Sinhalese) were killed and dozens injured. Police arrested the leader of the Buddhist extremist group Mahason Balakaya (English: Strong Ghost Regiment), Amith Weerasinghe, in relation to the violence. The events in Kandy represented the largest violent incident between Buddhist and Muslim communities since June 2014 when Galagoda Aththe Gnanasara, General Secretary of BBS, delivered a speech that many blamed for inciting riots in Aluthgama that lasted two days; Police arrested and subsequently released Gnanasara on several occasions.⁷
33. More recently, various sources in the referred material indicate that following the coordinated terrorist bombings on Easter Sunday 2019 which targeted churches and international hotels, there has been a further outbreak of communal violence and hate speech targeting Muslims. The bombings, which struck several churches and international hotels in Colombo, Negombo

² Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – Sri Lanka, 23 May 2018", CIS7B839411064.

³ DFAT, "DFAT Country Information Report - Sri Lanka", 4 November 2019, 20191104135244.

⁴ DFAT, "DFAT Country Information Report – Sri Lanka, 23 May 2018", CIS7B839411064 and DFAT, "DFAT Country Information Report - Sri Lanka", 4 November 2019, 20191104135244.

⁵ DFAT, "DFAT Country Information Report – Sri Lanka, 23 May 2018", CIS7B839411064.

⁶ Reuters, "Sri Lanka arrest five over anti-religious violence", 11 June 2017, CXC9040668979; Nikkei Asian Review, "Sri Lanka sees emerging tensions between Buddhists and Muslims", 1 December 2017, CXC90406618580; Aljazeera, "Fear grips Muslims in Sri Lanka's Ginthota after attack", 24 November 2017, CXC90406618281; Amnesty International, "Amnesty International Report 2016-17 – Sri Lanka", 22 February 2017, NG2A465F55; Amnesty International, "Amnesty International Annual Report 2017-18", 22 February 2018, NGED867A612; US Department of State, "Sri Lanka 2017 Human Rights Report", 20 April 2018, OGD95BE927333; DFAT, "DFAT Country Information Report – Sri Lanka, 23 May 2018", CIS7B839411064 and US Department of State, "International Religious Freedom Report for 2017 – Sri Lanka", 29 May 2018, OGD95BE927541.

⁷ DFAT, "DFAT Country Information Report – Sri Lanka, 23 May 2018", CIS7B839411064.

and the country's east have been attributed to two little-known extremist Muslim groups inspired by Islamic State,⁸ and led to tensions between Sri Lanka's Christian and Muslim communities.⁹ Reprisals against Muslims and their property took place across Sri Lanka following the bombings. The most notable attacks took place in the country's North Western and Western provinces. A senior Muslim politician told ABC Radio on 6 June 2019 that 31 mosques had been attacked across the country.¹⁰

34. DFAT has indicated that events of 12-13 May 2019 were the most serious case of anti-Muslim violence since 6 March 2018. Scores of Muslim-owned businesses, mosques, houses and vehicles were targeted by Sinhalese mobs in several towns and cities across North Western Province. Many properties were torched and destroyed or badly damaged. One Muslim businessman was killed. The government declared a countrywide curfew and blocked social media in response to the unrest, to prevent the circulation of videos and posts inciting violence against Muslims. More than 100 people were arrested in connection with the violence, including high-profile Sinhalese Buddhist nationalist Amith Weerasinghe. It is unclear if the BBS was involved in the May 2019 violence. DFAT indicated that with the exception of the anti-Muslim violence of March 2018 and May 2019, attacks on the Muslim community have been of a low-level nature.¹¹
35. I accept the applicant is a Muslim and would continue to practise his religion on return to Sri Lanka. While DFAT has indicated that Muslims face a low but increasing risk of official discrimination and a moderate risk of societal discrimination, including growing threat to their freedom of religion, on the information before me, the applicant has not claimed that he or any of his family members, who remain living in his home village have ever been prevented or restricted from practising their religion or faced any instances of official or societal discrimination. On the evidence before me the applicant was able to complete eleven years of education and in the past been able to maintain employment as a fisherman. His wife and children remain residing in his home village, [Village 2], Hambantota district in the Southern province of Sri Lanka, which has a predominately Muslim Malay population. He speaks Sinhalese, Tamil and Malay. Having regard to all the evidence, in the present case, I am not satisfied that the applicant's particular circumstances are such that he faces more than a remote chance of being affected by such discrimination. I am also satisfied the applicant would be able to continue to attend mosques and the manner in which he practises his Islamic faith does not involve him curtailing his religious practise or modifying his behaviour including the need to restrict the practise of his religion to avoid harm. I am not satisfied that on return the applicant will be prevented or restricted from practising his religion nor that he will face a real chance of harm as a practising Muslim on his return to Sri Lanka now or in the reasonably foreseeable future.
36. I accept that there has been a recent deterioration in communal relations since the Easter Sunday 2019 bombings and there are credible reports of violence between extremist Sinhala Buddhist groups BBS and Muslims in the past, however the information before me does not indicate that such events have occurred in the Hambantota district in the Southern province of

⁸ The New York Times, "What We Know and Don't Know About the Sri Lanka Attacks", 22 April 2019, 2090423102213; The Straits Times, "Sri Lanka on high alert over Ramadan terror threat", 1 May 2019, 20190501134734 and Eurasia Review, "Lessons From The Sri Lankan Easter Sunday Tragedy – Analysis", 5 June 2019, 20190606115530.

⁹ Deutsche Welle, "Sri Lanka's Catholics and Muslims deeply divided by terror attacks", 27 May 2019, 20190530115153.

¹⁰ Aljazeera, "Sri Lanka orders nationwide curfew amid anti-Muslim riots", 14 May 2019, 20190516114013; The New York Times, "What We Know and Don't Know About the Sri Lanka Attacks", 22 April 2019, 2090423102213; Human Rights Watch, "Sri Lanka: Refugees Threatened, Attacked", 29 April 2019, 20190430153818; DFAT, "DFAT Country Information Report - Sri Lanka", 4 November 2019, 20191104135244.

¹¹ DFAT, "DFAT Country Information Report - Sri Lanka", 4 November 2019, 20191104135244.

Sri Lanka, where his family continues to reside. I have considered the applicant's evidence regarding the violence between Sinhalese and Muslims, however apart from the event in 2012, which I found the event in 2012 was an isolated and opportunistic attack which had escalated from an argument over fishing nets and the identities of the perpetrators were and remain unknown. It is not apparent on the information before me that the applicant or any of his family members have been targeted and harmed by any anti-Muslim and/or extremist Sinhala Buddhist groups and I am not satisfied that they have been. I have considered the most recent reports regarding the Sirisena government's response to the Easter Sunday bombings and resulting communal violence and the assessment that in the current environment, Muslims face a moderate risk of violence, however it remains on the information before me that since the anti-Muslim violence of March 2018 and May 2019, attacks on the Muslim community have been of a low-level nature, and when this is considered with the particular circumstances of this applicant, I find any harm feared from anti-Muslim and/or extremist Sinhala Buddhist groups or individuals is speculative and any chance of harm to be remote. In light of the foregoing, I am not satisfied that the applicant faces a real chance of harm as a Muslim on his return to Sri Lanka now or in the reasonably foreseeable future.

37. In 2018, DFAT reported that Tamils were the second largest ethnic group in Sri Lanka. According to the most recent census in 2012, the Tamils constituted 15.3 per cent of the population. Tamils predominately live in the Northern and Eastern Provinces but there is small numbers in the Southern, North Western, North Central, Uva and Sabaragamuwa provinces. There is no official figures regarding the number of Malays, but the Malay community (largely made up of descendants of Malay members of the Ceylon Police Force) is Muslim and a few of its members hold senior positions in the Sri Lankan military and police.¹²
38. I have accepted that during the event in 2012, he was verbally abused and called 'koddia', the Sinhalese word for tiger. He has not claimed that on any other occasion he or his family have been harmed on account of their Malay Tamil ethnicity. Nor is it apparent on the evidence before me that the applicant or any of his family members have had any links or involvement with the LTTE or any Tamil separatism activities.
39. The DFAT reports indicate that the overall situation for Tamils in Sri Lanka has improved considerably since the end of the civil conflict in 2009. Tamils have a substantial level of political influence, and their inclusion in political dialogue has increased since the change in government in 2015. Forced registration of Tamils has ceased and security checkpoints on major roads in the north and east were removed in 2015. As a consequence of the improving situation, DFAT assessed that Tamils, face a low risk of experiencing official or societal discrimination based on ethnicity or caste, including in relation to access to education, employment or housing. For the past two years DFAT, has not mentioned Malays or Malay Tamils as a group of interest or distinct minority group.¹³
40. I have rejected the applicant's claimed fear of harm arising from his past experiences arising from the events in 2012, and found that he was not of interest to the Sri Lankan authorities or any groups or individuals for any reason at the time of his departure from Sri Lanka in November 2012. I accept there is credible evidence of serious harm being perpetrated against certain Tamils associated with, or perceived to be associated with, the LTTE by the Sri Lankan authorities in pre and post-war Sri Lanka. The applicant has not claimed to have had any involvement or association with the LTTE, political organisations or Tamil separatism activities.

¹² DFAT, "DFAT Country Information Report – Sri Lanka, 23 May 2018", CIS7B839411064 and DFAT, "DFAT Country Information Report - Sri Lanka", 4 November 2019, 20191104135244.

¹³ DFAT, "DFAT Country Information Report - Sri Lanka", 4 November 2019, 20191104135244.

There is no evidence before me that the applicant's family members or friends have had any involvement with the LTTE, political organisations, or Tamil separatism activities. The applicant originates from the Southern Province and area which the LTTE was not known to operate and I am satisfied that the possibility of the applicant as a Malay Tamil being perceived as having any involvement with the LTTE or Tamil separatism activities is remote.

41. Having regard to all the evidence before me, I am not satisfied that the applicant will be imputed with an adverse profile because of his or his family's past circumstances on return to Sri Lanka. I am not satisfied that as a returning Malay Tamil from the Southern province he will be perceived to have a pro-LTTE or anti-Sri Lankan government political opinion on return to Sri Lanka. I am not satisfied the applicant faces a real chance of harm as a Malay Tamil, or because of any actual or imputed political opinion on his return to Sri Lanka now or in the reasonably foreseeable future.
42. I accept the applicant left Sri Lanka illegally and he would return to Sri Lanka on temporary travel document. I accept he has applied for asylum and would be returning to Sri Lanka after his asylum application has failed and residence in Australia for an extended period.
43. In 2019, DFAT reported that for returnees travelling on temporary documents, police undertake an investigative process to confirm identity. This would identify someone trying to conceal a criminal or terrorist background, or trying to avoid court orders or arrest warrants. This often involves interviewing the returning passenger, contacting police in the person's claimed hometown, contacting claimed neighbours and family, and checking criminal and court records.¹⁴
44. I accept, as a person returning on a temporary travel document, the applicant may be detained at the airport with other returnees for processing by the Sri Lankan authorities. I accept that during this process the authorities will become aware of the applicant's past circumstances. I have found that he was not of interest to the Sri Lankan authorities or any groups or individuals for any reason at the time of his departure from Sri Lanka in November 2012 and that he will not be imputed with an adverse profile because of his or his families past circumstances on return to Sri Lanka. There is no evidence before me that he has outstanding court orders, arrest warrants or a criminal or terrorist background. There is also no independent information before me to suggest that absent any other concerns, that on return those who have returned after an extended period of residence in Australia and sought asylum unsuccessfully are imputed with an adverse opinion or that such factors cumulatively would put him at risk of harm on return, and I am not satisfied that the applicant will be at risk of attracting the attention of the authorities on this basis.
45. The DFAT reports advise that returnees are treated according to the standard airport procedures, regardless of their ethnicity and religion. The process can take several hours, due to the administrative processes, interview lengths and staffing constraints at the airport. Returnees are processed in groups, and individuals cannot exit the airport until all returnees have been processed, although returnees are free to go to the bathroom and talk to one another during this time.¹⁵ The information before me indicates that the processing of returnees at the airport is not done in a discriminatory manner or that there is a real chance the applicant will be subject to any mistreatment. Overall, I am satisfied that any period of

¹⁴ DFAT, "DFAT Country Information Report - Sri Lanka", 4 November 2019, 20191104135244.

¹⁵ DFAT, "DFAT Country Information Report – Sri Lanka, 23 May 2018", CIS7B839411064 and DFAT, "DFAT Country Information Report - Sri Lanka", 4 November 2019, 20191104135244.

detention that would occur during the investigative process would be brief and not exceed the several hours that the group processing generally takes.

46. The DFAT reports indicate that the Immigrants and Emigrants Act (I&E) governs entry and exit to Sri Lanka. Sections 34 and 35(a) of the I&E make it an offence, respectively, to depart Sri Lanka other than via an approved port of departure, such as seaport or airport, and without a valid passport. Returnees who depart Sri Lanka irregularly by boat are considered to have committed an offence under I&E Act.¹⁶
47. I accept on return the applicant may be charged under I&E for departing Sri Lanka other than via an approved port of departure. DFAT understands that on return where an illegal departure is suspected, returnees are arrested and charged under I&E by police at the airport. During this process, the police will take photographs, fingerprints and statements from returnees, and further enquire about activities while abroad of returnees are suspected to be former LTTE members. After processing returnees can remain in police custody at the airport for up to 24 hours. At the earliest available opportunity returnees are transferred to the closest Magistrate's Court where a Magistrate will make a determination on the next steps for each returnee. Should a Magistrate not be available – for example because of a weekend or public holiday – those charged may be detained for up to two days in an airport holding cell. In 2019 DFAT reported that it is not aware of mistreatment of returnees during this process.¹⁷
48. In 2019, DFAT reported that penalties for leaving Sri Lanka illegally can include imprisonment of up to five years and fine. The Sri Lankan Attorney-General's Department, which is responsible for the conduct of prosecutions, claims no fare-paying passenger on a people smuggling venture has been given a custodial sentence for departing Sri Lanka illegally (as distinct from facilitators or organisers). However, fines are issued to fare-paying passengers as a way of deterring future illegal departures.¹⁸ The evidence before me does not indicate that the applicant would be perceived and treated as anything other than a mere fare-paying passenger on the people smuggling venture. I am not satisfied that there is a real chance the applicant would be given a custodial sentence.
49. If the applicant pleads guilty to departing Sri Lanka illegally, he will be required to pay a fine, which can be paid in instalments, and will subsequently be able to go free. Where a fare-paying passenger returnee pleads not guilty, the Magistrate will usually grant bail on the basis of personal surety or guarantee by a family member. Where a guarantor is required, returnees may need to wait for the guarantor to come to court.¹⁹ The applicant has not claimed and the information before me does not indicate he would not be granted bail on personal surety, if he does in fact plead not guilty.
50. Returnees charged under I&E Act will only need to return to court when their case is being heard, or if summonsed as a witness in a case against the facilitators or organisers of the people smuggling venture. There is no general requirement to report to police or police stations between hearings. However, DFAT has noted that, while the fines issued for fare-paying

¹⁶ DFAT, "DFAT Country Information Report – Sri Lanka, 23 May 2018", CIS7B839411064 and DFAT, "DFAT Country Information Report - Sri Lanka", 4 November 2019, 20191104135244.

¹⁷ DFAT, "DFAT Country Information Report - Sri Lanka", 4 November 2019, 20191104135244.

¹⁸ DFAT, "DFAT Country Information Report - Sri Lanka", 4 November 2019, 20191104135244.

¹⁹ DFAT, "DFAT Country Information Report - Sri Lanka", 4 November 2019, 20191104135244.

passengers of people smuggling ventures are often low, the cumulative costs associated with regular court appearances (if required) over protracted lengths of time can be high.²⁰

51. In the case of this applicant, I am not satisfied that the conditions of detention for a brief period at the airport, a fine and the costs associated with regular court appearances, if required, amount to serious harm. In addition, the information before me does not indicate that I&E Act is discriminatory on its terms, that it is applied in a discriminatory manner or that it is selectively enforced. Accordingly, I am not satisfied that any investigation, prosecution and punishment would amount to persecution for the purpose of ss.5H(1) and 5J(1) of the Act.
52. In its most recent report, DFAT stated between 2010-11 and 2018-19; 3,716 Sri Lankan nationals returned from the Australian community or were removed from Australian onshore immigration detention centres to their country or origin or a third country. Most returnees are Tamil. The Sri Lankan Government has consistently stated that refugees are welcome to return. DFAT understands that most returnees, including failed asylum seekers, are not actively monitored on an ongoing basis. It is not aware of returnees, including failed asylum seekers, being treated in such a way that endangers their safety and security. Failed asylum seekers receive limited reintegration assistance. Many returnees have difficulty finding suitable employment and reliable housing on return. Those who have skills that are in high demand in the labour market are best placed to find well-paid employment. DFAT assesses that reintegration issues are not due to failure to obtain asylum, but rather due to the employment and accommodation difficulties returnees may face. DFAT understands that returnees may face financial difficulties reintegrating into their communities, including due to sale of their belongings to fund irregular ventures overseas, but do not experience societal discrimination for seeking asylum elsewhere. In 2019, DFAT assesses that returnees face a low risk of societal discrimination upon return to their communities.²¹
53. As discussed earlier, the country information indicates that a majority of the population in [Village 2] are fisherman. The applicant's evidence was that up until the time of his departure in November 2012 he was employed as a fisherman and I am not satisfied that he would be unable to obtain work of the kind he has had in past. His wife and children remain residing in his home village, [Village 2], Hambantota district in the Southern province of Sri Lanka, and I am not satisfied he could not rely on his immediate family members for accommodation, food, water or support. Nonetheless, I accept that on return he may face some reintegration issues that being some societal discrimination from his community; however I am not satisfied that such matters amount to serious harm.
54. I am not satisfied the applicant faces a real chance of persecution, as a Malay Tamil Muslim failed asylum seeker who has had a prolonged period of residence in Australia with his background who departed illegally on his return to Sri Lanka now or in the reasonably foreseeable future.
55. I am not satisfied the applicant has a well-founded fear of persecution.

²⁰ DFAT, "DFAT Country Information Report – Sri Lanka, 23 May 2018", CIS7B839411064 and DFAT, "DFAT Country Information Report - Sri Lanka", 4 November 2019, 20191104135244.

²¹ DFAT, "DFAT Country Information Report - Sri Lanka", 4 November 2019, 20191104135244.

Refugee: conclusion

56. The applicant does not meet the requirements of the definition of refugee in s.5H(1). The applicant does not meet s.36(2)(a).

Complementary protection assessment

57. A criterion for a protection visa is that the applicant is a non-citizen in Australia (other than a person who is a refugee) in respect of whom the Minister (or Reviewer) is satisfied Australia has protection obligations because there are substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm.

Real risk of significant harm

58. Under s.36(2A), a person will suffer 'significant harm' if:
- the person will be arbitrarily deprived of his or her life
 - the death penalty will be carried out on the person
 - the person will be subjected to torture
 - the person will be subjected to cruel or inhuman treatment or punishment, or
 - the person will be subjected to degrading treatment or punishment.
59. The expressions 'torture', 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' are in turn defined in s.5(1) of the Act.
60. I accept the applicant would return to Sri Lanka (whether involuntarily or otherwise) on temporary travel document. I accept he may be detained at the airport for processing on return and questioned. I also accept he may be arrested and charged with departing Sri Lanka illegally and detained briefly at the airport if a magistrate is unavailable, fined and possibly incur costs associated with bail and regular court appearances. I am not satisfied these measures constitute significant harm as defined. I do not accept there is a real risk of the death penalty, an arbitrary deprivation of life, or torture. Nor does the country information before me indicate that there is an intention to inflict pain or suffering that may reasonably be regarded cruel or inhuman in nature, severe pain or suffering, or an intention to cause extreme humiliation. I am not satisfied that it amounts to cruel or inhuman treatment or punishment or degrading treatment or punishment as defined. I am not satisfied there is a real risk of significant harm on this basis.
61. I accept that as a returning failed asylum seeker he may face some reintegration issues that being some societal discrimination from his community, however I am not satisfied these measures constitute significant harm as defined. It does not amount to the death penalty, arbitrary deprivation of life, or torture. It does not constitute pain or suffering that is cruel or inhuman in nature, severe pain or suffering, whether physical or mental, or extreme humiliation, as required in the definitions of cruel or inhuman treatment or punishment or degrading treatment or punishment. I am not satisfied there is a real risk of significant harm on this basis.

62. Furthermore, I am also not satisfied that the treatment and the circumstances to which the applicant may return, on their own or in combination, collectively amounts to significant harm as defined in ss.36(2A) and s.5 of the Act.
63. I have otherwise found the applicant does not face a real chance of harm on any or the bases claimed now or in the reasonably foreseeable future. As 'real risk' involves the same standard as 'real chance', I am also not satisfied that the applicant faces a real risk of significant harm on these bases.

Complementary protection: conclusion

64. 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.