



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA21/09002

Date and time of decision: 14 May 2021 12:58:00
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, Sri Lanka. He arrived in Australia as an unauthorised maritime arrival [in] September 2012. He tried to apply for a Protection Visa on 15 August 2013 but his application was deemed invalid. He applied for a Temporary Protection Visa (TPV) on 23 December 2015.
2. A delegate of the Minister for Immigration and Border Protection refused the application on 12 August 2016. The delegate accepted the applicant was a Tamil from the Northern Province, but did not accept the applicant faced a real chance or real risk of harm on return to Sri Lanka.
3. The delegate's refusal was affirmed by the IAA on 21 September 2016. The applicant sought judicial review. The IAA decision was quashed and the matter remitted for reconsideration by order of Kenny J on 22 March 2021.

Information before the IAA

4. I have had regard to the review material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
5. In September 2016 the applicant provided to the IAA a statutory declaration attaching three 'Warrants of Arrest' dated [day]/[month]/12, [day]/[month]/12 and [day]/[month]/2015. He declared that after the refusal decision in August 2016 he asked his family if it was safe for him to return to Sri Lanka. They informed him the Criminal Investigation Department (CID) had come to the house enquiring about him and had issued arrest warrants for him. He asked his family to send the warrants to him, and was now providing them. He fears he will be arrested on return to Sri Lanka because of these warrants.
6. The applicant implies he could not provide this information to the delegate before the decision was made, as he was not aware of the warrants until he spoke to his family about his possible return after 12 August 2016. However, if the applicant's family had been given arrest warrants for him, I consider it highly unlikely they would have kept copies of the warrants from 2012 and 2015 yet failed to mention them to the applicant. The applicant was asked in his TPV interview why he was saying he would be of adverse interest if he returned to Sri Lanka, and I consider he could have asked his family before the decision was made for any information to support his case. For these reasons, I am not satisfied this new information regarding warrants dated 2012 and 2015 could not have been provided before the decision was made in August 2016. However I am satisfied that s.473DD(b)(ii) is met because whilst I have concerns about the genuineness of the warrants, I am satisfied on the face of them that they are credible persona information which may have affected the consideration of his claims. Having regard to the importance of these warrants to the applicant's case, I am satisfied there are exceptional circumstances to justify considering this information.
7. On 29 April 2021 the applicant provided a written submission containing comment on the delegate's decision and new information. Attached to the submissions were further copies of the arrest warrants and a bundle of country information. The new information in his written submission includes the following: he was a member of the Liberation Tigers of Tamil Eelam (LTTE) from 1999 to 2008; his role in the LTTE was to supply guns and food; he left the LTTE in

2008 because he was married; he has been diagnosed with diabetes in Australia, suffers pain in his back and legs due to past torture, and his general health has worsened since he lodged his TPV application in 2015; that his elder brother was detained for 3 years; and that three months ago the CID harassed his parents about where he is.

8. The new information that the applicant was a member of the LTTE from 1999 to 2008, supplied guns and food to the soldiers, and left the LTTE when he married in 2008, has never been alluded to before by the applicant. In fact he positively stated in his application and numerous times in the TPV interview that he was not a member of or associated with the LTTE. He submits he did not provide this new information until now, and could not have provided it to the delegate before the decision was made, because he was warned by the boat smugglers that if the Australian authorities knew he was an LTTE member they would punish him. For this reason he was too scared to tell anyone he was an LTTE member until now. I am not persuaded by this explanation. He has been in Australia for more than 8 years. He had access to migration and legal assistance if he had concerns about the impact of disclosing an association with the LTTE. He had a comprehensive 3 hour interview with the delegate, and was warned a number of times in that interview that he must put all of his claims forward. He was directly asked a number of times if he was a member of or associated with the LTTE. He was told at the end of the interview to speak to his agent and put in any further information in writing to the delegate within 7 days. He did not provide any further information post interview. This new information would have been central to his claims. He has not provided a plausible reason why he is willing to disclose it now, yet chose to conceal it from the Department and in his first submission to the IAA in 2016. He has also not provided any reason why he might conceal being married. For all of these reasons, the applicant has not satisfied me that he could not have provided this information to the delegate. The claim about being a member of the LTTE may amount to personal information, but I have concerns about the credibility of it. His explanation of leaving the LTTE in 2008 because he got married lacks credibility. He has not provided any evidence of being married, and has in all previous contacts with the Department described himself as unmarried and never having been married. The applicant's new information is that he joined the LTTE in 1999, when he would have been only age [age], and that he left at age [age], without any apparent issues with the LTTE for having done so. I have concerns about the credibility of his claim that a child of [age] would join the LTTE to supply guns and food to the soldiers. Whilst I acknowledge child soldiers may have been used by the LTTE, I consider it not credible that such an important claim, to have been a child soldier in the LTTE, would not have been raised earlier during his many interactions with the Department or migration and legal advisors. I also have concerns at the brevity of this new information, particularly as it represents such a significant departure from his history of denying any membership or association with the LTTE. I have considered whether I should invite the applicant to provide further detail, such as how and why he came to join the LTTE at [age] years of age and to leave the organisation in 2008, however it is the applicant's responsibility to provide whatever new information he wishes to rely on. The applicant was assisted by the Asylum Seeker Resource Centre in providing this new information, and I must assess the new information he has provided against s.473DD. For all these reasons the applicant has not satisfied me that this new information is credible, and therefore I am not satisfied it is credible personal information that may have affected the consideration of his claims. I am not satisfied s.473DD(b) is met with respect to this new information, and therefore I must not consider it.
9. The applicant provided new information that he has been diagnosed with diabetes since arriving in Australia, suffers pain in his back and leg because of torture he suffered, and that his health has worsened generally. No medical evidence has been provided to support this new information. It is not clear when he was diagnosed with diabetes, so I am unable to be

satisfied whether he could or could not have provided this information to the delegate. I accept however his current state of health is something he could not have provided to the delegate before the decision was made. New information that his health has worsened is, on the face of it, credible personal information that may have affected the consideration of this claims. However, notwithstanding that s.473DD(b) is met, in the absence of any medical evidence to support this new information about his allegedly deteriorating health and new health conditions, I am not satisfied there are exceptional circumstances to justify considering it.

10. The information that his elder brother was detained until 2010, for ‘much longer than three months’ is new information. No explanation has been provided as to why he could not have provided this information to the delegate, and none is apparent to me. I do not accept the applicant could not have provided information that his brother was detained until 2010 before the decision was made. I have concerns about the credibility of this new information, as it is contradictory to his previous claims regarding his brother’s detention. He gave clear evidence at the TPV interview that the brother was detained in 2008 and released after 3 months. This was recorded in the delegate’s decision. He made no attempt to correct this in the first IAA review. He has provided no explanation for why he now says his brother was detained until 2010 and for much longer than 3 months. Taking into account the inconsistency and lack of explanation, I find this information is not credible, and is therefore not credible personal information that may have affected the consideration of his claims. I find s.4733D(b) is not met and therefore I must not consider this new information.
11. The new information that the CID harassed his parents three months ago, asked where he and his brother were, and injured his father’s arm by pushing him, could not have been given to the delegate before the decision was made. It is personal information that may have affected the consideration of his claims. At issue is whether the information is credible. The new information is brief and unsupported by any evidence, such as statements from his family or medical evidence of the father’s injury. The new information is that the father was pushed because his parents wouldn’t say where the applicant and his brother were. There is no explanation why his parents could not have said the applicant had left Sri Lanka and the other brother was missing since 2011. On the brief and unsupported information given, the applicant has not satisfied me that this new information is credible, and therefore I am not satisfied it is credible personal information that may have affected the consideration of his claims. Taking into account my conclusion that this new information is not credible, although s.473DD(b)(i) is met, I am not satisfied that there are exceptional circumstances to justify considering it.
12. The country information provided by the applicant amounts to 213 pages of reports and articles.¹ The applicant has only referred to 6² of the 13 reports in his written submission. For the other 7 reports he has not identified what part of the reports he relies on or how they are relevant to his claims. I accept the reports could not have been provided to the delegate as they post-date the decision. The reports’ relevance to the review is in the nature of country information, and whilst they name some individuals (for example President Rajapaksa) they are not credible personal information that may have affected the consideration of the

¹ The bundle also includes a 2016 report from the International Truth & Justice Project Sri Lanka, referred to by the delegate in their decision, which is not new information.

² Human Rights Watch, World Report 2021 – Sri Lanka; Tamil Guardian, “6.9 million people who voted for Gotabaya Rajapaksa wanted him to be a Hitler” claims Sri Lankan minister, 13 April 2021; US Department of State, 2020 Country Report on Human Rights Practices: Sri Lanka; DFAT, Country Information Report – Sri Lanka, 4 November 2019; Tamil Guardian, Former LTTE Cadre among 5 Tamils arrested by Sri Lanka Terrorism Division, 17 April 2021; and Centre for Policy Alternatives, Concerns relating to the recent regulations under the prevention of Terrorism Act, 18 March 2021.

applicant's claims. In circumstances where it is now nearly 5 years since the delegate's decision was made, I am satisfied there are exceptional circumstances to justify considering the more up to date country information reports the applicant refers to and relies on in his written submission. For the other 7 reports, even taking into account the long period of time since the delegate's decision and that they could not have been provided to the delegate, in circumstances where the applicant has not identified which parts he relies on or their relevance to the review, I am not satisfied there are exceptional circumstances to justify considering them.

13. The applicant submits he should be afforded an opportunity to present his claims in person and that the IAA should organise an oral hearing. Except in limited circumstances, I must review a fast track decision on the papers without interviewing the applicant: s.473DB(1). The applicant has been assisted to put together a written submission to the IAA by the Asylum Seeker Resource Centre. He has not identified what further new information or clarification of his claims he proposes to put in an 'oral hearing' nor why he could not provide this information in writing. He has not explained why, in a fast track review, he should be invited to put his claims orally to the IAA. I have considered his request for an interview, taking into account the lack of explanation of what information he wishes to put at an interview and having regard to the statutory framework under which I must conduct the review. In all the circumstances I am not satisfied I should exercise the discretion to invite him to an interview to provide new information or present his claims orally.

Applicant's claims for protection

14. The applicant's claims can be summarised as follows:
 - He is a single Tamil male from [City 1], Northern Province, Sri Lanka. His parents and [number of] siblings continue to live in their village in [City 1].
 - In 2008 his elder brother was detained, interrogated and tortured by the Sri Lankan Army (SLA) for 3 months as a suspected LTTE member. He was released, but went missing in 2011. The family do not know what happened to the brother.
 - Following his brother's detention, the applicant also become a suspected LTTE member or supporter. He was rounded up with other young people in the village by the SLA for interrogations. He was detained in February 2009 by the SLA or CID, during which time he was interrogated and threatened. He was detained a second time in March 2009 for a week. This time he was physically tortured and had his arm broken. He was taken to hospital, where he was able to call his family, and they arranged for his release. When the authorities came for him again in June 2009 he fled the area.
 - He worked in [City 2] and [City 3] in the Eastern Province from 2009 to 20012. He did not contact his family or visit his home during this period, for fear the SLA would detain him.
 - In 2012 an uncle arranged for him to depart Sri Lanka for Australia, to get away from his problems with the SLA and CID.
 - If he is returned to Sri Lanka he will be detained and tortured as a suspected LTTE member. He will be of adverse interest because of his brother and because he has scars on his body. He will also be targeted as a Tamil from a former LTTE area, as a returning asylum seeker from a western country who departed Sri Lanka illegally.

Refugee assessment

15. 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

16. 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.
17. I accept the applicant is a citizen of Sri Lanka, based on the identity documents he provided to the Department. I find Sri Lanka is his receiving country.
18. The applicant claims he was targeted by the SLA and CID because he was a Tamil in an area previously held by the LTTE, and because he was suspected of involvement with or knowledge of the LTTE due to his elder brother’s detention.
19. Tamils faced considerable discrimination and violence in Sri Lanka during the civil conflict from 1983 to 2009 between the SLA and the pro-separatist LTTE. The conflict ended in May 2009 when the Sri Lankan government regained complete territorial control over the country. Tamils were viewed with suspicion by the SLA during and in the immediate aftermath of the conflict. As the LTTE was a Tamil group, the security forces imputed LTTE association in a discriminatory way, based merely on Tamil ethnicity and location in an LTTE controlled area. Any association with the LTTE could be grounds for arrest, and many Tamil civilians were questioned, detained or monitored by the authorities for suspected or actual association with the LTTE. Thousands were rounded up and detained in camps under a large-scale rehabilitation process for former LTTE members. People were detained typically for one year, but up to two years for those assessed as highly radical. At its height the government ran 24 rehabilitation centres, but by 2019 had only one centre still operational, which reportedly had only one former LTTE member detained therein.³

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

20. When the conflict ended the applicant was [age] years old. The applicant said at the TPV interview that in 2008 and 2009 he was often rounded up by the SLA with all the other young boys and girls in the village. The priest in the village would intervene, and most of them would be released. The applicant says that on two occasions, in February and March 2009, he was taken by the SLA from his home and held for a few days the first time and a week the second time. He says he was not physically harmed the first time, just interrogated about what he knew of the LTTE. On the second occasion he says he was physically mistreated during interrogation and his arm was broken. He claims the SLA took him to hospital for treatment for his arm. After being questioned he was released. I accept that as a young Tamil man the applicant was initially viewed with suspicion by the SLA and CID for being a young Tamil in an area previously controlled by the LTTE. I accept for this reason he was rounded up on occasion and questioned, and may have been physically mistreated during questioning. However, I consider it significant that the applicant was always released from detention. I consider if he was of actual interest as a suspected LTTE member or supporter, he would have been detained for rehabilitation as was the practice at that time.
21. The applicant claims that in June 2009 the SLA or CID came to the house again, and this time he fled to [City 2] in the Eastern province to avoid them. He says he was essentially in hiding for the next three years, but in fact he was out working in [City 2] and [City 3] during this period. He clarified in recent submissions that mostly he worked in private homes, and infers that is why he was able to hide from the authorities. However at the TPV interview he described working on large projects such as building a [specified structure] and a [specified structure]. Even if he lived on the job sites where he worked, be they large construction sites or private homes, and did not go out much, I do not accept this amounted to him living in hiding. He worked on a number of different job sites during this period for different employers. He travelled between different work sites, including travel to [City 2] and later on to [City 3]. Tamils in the Eastern province were also under surveillance and monitoring by the authorities in the aftermath of the conflict. I consider that if the applicant were a person considered to be associated with the LTTE, he would have been detained or harassed by the SLA or CID regardless of whether he lived in the Northern or Eastern province. That he had no further contact with the SLA or CID after early 2009, and was not detained despite being rounded up on a number of occasions previously, strongly suggests he was not of adverse interest or seriously suspected or imputed with LTTE association. I consider his move to the Eastern province was motivated by work opportunities, not an attempt to hide from the authorities or flee the SLA or CID in June 2009.
22. The applicant relies on two arrest warrants from 2012 and one from 2015 as evidence he was suspected of supporting the LTTE and will be arrested on return to Sri Lanka. I have concerns about the timing of the warrants, given the applicant had been questioned by the authorities in 2008 and 2009 but released. He appears not to have been of sufficient adverse interest to have been detained in the rehabilitation camps built to detain LTTE members and supporters. The authorities collected and maintained sophisticated intelligence on former LTTE members and supporters, and also monitored and maintained a high level of awareness of the civilian population in the north and east of the country.⁴ In this environment, the applicant was not prevented from leaving [City 1] in the Northern province in 2009 nor harassed in the Eastern province between 2009 and 2012. The applicant claims he was in hiding, living and working on building sites, but having regard to the monitoring of Tamils at that time, I do not accept it was unknown to the authorities that he had not lived with his family in [City 1] for three years or that he was living in the Eastern province. I consider it unlikely the authorities would issue a warrant in [City 1] for the applicant in August 2012 for supporting the LTTE in circumstances

⁴ DFAT, Country Information Report Sri Lanka, 18 December 2015,

where he had been released by the authorities after questioning him in 2009, had not been of adverse interest since, and had not lived in [City 1] for 3 years. That the applicant failed to mention these warrants until after the delegate's refusal of his application also raises concerns. In circumstances where he had regular contact with his family, I do not accept they would not tell him warrants had been issued. Having regard to these concerns, I consider the warrants are not genuine. I do not accept there are outstanding warrants for the applicant, nor that he will be detained for this reason on return to Sri Lanka.

23. The applicant claims his elder brother was not an LTTE member, but had been seen speaking to LTTE cadres during the conflict. He believes it was for this reason his brother was detained in 2008. The applicant says this brother later disappeared in 2011. The family has no knowledge of what happened to the brother, but they suspect he was disappeared by the authorities. If this did occur, there is no evidence this caused any adverse attention to be paid to the remainder of the family. His parents and remaining siblings have never been detained or otherwise harmed in connection with the elder brother, or for any other reason. The applicant also had no adverse interactions with the authorities after early 2009. I accept it is plausible the applicant's brother, as a young Tamil man, was detained near the end of the conflict for 3 months, but I do not accept the elder brother's detention brought any ongoing adverse attention to the family, including to the applicant. Taking into account that the brother was detained and possibly disappeared in the aftermath of the conflict, and that there have been no adverse attention or consequences for the family in the 10 years since because of this or because of any suspicion of LTTE link, I do not accept the applicant faces a real chance of harm now or in the reasonably foreseeable future for reason of his elder brother's disappearance or possible suspected links to the LTTE.
24. The applicant claims he will be targeted for scarring on his body. Apart from his description of a broken arm he has not provided detail of the extent of the scarring or where it is on his body. No medical evidence was provided. Even if he has scars on his body I do not accept this raises his profile or would cause him to be of adverse interest. Freedom from Torture reported in 2011 that scarring was deemed evidence of LTTE membership and people were detained for this reason in 2009. However, that occurred in the immediate aftermath of the conflict and DFAT reports they are unaware of any more recent evidence of people being detained because of scarring.⁵ Any scarring the applicant had did not cause any issues for him in the three years he lived and worked in the Eastern Province after the conflict ended. I find he does not face a real chance of harm now or in the reasonably foreseeable future because of any scarring he may have on his body.
25. The applicant fears he will be of adverse interest to the authorities merely for being a Tamil from the Northern province, an area under LTTE control during the conflict. Tamils are the second largest ethnic group in Sri Lanka. They live largely in the north and east of the country, with the Northern province having a population of around 93% Tamil. In the aftermath of the conflict the authorities were sensitive to any re-emergence of the LTTE or other separatist movements and Tamils were long viewed with suspicion of LTTE links. However, the LTTE is now viewed as a spent force and whilst the authorities continue to monitor the Tamil community, they are more interested in individuals involved in politically sensitive issues rather than Tamils generally. There has been relaxation on restrictions of public commemorations of events such as Great Heroes' Day commemorating Tamils who died fighting with the LTTE. Tamils now have a substantial level of political, with numerous Tamil political parties and no barriers to political participation.⁶ The UNHCR have stated that

⁵ DFAT, Country Information Report Sri Lanka, 4 November 2019.

⁶ DFAT, Country Information Report Sri Lanka, 4 November 2019.

since the end of the conflict there is no longer a presumption of eligibility for protection simply for being a Tamil from the north of the country.⁷ The applicant relies on a recent article reporting on the arrest of 5 Tamils as evidence of the Sri Lankan authorities continuing to harass and threaten Tamils because they are suspected of an LTTE association. The article refers to at least one of the men arrested being a known former LTTE cadre, and that the men were charged with forming a group aimed at re-establishing the LTTE.⁸ Whether the charges are genuine or trumped up is unknown from the limited information provided, but country information before me does not support a conclusion that such arrests are common or that ordinary Tamils continue to be imputed with an association with the LTTE or harassed for this reason.

26. Although there is still a military presence, the east and north of Sri Lanka have been largely demilitarised since the applicant left. The Prevention of Terrorism Act (PTA) that was used widely against Tamils in the past, was effectively suspended from 2016 until it was revived after the 2019 Easter Bombings. The 2019 Easter Bombings in Sri Lanka led to emergency regulations and restrictions being introduced, and the military present in the north and east of the country were on high alert. But their focus on restrictions and checkpoints was not directed at Tamils, but to check for Islamist terrorists. The emergency regulations have now lapsed, and local sources report the heightened security has eased.⁹ I note the concerns raised by recent regulations issued under the PTA on 12 March 2021, but the regulations appear aimed at persons deemed to hold violent extremist religious ideology, and not at ordinary Tamils.¹⁰ Whilst I accept the momentum to repeal the PTA has slowed and the government has from time to time introduced further or emergency regulations under the PTA, I do not consider there is anything in the applicant's profile to give rise to a real chance he may be detained under it.
27. The applicant's parents and siblings continue to live in their village in [City 1] in the Northern province. The applicant confirmed at his interview in 2016 that apart from his elder brother's detention in 2008 and alleged disappearance in 2011, his parents and siblings had not suffered any harm from the SLA, CID or any other group. I note he claimed they told him they were observed by people they believed to be from PLOTE, but they were never approached by such people and this may have been part of the general monitoring at the time. I consider his family's experience is consistent with country information for ordinary Tamils in the Northern province. Taking into account the improvements in the situation generally for Tamils in the Northern province, I find the applicant does not face a real chance of harm for reason of his ethnicity or membership of a particular social group Tamils from the Northern province.
28. The applicant submits that the security situation in Sri Lanka has deteriorated since the election of Gotabaya Rajapaksa as President in 2019, particularly for Tamils. The return of the Rajapaksa family to power in Sri Lanka, some members of whom were implicated in alleged war crimes and human rights abuses, was reported to be of concern to the Tamil community. Since being elected the Rajapaksa government has withdrawn from its international commitments to promote reconciliation and accountability within Sri Lanka. Human rights defenders, journalists and lawyers have been under increased surveillance for the perception that their work challenges the government. Rajapaksa has also acted to protect military

⁷ UNHCR, Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers for Sri Lanka, 21 December 2012.

⁸ Tamil Guardian, Former LTTE Cadre among 5 Tamils arrested by Sri Lanka Terrorism Division, 17 April 2021.

⁹ DFAT, Country Information Report Sri Lanka, 4 November 2019.

¹⁰ Centre for Policy Alternatives, Concerns relating to the recent regulations under the prevention of Terrorism Act, 18 March 2021.

officers accused of war crimes during the civil conflict, and created an environment where the courts are reluctant to act against the security forces for past war crimes. However I do not accept the information before me demonstrates an express anti-Tamil agenda or significant winding back of the considerable gains made by the Tamil community since the end of the conflict. The information before me does not indicate the situation has deteriorated for Tamils in [City 1] with a profile like the applicant.¹¹ The applicant is not an activist, separatist, journalist, human rights defender, or otherwise a person likely to raise the adverse attention of the Rajapaksa government. I do not accept the applicant faces a real chance of harm because of the change in government and return to power of the Rajapaksa family.

29. The applicant claims he will be targeted on return to Sri Lanka for having left the country illegally. It is an offence under Sri Lankan law to depart the country other than via an approved port of departure: ss.34 and 45(1)(b) of the Immigrants and Emigrants Act (I&E Act). 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 only a fine is imposed on passengers who depart illegally. Custodial sentences have been imposed only on persons facilitating or organising the boats. The fine imposed on mere passengers is usually between LKR15,000 and LKR20,000 (approximately AUD122 to AUD163).
30. The following procedures are reported to routinely occur for persons arriving in Sri Lanka who departed illegally: they are questioned at the airport and may be charged under the I&E 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 CID's office for up to 24 hours during processing; the returnee is taken to the closest Magistrate's Court; if a magistrate is not available, because it's the weekend or a public holiday, the returnee can be held for up to 2 days in an airport holding cell; and the magistrate normally grants bail for mere passengers on a people smuggling boat. DFAT reports that there are no reports of mistreatment during the processing of returnees who departed illegally.¹²
31. I do not accept the processing on return, being charged and convicted of an offence under the I&E Act, or the imposition of a fine, amount to serious harm under s.5J(5) of the Act. In the unlikely event the applicant is detained for a few days for returning on a weekend or public holiday I do not accept a short period of detention amounts to serious harm under s.5J(5) even if the holding cell is uncomfortable or the applicant is distressed by the detention.
32. DFAT advises thousands of Sri Lankans have returned from Australia and other western countries after unsuccessfully seeking asylum. It is not an offence to seek asylum outside Sri Lanka. 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 or for returning from a western country. 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 antigovernment activity. The applicant does not have such a profile, nor has he been engaged in such activities. Tamil failed asylum seekers who returned to the Northern province told DFAT they had no protection concerns and had not

¹¹ Human Rights Watch, World Report 2021 – Sri Lanka; Tamil Guardian, "6.9 million people who voted for Gotabaya Rajapaksa wanted him to be a Hitler" claims Sri Lankan minister, 13 April 2021; US Department of State, 2020 Country Report on Human Rights Practices: Sri Lanka;

¹² DFAT, Country Information Report Sri Lanka, 4 November 2019.

experienced harassment or monitoring.¹³ I consider the applicant would be returning to the Northern province from a western country as an ordinary failed asylum seeker, and I do not accept he faces a real chance of harm for this reason.

33. Taking into account the information and findings referred to above, I find the applicant does not face a real chance of harm for returning as a young Tamil man who was rounded up and briefly detained in 2009, is from the Northern province, and would be returning as a failed asylum seeker from a western country, whether these factors are considered individually or cumulatively.

Refugee: conclusion

34. 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

35. 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

36. 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.
37. 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.
38. The applicant may be charged under the I&E Act on return to Sri Lanka, and if he is returned on a weekend or public holiday he may be detained in an airport holding cell for up to 2 days. I rely on country information referred to above to find he would not be mistreated during such processing and possible detention. I do not accept the processing at the airport, charges under the I&A Act, a conviction and fine, and a possible short period of detention amount to significant harm or that there is real risk the applicant will face significant harm during such detention. The applicant may be distressed during detention, but I do not accept the distress amounts to torture, or cruel or inhuman treatment or punishment, or degrading treatment or punishment as defined in the Act.

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

39. For the reasons given above I have not accepted the applicant was imputed with an association with the LTTE or otherwise of adverse interest, and it follows I do not accept he faces a real risk of significant harm for these reasons. I have otherwise found the applicant does not face a real chance of harm for reason of his ethnicity, for being a Tamil from in the Northern province, or a returning failed asylum seeker from the west 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 will not face a real risk of significant harm for any of the reasons claimed or at all.

Complementary protection: conclusion

40. 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.