



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA16/01591

Date and time of decision: 3 August 2017 15:19:00
Katrina Fairburn, 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 an referred applicant, or their relative or other dependant.

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a young, single Catholic Tamil from [District 1] in the Northern Province of Sri Lanka. He fears returning to Sri Lanka because he would be at risk of being harmed by the Sri Lankan authorities, including the Criminal Investigation Department (CID), the military and the navy, for imputed association with the Liberation Tigers of Tamil Eelam (LTTE) due to his ethnicity, area of origin and connection with his [Sibling 1] who supported the LTTE. He also fears harm on return to Sri Lanka from the Muslim community near his village in [Town 1] due to disputes arising from resettlement and access to fishing. [In] September 2013, the applicant made an invalid application for a Protection (subclass 866) visa. [In] February 2016, he lodged an application for a Safe Haven Enterprise (subclass 790) visa.
2. [In] December 2016, a delegate of the Minister for Immigration and Border Protection refused to grant the visa.

Information before the IAA

3. I have had regard to the material referred by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. On 17 January 2017, the applicant's representative forwarded to the IAA a submission and supporting statutory declaration from the applicant. The submission contained argument about the basis for the delegate's findings and decision. Parts of the submission relate to material before the delegate which is also before me and I have considered.
5. The applicant's supporting statutory declaration dated [in] January 2017 provides further particularisation of his claims for protection that were discussed with the delegate during the visa interview and raised as part of his visa application. I consider this declaration was not before the delegate at the time of their decision, contains additional details about the applicant's claims, and is new information.
6. The applicant's representative has submitted that the information could not have been provided to the department as it was in response to the delegate's findings outlined in their Protection Visa decision record. The applicant was represented by a legally qualified registered migration agent at the time of his visa interview and I consider that he would have been able to access legal advice and assistance about presenting his claims for protection. Notwithstanding his representation, the applicant was also informed directly by the delegate during the visa interview of the framework for review of refused decisions by the IAA, the importance of providing complete and accurate information in support of his protection claims as early as possible, and that the department would consider any further information provided after the visa interview and prior to a decision being made. I have listened to the recording of the visa interview and the circumstances of the applicant's return from [Country 1] were canvassed by the delegate, as was the basis for why and when unidentified men came to the applicant's house looking for him. I note that the visa interview occurred [in] October 2016 and a decision was not made by the delegate [until] December 2016.
7. I am satisfied the applicant was on notice about providing complete and accurate information in support of his claims as early as possible, was aware these issues had been raised for

discussion during the visa interview and, noting the delegate's decision was not made until more than two months had passed since the visa interview, had adequate opportunity to provide this opportunity before the delegate's decision was made. The applicant has not satisfied me that the requirements under s.473DD are met. Given the applicant had opportunity to provide this declaration before the decision was made and the claims included in the declaration were already before the delegate, I am also not satisfied there are exceptional circumstances to justify considering the new information.

8. On 24 January 2017 the Department of Foreign Affairs and Trade published an updated Country Information report on Sri Lanka.¹ Relevantly to this decision, the report provides information about the position of Muslims, Tamils, persons perceived to have connections to the LTTE, persons who departed Sri Lanka illegally and returning asylum seekers. I consider this report may be relevant to assessing the application, was not before the delegate and constitutes new information. As the report was published after the delegate's decision and updates an earlier DFAT report on Sri Lanka published on 18 December 2015, I am satisfied there are exceptional circumstances to justify considering the new information.

Applicant's claims for protection

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

- He is a single, Catholic Tamil male from [District 1] in the Northern Province of Sri Lanka, aged [years]
- He was born in [Town 2] which was within an LTTE-controlled area during the war. While he was at school, the LTTE provided training to students about how to avoid shelling. He and other villagers were required to attend LTTE memorial services and meetings from time to time.
- In 1999, his family was displaced from their village due to intense shelling by the Sri Lankan army. They relocated to the government-controlled area in [Town 3] and resided at [a refugee camp] for [number of years].
- At the camp the applicant's [Sibling 1] volunteered information to the military that he had sold goods to the LTTE such as [Product 1]. He was taken into custody and kept at a detention centre for [number of months]. His [Sibling 1] was released following intervention from [Religious Leader 1] of [Town 1].
- While living at the camp, the applicant and other Tamils were closely monitored and their movements were restricted. The military visited in white vans at night and took people identified by informants, for questioning. The Muslims in the area worked as informants to the military and informed on people with whom they had a private vendetta. The applicant was never taken for questioning.
- After living at the camp, [Religious Leader 1] of [Town 1] provided [the land] in [Town 4] where the applicant and his family resettled. The applicant and other villagers continued to be subjected to intense monitoring and frequent round-ups by the army. The applicant was involved in approximately four round-ups but was never identified as a person involved with the LTTE or arrested.
- In June 2006, the applicant travelled to [Country 1] where he worked three months until he [got a medical condition], returning to Sri Lanka in about September 2006.

¹ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

- On the applicant's return to Sri Lanka, he was involved in a further two round-ups but was not questioned or arrested. In 2008, [number of boys] from his village the applicant's age were arrested. [Some] were badly beaten before being released and [some] never returned.
- One night the applicant was with a group of villagers who stopped a navy truck from entering the village, in order to check if there were 'greasemen' present. The navy officers beat the villagers and [detained them] until the next day.
- Army officers harassed the villagers, asked them to buy [goods] for them and beat them for no reason.
- The applicant left Sri Lanka in July 2008 and remained working in [Country 1] for about [number of years].
- While the applicant was in [Country 1] his [Sibling 1] was abducted in [Town 4] by the military for ransom and mistreated while in custody. In [2010], the applicant was told by his mother that the army had searched their house looking for his [Sibling 1]. The applicant's [Sibling 1] departed Sri Lanka by boat and is residing in Australia.
- The applicant returned to his home in [Town 1] in about August 2010. On a day when he was not at home, [a number of] unidentified men came and asked for the applicant. They were not wearing uniforms and did not identify themselves.
- The applicant was sent to stay with his [Sibling 2] who lived in [Town 1] about [number of] kilometres away. He stayed there and opened a [business] and assisted his [Sibling 3] with his fishing business.
- The applicant experienced difficulties with being able to fish arising from ongoing dispute between the local Muslim community and the Catholic Tamils about access to fishing. Difficulties included being required to provide a portion of the catch to the navy, paying taxes to the Muslim community to reach the seashore and being attacked by Muslim villagers, and having their fishing boats and property damaged.
- At the annual Government [sport] match, the Muslim community attacked the applicant's village team with [weapons] bats when they won the match.
- In 2012, a friend of the applicant's was arrested by the army and questioned about his [sibling] who had supported the LTTE, just like the applicant's [Sibling 1].
- [In] September 2012 the applicant departed Sri Lanka illegally by boat and travelled to Australia.
- In [2012], the applicant's family told him that the army had come to the house and asked for him. His parents told the army he had left for overseas.
- Animosity from the Muslim community towards the people in the applicant's village is continuing. [In] September 2013, villagers were attacked by Muslims when they tried to [undertake a political activity in the] village. The military still holds a strong presence in the north.
- Having lived in Australia, he would be suspected of having made connections with the Tamil Diaspora supporting the return of the LTTE.
- [Religious Leader 1] of [Town 1] is very sick and is not able to protect the Tamil Catholics of his village as he had in the past.

Refugee assessment

10. 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

11. 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.
12. The applicant has claimed he fears harm on return to Sri Lanka from the Sri Lankan authorities, because he is a young, single, Catholic Tamil male from a formerly LTTE-controlled area whose [Sibling 1] was detained at a rehabilitation centre for supporting the LTTE by providing them with [Product 1].
13. The applicant provided detailed information about his background and family connections in both his applications and during his visa interview. During his visa interview, he was assisted by a Tamil interpreter and spoke fluently in the Tamil language. As part of both of his visa applications and also at interview, he provided documents to support his identity. Based on the documentation provided by the applicant and his personal information, I accept the applicant’s identity is as claimed and that he is a single, Catholic Tamil from [District 1] in the Northern Province of Sri Lanka, who is aged approximately [age].
14. I accept that he is a national of Sri Lanka and of no other country.
15. The applicant provided a detailed and credible account of his upbringing in [Town 2] and the impact of residing in an LTTE-controlled area during the conflict. He indicated that his own exposure to the LTTE consisted of attending memorial services and meeting and receiving training from the LTTE while at school about how to avoid shelling. He stated that he never received any weapons training from the LTTE or participated in any fighting. However, he claimed that his [Sibling 1] had provided support for the LTTE by selling them items they could not readily access such as [Product 1] a couple of times a week over about a two year period. Country information before the delegate indicates that all persons living in areas formerly controlled by the LTTE necessarily had contact with the LTTE and its civilian administration in

their daily lives.² I consider the applicant's testimony to be credible and having regard to the country information about LTTE activity during this time, I am satisfied the applicant had incidental exposure to LTTE activities but was not trained by them or engaged in any fighting on their behalf. I am also satisfied that the applicant's [Sibling 1] supported the LTTE by regularly supplying them with goods such as [Product 1].

16. The applicant claimed that in 1999, due to intensive shelling in their village they were displaced to [a refugee camp]. After spending [number of years] in the camp, the villagers relocated to [the land] in [Town 4]. In support of this claim, he provided letters from [a public official] of [Town 4] dated [in] October 2012 and [in] October 2012 confirming his status as a permanent resident of [Town 2] and displacement of his family to [Town 4]. Country information before the delegate indicates that a large number of families remain internally displaced from their villages of origin.³ Having regard to the letters from the [public official] and the applicant's testimony, I accept that the family were displaced from [Town 2] and spent approximately [number of years] residing in [a refugee camp] followed by resettlement in [Town 4]. The applicant has consistently provided information that his parents and some siblings continue to reside at the village of [Village 1] in [Town 4], with [number of siblings] living nearby in [Town 1]. I accept this to be the case.
17. The applicant stated that while his family were in the camp, the Sri Lankan army called for people to volunteer information about activities linked with the LTTE. On this basis, the applicant's [Sibling 1], who had supplied the LTTE with some goods such as [Product 1] came forward. He was arrested and taken away from the camp for about [number of months]. The applicant claimed that he returned to the camp with the assistance of [Religious Leader 1] of [Town 1] and his head was shorn. Although his [Sibling 1] did not speak of his experiences, the applicant came to know that he had been taken to [a detention centre] for rehabilitation. The applicant claimed that his [Sibling 1] came to the adverse attention of the authorities a second time when he was picked up by a military truck in [Town 4] in about 2010. His [Sibling 1] was released a short time later as the abduction had been witnessed and [Religious Leader 1]'s assistance sought. The applicant's account of his [Sibling 1]'s experiences with the authorities was detailed and consistent with country information before the delegate about the treatment of LTTE supporters by security forces. I accept that the applicant's [Sibling 1] was arrested and detained at [a detention centre] for [number of months] where he was questioned and possibly mistreated for having supported the LTTE through the provision of goods during the war.
18. Country information before the delegate reflects that [Religious Leader 1] of [Town 1], [name], undertook a protective role towards the Catholics displaced from [Town 2] and re-settled in the village of [Village 1]. While I accept that his intervention may have exerted some influence in securing the release of the applicant's [Sibling 1], I also consider that his release after a period of [number of months] indicates the authorities were satisfied that he did not hold a profile for LTTE involvement that presented a political or security threat. I note that there is no information before me to indicate that the applicant's [Sibling 1] experienced further questioning or detention by the authorities during the ten years prior to 2010. The applicant claimed that in 2010 he was told by his mother that in [2010], the army had searched their house looking for his [Sibling 1]. I note that the applicant stated his [Sibling 1] was abducted by the military for the purpose of a ransom demand. Country information indicates that pro-government paramilitary groups such as the Eelam People's Democratic Party (EPDP) and

² United Nations High Commissioner for Refugees (UNHCR), "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012, UNB0183EA8, p.26

³ Ibid, p.9

government security forces increasingly took on the characteristics of criminal gangs in the years following the end of the war.⁴ The applicant's testimony is consistent with country information and I accept that the military visited the family home in [2010] looking for the applicant's [Sibling 1] and abducted him in 2010. I am also satisfied that the [Sibling 1's] abduction was motivated by financial gain rather than because he was considered to be a security or political threat.

19. The applicant described his own encounters with the Sri Lankan authorities as having occurred in the company of other villagers. He stated that following his family's resettlement in the village of [Village 1], villagers continued to be subjected to intense monitoring and frequent round-ups by the army. The applicant described being involved in approximately four round-ups where disguised informants would identify LTTE supporters to the army for questioning. Despite the applicant's relationship with his [Sibling 1], who was known to the army as an LTTE supporter, the applicant was never identified for questioning or arrested. In addition to the round-ups, the applicant claimed that his movements outside the village were severely restricted due to the need to obtain passes and the number of checkpoints in the area. He also described an incident where the villagers stopped a navy truck believing it to contain 'greasemen' and were subsequently beaten by the navy officers and [detained] overnight.
20. Country information indicates that many Tamils, particularly in the north and the east reported being monitored, harassed and their movement restricted by security forces during the conflict and the Rajapaksa Government.⁵ I accept that the applicant experienced a degree of harassment and restrictions on his movements by the army, including participating with other villagers in a number of army round-ups and being beaten and [detained] overnight by the navy. The applicant confirmed to the delegate that at no time had he individually been questioned, detained or mistreated by the Sri Lankan authorities, despite his connection to his [Sibling 1] and the number of times he was involved in round-ups or needed to pass through checkpoints. Given the instances relayed by the applicant occurred in company with other villagers, I am not satisfied the applicant was ever targeted by the authorities, including the army or the navy, because they considered he held a profile for being involved with the LTTE or for any other reason. Rather, the evidence indicates the applicant had experienced treatment by the local security forces prevalent at the time and directed at Tamil males in his village generally.
21. The applicant referred to treatment being experienced generally by Tamils in his village including that army officers would harass villagers, ask them to buy [goods] for them and beat them for no reason. There is no information before me, and the applicant has not claimed, that he was ever subjected to extortion or beatings from the army separate from his experience of being beaten and [detained] by the navy who the villagers had suspected were 'greasemen'. Given country information referred to previously, I accept that the applicant may have been aware of other villagers experiencing this treatment. On the material before me, I am not satisfied that the applicant was ever extorted by the army for [goods] or that he was beaten for no apparent reason.
22. During his visa interview, the applicant described being able to travel to Colombo in the company of an older person to apply for and obtain a passport in his own name. [In] June 2006, he travelled from Sri Lanka to [Country 1] under that passport on a work visa, where he remained for approximately three months before returning to Sri Lanka

⁴ US Department of State, "Sri Lanka – Country Reports on Human Rights Practices 2012", 1 April 2013, OGD0B5438166, pp.3-4

⁵ Ibid, p.25; DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105, p.12

[in] September 2009. He stated during his visa interview that on return he was involved in two further army round-ups but was not singled out, questioned or mistreated, despite having returned to the village from overseas. This was in contrast to [number] other boys of his age who had been taken for questioning and mistreated, with [some] boys not returning to the village. There is no information before me, apart from the age of the boys, to indicate the circumstances of their treatment by the army and how this is connected to the applicant's own claims for protection. I am not satisfied the applicant's profile with the authorities was affected by the army's treatment of other boys his age in the village.

23. The applicant also travelled to [Country 1] on his passport from [July] 2008 where he remained for work purposes until [August] 2010. During the visa interview, the applicant described being questioned by airport officials about the reasons for his travel on departure and arrival, but was cleared and released within a couple of hours at most. I consider that although the applicant may have experienced some monitoring and restriction of his movements, he was not prevented from travelling between [Town 1] and Colombo or from undertaking overseas travel. I consider that the apparent ease with which the applicant was able to obtain a passport and travel overseas on multiple occasions indicates that at this time the Sri Lankan authorities did not consider him to hold a profile for LTTE involvement or was a political or security threat.
24. The applicant stated that after he returned to [Town 1] [a number of] unidentified men visited his home when he was not there and asked for him. His mother described to the applicant that the men were not in uniform and she asked him whether they were friends of his. The applicant and his family have since speculated that the men may have been linked to the people seeking a ransom for the applicant's [Sibling 1] or be representatives from the government. There is no information before me, and the applicant has not claimed, that the men identified themselves, or made any threatening or comments about the applicant. At the visa interview and in post-interview submissions, the applicant confirmed that up until the point of his departure from Sri Lanka, he had never been visited by the army, the navy or the CID. Had the men been from the government and seeking the applicant, I consider it implausible that they would not have directly requested the applicant to make contact or made broader enquiries with neighbours and friends about the applicant's location. I accept that the applicant's family may have received a visit from unidentified men following the applicant's return to the village, but having regard to the applicant's profile with the authorities, that the applicant's attendance was not sought and no threats were made, I am not satisfied that the men were asking after the applicant with adverse intent. As the men were not recognised by the applicant's mother, able to be identified by their clothing or gave any information about their identity, I am also not satisfied they were linked with the CID, the army, the navy or any paramilitary groups.
25. Following the visit by the unidentified men, the applicant claimed he relocated to his [Sibling 2's] house nearby. While there he operated a [business] and assisted his [Sibling 3] who was a fisherman. He described these activities in his visa application as [details of work duties]. I accept the applicant's role in assisting his [Sibling 1's] fishing business as he has described and note that this did not involve going out to fish. Having regard to the nature of the applicant's duties, that he commenced in the role from about September 2010 and that he undertook this work as a second job to his [business], I am satisfied that he was not employed as a fisherman, or perceived to be a fisherman from [Village 1].
26. The applicant outlined in detail the impact of ongoing poor relations between the villagers of [Village 1] and the neighbouring Muslim fishing villages. He presented a detailed summary of the reasons behind the conflict between the communities which involved a history of displacement by both communities which are heavily reliant on fishing as a livelihood and

ensuing competition between the communities over access to fishing resources and infrastructure at the shore. Country information before the delegate about the dispute indicates that despite attempts to resolve the impasse through political and court action the dispute has involved violent clashes and protests, involving the destruction of property belonging to villagers from [Village 1].⁶ Having regard to the country information and the applicant's testimony, I accept the dispute has impacted on the fishermen of [Village 1] by limiting their ability to fish and resulting in some clashes which have turned violent and led to the destruction of fishing-related property in 2011. Having regard to the source of the conflict arising from access to resources, I am satisfied the primary motivation for ill-feeling by the Muslim community towards the fishermen of the [Village 1] village is due to disputed access to resources rather than religious or ethnic considerations alone.

27. While I accept that the applicant may have been exposed to general retaliation by the Muslim community when attempting to [undertake work for Sibling 3's business], there is no information before me to indicate, and the applicant has not claimed, that he was individually targeted by Muslims, either by being directly threatened and harmed or by being informed against. I am satisfied the applicant's exposure to the conflict between the communities has occurred incidentally and due to being in the proximity where clashes have occurred.
28. The applicant claimed that the animosity of the Muslim communities towards the villagers from [Village 1] presented an additional risk to their safety as the Muslims held close ties with the Sri Lankan Government and paramilitary groups such as the EPDP. He claimed that through patronage from a [public official] in [Town 1], the Muslim people could act with impunity towards the [Village 1] villagers and would maliciously inform the authorities of LTTE involvement by villagers. While I accept the applicant may believe this is the case, country information indicates that the police and courts in [Town 1] have taken formal steps in response to illegal actions, including property damage, undertaken by the Muslim community in respect of the fishing dispute.⁷ Having regard to the country information, I am not satisfied that members of the Muslim community are able to exert the amount of influence over local authorities or act with impunity against the [Village 1] villagers as the applicant has claimed.
29. The applicant referred to other instances of ongoing tensions with the Muslim community, being after a [sporting] match and when [Village 1] attempted to [undertake a political activity in] the village in 2013. The applicant referenced these incidents to indicate that tensions between the Muslim community and the villagers of [Village 1] are ongoing. I accept that these incidents may have occurred and are reflective of tensions between the two communities that have resulted in violence occurring at flash points under provocative circumstances. There is no information before me to indicate there have been further instances resulting in violence between the two groups since September 2013. I note that the applicant's family have continued to reside in [Village 1] and there is no information before me to indicate that they have come to any harm as a result of tensions with the Muslim community arising from the competition over fishing resources.
30. For reasons stated, I consider the conflict between the villagers of [Village 1] and neighbouring Muslim communities to be restricted to the dispute about access to fishing resources and infrastructure. There is no credible information before me to indicate that generalised violence occurred between the communities, such that people who were not directly involved in the fishing dispute were exposed to harm. I am not satisfied on the information before me that the dispute between the two communities involves generalised violence or that attacks against

⁶ [Source deleted].

⁷ Ibid

villagers of [Village 1] have occurred in recent years. I note that country information indicates that processes through political and judicial avenues have been accessed in order to resolve the dispute and police have taken action against members of the Muslim community who have acted illegally. Although the applicant indicated that no report was made to the police following the [sporting] match incident, country information indicates that police have taken appropriate action with respect to other incidents between the two communities that resulted in damage to property and violent protests at the court. Notwithstanding the applicant's misgivings, I am satisfied the villagers of [Village 1], including the applicant, have been able to access state protection in addition to relying on [Religious Leader 1] of [Town 1] as an influential and important protector of their rights. Given the availability of state protection, I am not satisfied that the absence of [Religious Leader 1]'s advocacy due to illness creates a real chance the applicant will face harm.

31. The applicant has raised concerns that in 2012 a friend was questioned by the army in relation to activities by his [sibling] to support the LTTE. The applicant has speculated that the army's interest in questioning his friend was triggered by a report from a member of the Muslim community due to the poor relationship between the Muslim fishermen and the fishermen of the [Village 1]. As the friend's [sibling]'s involvement with the LTTE was similar to the circumstances of his own [Sibling 1], the applicant is concerned that he would also be subjected to questioning by the army following the prompting of members of the Muslim community. There is no information before me to support the applicant's suspicions that Muslims were able to instigate an investigation by the army into his friend. I consider the applicant's concerns in this regard to be speculative. Separately, I note that circumstances of the applicant's [Sibling 1]'s support of the LTTE was already known to the army for many years and neither the applicant nor other members of his family had been subjected to questioning about the [Sibling 1], despite having resided in the area and the applicant being included in a number of army round-ups. Having regard to this, I consider the applicant's concerns to his own safety arising from the army's questioning of his friend to also be speculative. I am not satisfied the questioning by the army of the applicant's friend in 2012 occurred at the behest of a member of the Muslim community or that it indicates the applicant would face harm on this basis.
32. I accept that given the applicant's prior experience as an internally displaced Tamil in [Town 1] who has been harassed and monitored by authorities and witnessed the detention and treatment of his [Sibling 1], he is concerned about future treatment by the authorities, including the CID, army and the navy, and members of the neighbouring Muslim communities should he return to Sri Lanka. During the visa interview, the delegate raised with the applicant the impact of the passage of time since the applicant's departure in 2012 and changed circumstances in Sri Lankan politics. Country information before the delegate indicates that the security situation in Sri Lanka has improved with a decrease in militarisation and monitoring trends. Recent reports of country information do not support a conclusion that Tamils, including young Tamil men from the Northern Province, are being systematically targeted and subjected to serious harm because of their race and/or area of origin.⁸ The United Nations High Commissioner for Refugees Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka issued in 2012, states that in its opinion, originating from an area previously controlled by the LTTE does not of itself result in the need for international refugee protection.⁹

⁸ DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105, pp.28-29

⁹ United Nations High Commissioner for Refugees (UNHCR), "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012, UNB0183EA8, p.26

33. The applicant has claimed he will face harm on return to Sri Lanka because having lived abroad in Australia he would be presumed to have made connection with his [Sibling 1] who is resident here, and engaged in diaspora activities that would bring him to the adverse attention of the Sri Lankan authorities. In respect of the applicant's concerns that he would be imputed with engaging in anti-government diaspora activities due to his connection to his [Sibling 1] in Australia, there is no information before me, and the applicant has not claimed, that there is any publicly available evidence to support a suspicion the applicant has engaged in any diaspora activities. I am not satisfied on the information before me that the applicant would be suspected by the Sri Lankan authorities of holding anti-government opinions and/or involvement with the LTTE based on imputed diaspora activities or association with his [Sibling 1] in Australia.
34. For reasons already stated, I do not consider the applicant has a profile with the Sri Lankan authorities for actual or imputed support of the LTTE, or is considered to be a person of interest to the authorities for any reason, notwithstanding his connection to his [Sibling 1] who was detained and rehabilitated for having provided goods to the LTTE during the war. Given the applicant's profile, the country information about the change in Sri Lanka's political and security landscape, I am not satisfied that the applicant would be targeted by the Sri Lankan authorities, including the CID, army or the navy, on return to Sri Lanka.
35. The applicant has stated that he has faced harassment and discrimination as an internally displaced person residing in [Village 1]. I accept that the applicant as a displaced person has faced restriction on his movements, scrutiny by authorities, and hardship and insecurity of residence, and is concerned this would continue on his return. However, the law in Sri Lanka prohibits discrimination based on race, sex, gender, disability, language or social status.¹⁰ I note that the applicant completed secondary schooling to Year 13 level in [Town 4], despite the disruption to his studies caused by displacement. Following the completion of his studies, the applicant was employed in his father's [shop] and as a [occupation] when working in [Country 1]. On return from [Country 1], in addition to assisting his [Sibling 3] with [various duties], he also was self-employed providing [details of work] to other villagers. Since being in Australia, he has been employed as a [occupation]. Given his work experiences in Sri Lanka, [Country 1] and Australia, I consider he has demonstrated the capacity to be flexible in finding employment and is not dependent on employment in fishing as his only means of generating an income. Having regard to his education, work experience and personal attributes, I am not satisfied the applicant would not be able to earn an income on his return to Sri Lanka, such that he could not subsist or would bring him into conflict with neighbouring Muslim fishermen.
36. As part of his visa application and during the visa interview, the applicant also raised other concerns including reports that people who have gone missing from [Town 4] are believed to have been abducted by the military, and a recent news article about the wife of a former LTTE commander having been arrested and questioned about the location of weapons. There is no information before me to indicate the circumstances of the people who have gone missing or the arrest of the LTTE commander's wife, and how this is connected to the applicant's own claims for protection. I am not satisfied that the reports of other people in [Town 4] going missing and an LTTE commander's wife being arrested and questioned gives rise to a real chance the applicant would face harm.
37. The applicant has claimed he will face harm on return to Sri Lanka as a returned asylum seeker who has lived abroad for a prolonged period of time. There is no information in the referred

¹⁰ US Department of State, "Sri Lanka Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320, p.28

materials to indicate that returnees from Australia are targeted for extortion because they have lived for a prolonged period of time abroad. I am not satisfied on the information before me that the applicant would be or targeted for extortion by the Sri Lankan authorities, including the military and the CID, due to his prolonged period abroad.

38. Implicit in his claim about being a returned asylum seeker is the fact that the applicant would be an illegal departee and I have also considered whether there is a real chance of serious harm on this basis. I accept that the applicant departed Sri Lanka illegally in September 2012 and has resided abroad since that time. I also accept that he will return to Sri Lanka as a returned asylum seeker and is likely to be identified as such. The country information in the referred material indicates that Sri Lanka's Constitution entitles any Sri Lankan citizen the freedom to return to Sri Lanka. There is no information before me to indicate that Tamils who have lived for prolonged periods abroad are facing serious harm on return to Sri Lanka due to the amount of time they have spent abroad.
39. DFAT reports that persons who depart other than via an approved port of departure (illegal departees), may be liable for imprisonment and a fine pursuant to the *Immigration and Emigrants Act 1949* (the I&E Act),¹¹ although penalties for such persons are discretionary and are almost always a fine. As the applicant does not have a profile for LTTE involvement or would otherwise be considered a security or political risk by the Sri Lankan authorities, I do not consider that the applicant would be targeted or subjected to processes on re-entry to Sri Lanka that would be different from the usual procedures outlined below.
40. Upon arrival in Sri Lanka such persons are processed by a number of agencies who check travel documents and identity information. Processing of illegal departees may take several hours primarily due to the administrative practices, interview lengths and staffing constraints. As these persons are processed en masse, individuals are unable to leave the airport until all returnees have been processed. DFAT assesses that such persons are processed in accordance with standard procedures regardless of ethnicity and are not subjected to mistreatment during processing at the airport.¹²
41. Persons who have departed illegally who have been arrested can remain in custody at the CID's Airport Office for up to 24 hours after arrival and if a Magistrate is not available within this time, for example because of a weekend or public holiday, may be held at a nearby prison.¹³
42. I accept the applicant departed Sri Lanka illegally as a passenger on a boat. I accept that should he plead guilty he would be fined and would then be free to go. I am not satisfied that, having regard to this discretion coupled with the country information in the referred materials that indicates the ability to pay the fine by instalment, a financial penalty would amount to economic hardship to the applicant giving rise to serious harm.
43. Returnees who plead not guilty, will, in most cases, be immediately granted bail by a Magistrate and released on the basis of a surety (personal or guaranteed by a family member) and will rarely be subject to any conditions in relation to the bail or any general requirement to report to police or police stations between court attendances.¹⁴
44. There is no evidence before me that suggests the operating procedures under the I&E Act are discriminatory on their face, nor does the country evidence suggest it is applied in a

¹¹ DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105, p.33

¹² Ibid, p.34

¹³ Ibid, p.34

¹⁴ DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105, p.34

discriminatory manner. Accordingly, I am not satisfied on the evidence that detention arrangements for the purpose of being charged under the I&E Act and financial penalties imposed upon a plea of guilty are applied in a discriminatory manner.

45. Alternatively, I have considered whether detention of the applicant for a short period and/or receipt of a financial penalty upon a plea of guilty would amount to serious harm. As he would have the opportunity to pay a fine by instalment I consider this treatment, both separately and taken together, would not amount to serious harm.
46. DFAT assesses the risk of torture or mistreatment for the majority of returnees is low and continues to reduce.¹⁵ The evidence before me does not support a conclusion that returning Tamil asylum seekers face a real chance of harm. For the reasons stated above, I am not satisfied the applicant will face a real chance of serious harm on the basis of being a returned asylum seeker and/or for illegal departure.
47. The applicant is a single, male Catholic Tamil from the Northern Province, aged approximately [age] who is an internally displaced person from [Town 2] who has been resettled in the village of [Village 1] in [District 1]. His [Sibling 1] was arrested, detained and mistreated for [number of months] while he underwent rehabilitation at [a] detention centre for supporting the LTTE during the war, was abducted by the military in about 2010, departed Sri Lanka and currently resides in Australia. The applicant has experienced harassment, monitoring and some restriction of movement by the Sri Lankan military but was never questioned, arrested, detained or mistreated. He has been able to travel between [Town 1] and Colombo to obtain a passport and travelled overseas to [Country 1] to work on two occasions without impediment. On return to [Town 1] in 2010, the applicant assisted his [Sibling 3's] fishing business with [various duties]. He has had limited involvement in the dispute over access to fishing resources and infrastructure between the fishermen of [Village 1] and neighbouring Muslim villages. The applicant was never directly targeted or harmed during clashes between the two communities not individually targeted or informed upon. Noting the applicant's history and profile, and having regard to the country information about the political and security situation in Sri Lanka, I am not satisfied that he faces a real chance of serious harm now or in the reasonably foreseeable future.

Refugee: conclusion

48. 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

49. 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

50. Under s.36(2A), a person will suffer 'significant harm' if:

¹⁵ Ibid, p.29

- 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.

51. In respect of the applicant's claims that he faces harassment and discrimination from neighbouring Muslim communities on the basis he is a catholic displaced person residing at [Village 1], I have accepted that tensions between the two communities exist. Given the applicant is not prominently involved in the fishing dispute, has not previously been targeted or harmed by members of the Muslim community, including on the basis of his religion, and his family have continued to reside in [Village 1] without incident, and the applicant possesses skills, experience and the personal attributes to obtain employment from sources other than fishing such that he could subsist, I am satisfied there is not a real risk of significant harm to the applicant on this basis.
52. As part of his visa application, the applicant's representative made specific claims for complementary protection in respect of generalised violence in his local area arising from the ongoing dispute between Muslim fishermen and the fishermen of the [Village 1] village over access to fishing resources and infrastructure. I have found that the dispute is focussed between people involved in fishing and that while there were incidents of violence occurring around the time of the court case and up until the end of 2013, there have not been further incidents in recent years. I note that country information indicates that processes through political and judicial avenues have been accessed by the villagers of [Village 1] in order to resolve the dispute and police have taken action against members of the Muslim community who have acted illegally. Given the passage of time and apparent absence of further incidents and the availability of state protection, I am not satisfied the applicant faces a real risk of significant harm on this basis.
53. For the reasons already stated, I have found that there is not a real chance the applicant will face serious harm from the Sri Lankan authorities, including the local CID, navy or army, on return to Sri Lanka due to his marital status, age, Tamil ethnicity and/or because he originates from the Northern Province, or for imputed LTTE involvement due to his connection to his [Sibling 1] or his own brief interaction with the LTTE while at school or as a result of his previous interaction with the Sri Lankan authorities. I have also found there is not a real chance he would be harmed by the authorities due to having been abroad in Australia for a prolonged period of time in Australia, or for being a returned asylum seeker.
54. As 'real chance' and 'real risk' involve the same standard,¹⁶ it follows that based on the same information, and for the reasons stated above, I am also satisfied there is no real risk of significant harm on these bases if returned to Sri Lanka.
55. There is no suggestion the applicant faces the death penalty on return for any reason.
56. As to his treatment under the criminal justice system for illegal departure, on the basis the applicant was a passenger on a people smuggling venture and not otherwise holding a profile

¹⁶ *MIAC v SZQRB* (2013) 210 FCR 505

of interest to the authorities, country information indicates that he would only be detained for a short time and if pleading guilty, the most likely punishment would be a fine.

57. I accept that conditions in prison and on remand for detainees are poor due to overcrowding and poor sanitation, but note this is due to limited resources rather than an intention by the state to inflict pain and suffering or degrading treatment.¹⁷ Country information indicates that the amount of a fine imposed on returnees who plead guilty to an offence under the I&E Act is discretionary and may be paid by instalment. Evidence does not indicate that financial penalties are imposed in a manner intended to inflict pain and suffering or cause extreme humiliation.
58. Alternatively, I have considered whether a questioning on arrival, short duration in detention or a financial penalty would amount to severe pain or suffering, or suffering that may be considered cruel or inhuman or degrading. Having regard to the applicant's circumstances, the short duration of questioning and any detention and the ability to pay a fine by instalment, I am not satisfied it would.
59. Accordingly, I am not satisfied that there is a real risk the applicant will face the death penalty, arbitrary deprivation of life, torture, cruel or inhuman treatment or punishment, or degrading treatment or punishment, including as a result of conditions he may face as a necessary and foreseeable consequence of being returned to Sri Lanka as an illegal departee.

Complementary protection: conclusion

60. 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.

¹⁷ US Department of State, "Sri Lanka – Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320, p.9

Applicable law

Migration Act 1958

5 (1) Interpretation

...

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.