



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA19/06507

Date and time of decision: 26 April 2019 08:30:00
L Hill, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a citizen of Sri Lanka. He arrived in Australia in September 2012 and applied for a Safe Haven Enterprise Visa (protection visa) on 10 March 2017. A delegate of the Minister for Immigration (the delegate) refused to grant the visa on 26 March 2019.

Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
3. No further information has been obtained or received.

Applicant's claims for protection

4. The applicant's claims can be summarised as follows:
 - He is a Tamil male who was born in [District 1] in the Eastern Province of Sri Lanka.
 - During the civil conflict period, he was harassed by the Sri Lankan authorities. He was stopped and questioned at checkpoints and subjected to several round ups.
 - In 2008, on account of the violence that was occurring at that time between Tamil and Muslim groups near his family home he went and stayed at his aunt's home for approximately nine months.
 - In February 2010, he was physically assaulted by members of Tamil Makkal Viduthalai Pulikal (TMVP). He lodged a complaint with the police about this event. That same night two TMVP members came to his family home and told his mother that their leader, J wanted to speak to him. The TMVP members indicated to his mother that he should consider this a warning and not to cause trouble for the TMVP.
 - In or around July 2012 his distant relative K decided to run for the provincial council elections on behalf of the TNA. He agreed to assist K with his campaign.
 - On or around the night [in] August 2012, an armed group of unknown men in a white van attended his family home and sought his whereabouts. The unknown men told his family that if he continued to support the TNA he would be harmed. He believed that the unknown men were from TMVP.
 - The following day he lodged a complaint with the police about this event. That night he stayed at his friend's house. That same night the unknown men again attended his home and asked for his whereabouts. For the following weeks he remained in hiding during which he received phone calls from an anonymous number. His father was also hit by an auto rickshaw which was made to look like an accident but designed to harm his father.
 - Arising from the harassment and physical assaults he and his family endured he had no choice but to make arrangements to flee Sri Lanka.
 - Since his departure his mother made a complaint about his circumstances with the Human Rights Commission of Sri Lanka. His family has also been harassed by the Sri

Lankan authorities and unknown men. His parents believe the unknown men are from the TMVP.

- In 2015, his father was severely physically assaulted by unknown men who attended the family home and sought his whereabouts.
5. The applicant fears on return to Sri Lanka he will be harmed by the Sri Lankan authorities and paramilitary groups including the TMVP on the basis of his ethnicity, actual and imputed political opinion arising from assistance to the TNA, [social media] activities, familial relationship to members of the LTTE and because he has left Sri Lanka illegally and return as a failed asylum seeker. He also fears he will be harmed by the TMVP and J because of the complaints he has made to the police referring to members of TMVP.

Refugee assessment

6. 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

7. 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.
8. I accept the applicant's identity is as claimed. I accept the applicant is a Tamil male from the Eastern Province of Sri Lanka, and a Sri Lankan national. Sri Lanka is the receiving country for the purpose of this assessment.
9. I accept that on a number of unspecified occasions during the civil conflict period, the applicant as a Tamil male was harassed by the Sri Lankan authorities including the SLA. I accept this harassment included being stopped and questioned at checkpoints and subjected to several round ups in which he and other Tamils would be taken to secluded areas and questioned and their identities checked before being released.

10. The applicant's evidence is plausible when considered against the DFAT report which indicates that during the civil conflict more Tamils were detained under emergency regulations and the Prevention of Terrorism Act (PTA) than any other ethnic group. Many Tamils in the north and east reported being monitored, harassed, arrested and/or detained by security forces during the civil conflict and the Rajapaksa government. With LTTE members and supporters being predominately Tamil, LTTE support was at times imputed on the basis of ethnicity.
11. The applicant's evidence was that on each occasion he was detained for no more than a day before being released. Information in the review materials indicates that at the time of his claimed detention and questioning by the SLA, under the Prevention of Terrorism Act 1979 (PTA) suspects could be held without charge for three-month periods, not exceeding a total of 18 months and I consider that had the applicant been of interest to the SLA, given the powers available to them under the PTA he would not have been released. I am satisfied that the applicant was released because at that time he was not of any continuing interest to the Sri Lankan authorities.
12. I accept that in 2008, the applicant stayed at his aunt's home for approximately nine months because of the violence which was occurring at that time between Tamil and Muslim groups near his family home. There is no evidence before me to indicate that these events had any connection with the applicant or that he fears harm on this basis. I am satisfied that these events will not have any repercussions for the applicant on his return.
13. In the first protection visa statement lodged with the Department in 2013 (first statement), the applicant claimed that in February 2010, he was visiting a friend at a shop when severely intoxicated members of TMVP entered and dragged him out. They did not say anything to him but proceeded to physically assault him. He was able to break away and escape to his family home. After telling his family what had happened he decided to lodge a complaint with the police. The police told him that they would process the matter accordingly.
14. The applicant claimed that night two TMVP members went to his family home and told his mother that J, who was the TMVP leader in his area, was looking for him and wanted to speak to him in private. His mother told them he was not home and was only a young child. On hearing this, the TMVP members indicated to his mother that he should consider this a warning and not to cause trouble for the TMVP.
15. The applicant claimed that the following day, the police attended his home and asked him more questions about his complaint. He indicated that he knew the individuals who had beaten him and could lead the police to their homes. When the police realised who these individuals were, that being TMVP members they were advised that it would be safer for them if they dropped the complaint. They indicated that he and his family would not have any further problems after the complaint was dropped. They took this as a veiled threat. Seeing that the police would not protect them and being aware of the brutal reputation of the TMVP he agreed to drop the complaint. They also realised that if the TMVP wanted to harm them they could do so at any time.
16. In the second protection visa statement lodged with the Department in 2017 (second statement), the applicant reiterated his claims regarding the events involving the TMVP. He stated that he had been violently assaulted, denied protection and threatened by the police to drop his complaint. He stated that this event had led to him to flee Sri Lanka.

17. At the protection visa interview, in response to being asked what he thought would happen to him on return, he stated that he feared that he would be harmed by the J and TMVP. It was put to him that it was difficult to accept that arising from one event in 2010 that he was of continuing interest to J and the TMVP as claimed. He stated that since this event his problems had progressed. He was asked why the TMVP was interested in him. He stated that he didn't know.
18. I accept that in February 2010, the applicant was physically assaulted by members of the TMVP. I accept he made a complaint to the police about this event. I accept after speaking to the police he agreed to drop the complaint. This aspect of the applicant's claims has been generally consistent throughout his interactions with the Department including at this entry interview where he made mention of being physically assaulted by members of a paramilitary group [in] February 2010.
19. In contrast, the applicant's evidence that arising from his complaint to the police that he was of continuing interest to the TMVP was unconvincing. The applicant's evidence that the TMVP would continue to be interested in him on the basis of a complaint that he had agreed with the police to drop is illogical. Furthermore, at least two years passed between the applicant agreeing to drop the complaint and his departure from Sri Lanka during which he remained living in his family home yet he made no mention of being targeted or harmed on this basis.
20. I am not satisfied the applicant has been a truthful witness regarding these aspects of his claims. I do not accept that arising from the event in 2010 and his subsequent complaint to the police which he dropped he was of continuing interest to anyone including the TMVP or J as claimed. I am satisfied the applicant as contrived these aspects of his claims to enhance his claims for protection.
21. In the first statement, the applicant claimed that in or around July 2012 his distant relative K decided to run for the provincial council elections as a candidate for the TNA. At the time he was unemployed and subsequently K asked his mother if he would assist him with his campaign. He did not hold a strong political opinion but believed Tamil people were marginalised and discriminated against and he agreed to assist K. He assisted by distributing pamphlets prompting K, putting up posters, organising meetings, making placards and assisting with day to day campaign activities. He did this voluntarily on a full time basis.
22. The applicant claimed that on or around [August] 2012, an armed group of unknown men in white van attended his family home and asked for his whereabouts. They were told he was not home. They told his family that if he continued to support the TNA he would be harmed. He believed that from this threat that the unknown men were from a pro-government paramilitary group, likely the TMVP.
23. The applicant claimed that the following day he went to the police station and lodged a complaint about the visit. He gave a statement and the police advised they would process it accordingly. Arising from his fear of the unknown men he spent the night at his friend's house in Kallady. That same night the unknown men again attended his home. They broke and damaged his family's personal belongings and physically assaulted his father. They asked his father why he had lodged a complaint with the police and that he would be punished for doing that. They asked for his whereabouts. His father said he didn't know where he was. The unknown men left and told his father that he should notify them when he returned. His father then contacted him and told him what had happened and that he should remain in hiding. He then had no choice but to make the arrangements to depart the country.

24. The applicant claimed that for the following few weeks he remained in hiding at his friend's house during which he received phone calls from an anonymous number. The male caller would ask for his location. He refused to give this information as he knew he would be harmed. This angered the male caller who eventually indicated that he would find him. He ceased using his phone. While in hiding his father was hit by an auto rickshaw. He stated that it was clear that this was made to look like an accident but designed to harm his father. His father was admitted to hospital with [an] injury. His family immediately notified the police and gave the details of the auto rickshaw but the police indicated they could not assist. This was a further indication that the individuals who were targeting him and his family were associated with the police.
25. The applicant claimed that since his departure from Sri Lanka his mother made a complaint about his circumstances with the Human Rights Commission of Sri Lanka (Human rights complaint). However they have been unable to assist (they believed that this was because they were overburdened, inefficient or corrupt).
26. In the second statement, the applicant claimed his entire immediate and extended family openly supported the TNA because they believe it is the only party that supports Tamils and that is why he was involved from a relatively young age. As soon as he had an opportunity to support them he did it. After he finished his studies he began to attend TNA meetings and rallies with his family and on his own. During, the elections he attended meetings daily and other times weekly. His political opinion grew more separate from his family as he became more supportive of the TNA and the Tamil situation. He spoke at two or three public meetings about the oppression of the Tamil people by the Sri Lankan government.
27. The applicant claimed that since he had left Sri Lanka his family has been repeatedly harassed by the Sri Lankan authorities. Unknown men have also harassed his family every few months and continue to seek his whereabouts. Each time they attend they arrived on motorbikes and break down the door to the family home. His parents believe the unknown men are from the TMVP.
28. I accept that between July and August 2012, that being for approximately one month the applicant assisted his distant relative K who was a TNA candidate in the provincial council elections. I accept that his assistance involved him distributing pamphlets prompting K, putting up posters, organising meetings, making placards and assisting with day to day campaign activities. This aspect of the applicant's claims have been generally consistent throughout his interactions with the Department including at this entry interview where he made mention of having assisted the TNA by organising meetings, sending out notices and similar activities at the time of the election.
29. I do not accept however that his entire immediate and extended family openly support the TNA or that prior to July 2012 he attended or assisted the TNA or K. Nor do I accept that he has ever spoken at any TNA meetings or rallies. These aspects of the applicant's claims were not made in his first statement which he was assisted to prepare by a legal practitioner and interpreter and I am satisfied that had these claims had any credible basis he would have made mention when speaking about his assistance to the TNA, he did not. I also find these aspects of the applicant's claims to be inconsistent with his evidence in his first statement that at the time of his assistance to K he did not hold a strong political opinion and further undermined by his evidence at the entry interview that only he had been associated or involved with any political groups or organisations and is.

30. I also do not accept that arising from the applicant's assistance to his distant relative K who was a TNA candidate that he was of interest to, threatened or his whereabouts sought by the Sri Lankan authorities or any groups including the TMVP or individuals.
31. The applicant's evidence regarding these aspects of his claims was unconvincing. Other than his assistance to K's election campaign, there is no other evidence before me to suggest he was not involved in any other political organisations or activities and I am unpersuaded that the claimed level of interest by unknown people or the TMVP corresponds with his claimed level of involvement in K's, that being for no more than one month he assisted with low level campaign activities. I also find the applicant's evidence about why he was being threatened and his whereabouts sought to be vague and inconsistent. At the protection visa interview the applicant initially stated that he did not know why unknown people had come after him; he later said it was because he was seen as opposing them.
32. The applicant's evidence regarding the details of the visit by the unknown men to his home was problematic. In the first statement, he states that the men who visited his family home and sought his whereabouts were unknown men yet later states that prior to leaving his family home the same men told his father that he must notify them when he returns home. The inherent contradiction in these aspects of his evidence, that being that the men were unknown to him or his family yet his father knew who they were to the extent that he was to notify them of his return is illogical and further undermines his claims.
33. I have considered the Extract from the Information Book (extract) and Human Rights Commission of Sri Lanka card (card). The extract is dated [August] 2012 and typed in Tamil. At the protection visa interview, the applicant confirmed that it reiterated his claims regarding the events [in] August 2012. He was asked to provide an English translation. To date no English translation has been provided and I am unable to make any meaningful assessment of its contents. The card is written in English and merely refers to a threat. It makes no mention of the details of the threat including who gave the threat, when it occurred and what was said. It is dated [November] 2012, after the applicant had departed Sri Lanka and raises questions about why his mother would seek to lodge such a complaint and seek such a document if the applicant was no longer in Sri Lanka. Finally, when considered along with my concerns above, I am not satisfied that the documents can be considered as reliable evidence and give them no weight.
34. In light of the foregoing, I am not satisfied the applicant has been a truthful witness regarding these aspects of his claims. I do not accept that the applicant was of interest to, threatened or his whereabouts sought by the Sri Lankan authorities or any groups including the TMVP or individuals because of his assistance to a TNA candidate, K and his election campaign activities. It follows that I do not accept any of the applicant's subsequent claims including that he was in hiding prior to his departure, he received phone calls from an anonymous number or that his father was hit by an auto rickshaw on this basis. I am satisfied the applicant has contrived these aspects of his claims to enhance his claims for protection.
35. The applicant has claimed that on return he will be harmed by the Sri Lankan authorities and paramilitary groups such as the TMVP because of his past assistance to a TNA candidate.
36. DFAT reports that Tamils have a substantial level of political influence and their inclusion in political dialogue has increased since Sirisena came to power in 2015. There are a number of Tamil political parties, with the largest coalition of parties operating under the umbrella of the TNA. The TNA currently has 16 members of parliament and holds the majority of seats in

the Northern Provincial Council. The TNA leader, Rajavarthiam Sampanthan, is leader of the National Opposition.

37. DFAT also reports that all parties operate freely subject to general legal restrictions and this freedom applies to high-profile elected representatives and office holders and low-profile party members, supporters and volunteers. Furthermore DFAT assesses that there are no official laws and policies that discriminate on the basis of political opinion nor is there systemic political discrimination against any particular group.
38. The applicant has not provided any credible evidence that he has had any contact or engagement with the TNA or K since his departure from Sri Lanka. I do not accept the applicant's claims that he is a supporter of the TNA. Furthermore, given the current status of the TNA in the Sri Lankan government together with the absence of any evidence that the applicant has had any contact or engagement with the TNA or K since his departure from Sri Lanka, I am not satisfied that as a result of the applicant's low level assistance to a TNA candidate, K with his election campaign activities for a short period of time over six years ago he would be identified as someone of adverse interest to the Sri Lankan authorities or any other groups or individuals. There is also no independent information before me to suggest that absent any other concerns, Tamils who have assisted the TNA or TNA candidates are imputed with an adverse opinion or profile and harmed on return. I am not satisfied the applicant faces a real chance of harm as a consequence of his past assistance to the TNA or a TNA candidate, on his return to Sri Lanka now or in the reasonably foreseeable future.
39. In the second statement, the applicant claimed that his political opinion has become stronger since he has come to Australia. He has continued to follow what has happened to his people (Tamil) by the current Sri Lankan government. He closely follows the news about what is happening there. He also uses [social media] account to share articles related to the injustices against the Tamil people in Sri Lanka. He recently shared an article referring to a protest regarding the Tamil people who have gone missing and their land confiscated.
40. Other than the applicant's assertions, I have no evidence such as any screenshots of his [social media] profile or posts to substantiate his use of a [social media] account to share pro-Tamil and anti-government posts, and I do not accept that he has. Furthermore, other than the applicant's claims regarding his assistance to a TNA candidate, for approximately one month in 2012, the applicant has not claimed to have been involved in any other political groups or activities when he was in Sri Lanka or Australia and I do not accept his claims that his political opinion has become stronger in Australia.
41. In the second statement, the applicant claimed that in July 2015, his father was physically assaulted by men who had gone to interrogate him about his whereabouts. When beating him they said in Tamil something to the effect of, "where is your son?". His father was hospitalised for the injuries sustained in the physical assault.
42. Other than the applicant's claims that he was of interest to, threatened and his whereabouts sought in 2010 and 2012 which I have rejected the applicant has not claimed that he was of interest to the Sri Lankan authorities or any other groups or individuals for any other reason at the time of his departure, and I do not accept that he was. Furthermore, more than three years passed between the applicant's departure in August 2012 and his father's physical assault in July 2015, and there is no other credible evidence before me to suggest that the Sri Lankan authorities or any groups or individuals would be interested in seeking the applicant's whereabouts for any other reason.

43. Separately, I have considered the Extract from the Information Book (extract), [a hospital] letter and diagnosis ticket been provided in support of these claims. The extract is dated [July] 2015 and typed in Tamil. To date no English translation has been provided however at the protection visa interview, the interpreter gave a verbal summary that it stated that his father had been assaulted by unknown persons because of his involvement in a party (TNA). The [Hospital] letter and diagnosis ticket are written in English and suggest that the applicant's father was admitted to hospital and diagnosed with traumatic wounds and body pain due violence. They provide no details of who perpetrated the violence or the reasons why. Country information in the review materials indicates that document fraud is prevalent in Sri Lanka due in part to the lack of computerised databases to store information. Other asylum seeker destination countries have reported receiving fraudulent documentation from applicants and that attempts to use fraudulent documents are common. Overall, having regard to the country information along with my findings above, I am not satisfied that either document can be considered as reliable evidence in support of the applicant's claims and give them no weight.
44. In light of the foregoing, I am not satisfied the applicant has been a truthful witness regarding these aspect of his claims. I do not accept that in July 2015 his father has been physically assaulted and hospitalised. I am satisfied that the applicant has contrived these aspects of his claims to enhance his claims for protection.
45. In the second statement, the applicant claimed that his cousin and her husband were active members of the LTTE. They were detained by the Sri Lankan authorities and released in 2010. On the basis of their familial relationship to members of the LTTE, he and his family members were suspected by the Sri Lankan authorities of being involved with the LTTE and questioned many times.
46. I do not accept the applicant's cousin and husband were members of the LTTE. Nor do I accept that on this basis he and his family members were questioned by the Sri Lankan authorities. The applicant's evidence at the protection visa interview was vague and unconvincing. He merely reiterated the evidence he had provided in his second statement and when asked when he last had contact with these family members or the details of what offences they had been charged with or where they had been detained, he stated that he didn't know. Furthermore, the absence of these claims from his first statement which an interpreter and legal practitioner assisted him to prepare and his evidence at the entry interview that neither he nor any members of his family were involved in any activities or protests against the government further undermines the credibility of these claims, and I do not accept that they are true.
47. The applicant fears on return to Sri Lanka he will harmed on the basis of his ethnicity, actual and imputed political opinion and because he has left Sri Lanka illegally and return as a failed asylum seeker and other matters which I have found not to be credible above. The delegate has also considered whether the applicant would be harmed as he is a Tamil from a former LTTE controlled area, although the applicant has not claimed that he fears he will be harmed on this basis.
48. The DFAT, UK Home Office and US Department of State reports indicate that the overall situation for Tamils in Sri Lanka has improved considerably since the end of the civil conflict in 2009. Tamils have a substantial level of political influence and their inclusion in political dialogue has increased since the Sirisena government came to power in 2015. As a consequence of the improving situation, in 2017 and again most recently in 2018, DFAT assessed that Sri Lankans of all backgrounds generally have a low risk of experiencing official

or societal discrimination, including in relation to access to education, employment or housing. Furthermore, the 2017 UK Home Office reports has assessed that it was its opinion that being a person of Tamil ethnicity would not in itself warrant international protection.

49. I accept the applicant is a Tamil male, who has previously resided in the Eastern Province. Country information published by the UNHCR and UK Home Office supports that a person being of Tamil ethnicity from the North or the East would not in itself warrant international protection. There is no independent information before me, absent any other concerns to suggest that Tamils who resided in former LTTE controlled areas in the Eastern Province who departed Sri Lanka are imputed with pro-LTTE or anti-Sri Lankan government political opinion. I am satisfied that the applicant will not be imputed with any type of profile because he is a Tamil male who resided in the Eastern Province including in former LTTE controlled areas on return now or in the reasonably foreseeable future.
50. I have had regard to the submissions attached to the protection visa application relating to the arbitrary arrest, detention, abduction, torture, sexual abuse and killing of individuals who were perceived to be connected to or supporters of the LTTE, while some of the information is dated, I accept that there is credible evidence of serious harm being perpetrated against certain Tamils associated with, or perceived to be associated with, the LTTE by the Sri Lankan authorities in pre and post-war Sri Lanka.
51. I have also had regard to reports by the UK Home Office, US Department of State and DFAT, which while not suggesting that there does not continue to be issues of concern, indicate it is individuals who have or are perceived to have had a significant role in relation to post-conflict Tamil separatism or a renewal of hostilities within Sri Lanka who are now at risk of serious or significant harm on return. DFAT has assessed that those at highest risk of monitoring, arrest, detention or prosecution are high profile former LTTE members, including the former leadership, and former members suspected of terrorist or serious criminal offences during the conflict or of providing weapons or explosives to the LTTE, and that close relatives of such people who remain wanted by the authorities may be monitored. People on a "stop list", those with extant court orders or arrest warrants or orders to impound their passport, may be at risk of being detained; and people on a security services' 'watch list' for separatist or criminal activities, may be monitored. The US State Department has reported that although the use of force against civilians by government officials remained a problem it was increasingly rare, and that arbitrary arrest by police had decreased.
52. I have rejected the applicant's claims regarding his familial relationship to members of the LTTE, his activities in Australia and that he was of interest to, threatened or his whereabouts sought by the Sri Lankan authorities or any groups including the TMVP or individuals because of his assistance to the TNA or TNA candidate. I have also found the applicant would not be of interest to the Sri Lankan authorities, or groups or individuals on return because of his low level support to a TNA candidate at least six years ago. He has not committed any terrorist or criminal acts or been involved in any LTTE or Tamil separatist activities since the civil conflict ended. There is no information to suggest that the applicant is on either the stop or watch list.
53. Having regard to all the evidence before me, I am not satisfied that the applicant will be imputed with any type of profile arising from his or his family's past circumstances on return to Sri Lanka. I am not satisfied that as a Tamil male who resided in former LTTE controlled areas the Eastern Province, his past assistance to the TNA or a TNA candidate or he will be perceived to have an pro-LTTE or pro-Tamil or anti-Sri Lankan government political opinion, on his return to Sri Lanka. I am not satisfied the applicant faces a real chance of harm as a

Tamil, or because of any actual or imputed pro-LTTE, pro-Tamil or anti-Sri Lankan government political opinion, on his return to Sri Lanka now or in the reasonably foreseeable future.

54. I accept the applicant left Sri Lanka illegally and he would return to Sri Lanka on temporary travel document. I accept the applicant would be returning to Sri Lanka after his asylum application has failed and that the Sri Lankan authorities may know or infer that he has made claims for protection in Australia.
55. The most recent DFAT report states that most Sri Lankan returnees, including those from Australia are questioned at the airport upon their return. DFAT has reported that for returnees travelling on temporary travel documents, police undertake an investigative process to confirm identity, which would identify someone trying to conceal a criminal or terrorist background, or trying to avoid court orders or arrest warrants. This often involves interviewing the returning passenger, contacting the person's claimed hometown police, contacting the person's claimed neighbours and family, and checking criminal and court records.
56. I accept, as a person returning on a temporary travel document, the applicant may be detained at the airport with other returnees for processing by the Sri Lankan authorities. I accept that during this process the authorities will become aware of the applicant's past circumstances. However, as discussed above, I have found the applicant will not be imputed with any type of profile arising from his or his family's past circumstances on his return to Sri Lanka. There is no evidence before me that he has outstanding court orders, arrest warrants or a criminal or terrorist background.
57. DFAT and other sources in the review material advises that returnees are treated according to the standard airport procedures, regardless of their ethnicity and religion and that they are not subject to mistreatment during processing at the airport. The process can take several hours, due to the administrative processes, interview lengths and staffing constraints at the airport. Returnees are processed in groups, and individuals cannot exit the airport until all returnees have been processed. The information before me indicates that the processing of returnees at the airport is not applied in a discriminatory manner or selectively enforced and nor will the applicant be mistreated.
58. Overall, I am satisfied that any period of detention that would occur while these investigations are ongoing will still be brief and would not exceed the several hours that group processing generally takes. I am not satisfied the applicant being subjected to standard processing at the airport amounts to serious harm.
59. I accept on return the applicant may be charged under the Immigrants and Emigrants Act (I&E Act) for departing Sri Lanka other than via an approved port of departure. Returnees who are arrested and charged under the I&E Act are processed at the airport and enquiries made about activities while abroad if returnees are former LTTE members. After processing returnees may be detained at the airport for up to 24 hours. At the earliest available opportunity returnees are transferred to the closest Magistrates Court. Should a magistrate not be available before this time – for example, because of a weekend or public holiday – those charged may be detained in an airport holding cell for up to two days. Information before me indicates that detention is not selectively applied to returnees, or that returnees are processed in any discriminatory manner or that those who committed an offence under I&E Act, such as the applicant, face a higher risk of torture or other mistreatment.

60. DFAT reports that penalties for returnees who depart illegally can include imprisonment and a fine. According to the Sri Lankan Attorney-General's Department, no mere passenger on a people smuggling venture has been given a custodial sentence for departing Sri Lanka illegally. However, fines are issued to deter people from departing illegally in the future. There is nothing before me to indicate that the applicant would be perceived and treated as anything other than a mere passenger on the people smuggling vessel. I am satisfied that the applicant will not be given a custodial sentence.
61. If the applicant pleads guilty to departing illegally, he will be required to pay a fine (which he can be done by instalment) and will subsequently be free to go. Where a passenger returnee pleads not guilty, the magistrate will usually grant bail on the basis of personal surety or guarantee by a family member. Where a guarantor is required, returnees may need to wait for the guarantor to come to court. DFAT has indicated that anecdotal evidence suggests that most passengers of people smuggling ventures spend many years on bail, and that most are free to go after paying a fine. It further noted that the fines issued were low. The applicant has not claimed and there is no evidence before me to indicate he would not be granted bail on personal surety.
62. Those charged under I&E Act will only need to return to court when their case is being heard, or if summonsed as a witness in a case against the organiser/facilitator of a people smuggling venture. There is no general requirement to report to police or police stations between hearings. DFAT noted that the fines issued for passengers of people smuggling ventures was often low, but that the cumulative costs associated with regular court appearance over a protracted lengths of time can be high.
63. I am not satisfied that the conditions of detention for a brief period at the airport in a holding cell, a fine and the costs associated with regular court appearances, if required amount to serious harm in this case. In addition, the information before me does not indicate that I&E Act is discriminatory on its terms, that it is applied in a discriminatory manner or that it is selectively enforced. Accordingly, I am satisfied that any investigation, prosecution and punishment would not amount to persecution for the purpose of ss.5H(1) and 5J(1) of the Act.
64. In its most recent report, DFAT reported that between 2008 and 2017, over 2,400 Sri Lankan nationals departed Australia for Sri Lanka. This includes nationals who were returned from the Australian community, and those removed from Australian onshore immigration detention centres. Many others returned from the US, Canada, the UK and other European countries, and most returnees are Tamil. In 2017, the Sri Lankan Prime Minister publicly stated that failed asylum seekers from Australia would be welcome back to Sri Lanka. However, DFAT has also reported that apart from this positive government sentiment, failed asylum seekers, may face practical difficulties on return. Failed asylum seekers receive limited reintegration assistance and many returnees have difficulty finding suitable employment and reliable housing on return. However, DFAT assesses that reintegration issues are not due to failure to obtain asylum, but rather due to the employment and accommodation difficulties they may face. DFAT also notes that some failed asylum seekers reported social stigma from their communities upon return. Furthermore, while DFAT has reported that it is aware of anecdotal evidence of regular visits and phone calls by the CID to failed asylum seekers, the information relates to those in the North and not the East where the applicant's family remains residing.
65. I accept that the applicant would return to the East of Sri Lanka as failed asylum seeker and that as such the applicant may face some reintegration issues that being difficulties finding

employment and accommodation and some social stigma from his community; however I am not satisfied that such matters amounts to serious harm.

66. I am not satisfied the applicant faces a real chance of persecution, as a Tamil failed asylum seeker with his background who departed illegally on his return to Sri Lanka now or in the reasonably foreseeable future.
67. I am not satisfied the applicant has a well-founded fear of persecution.

Refugee: conclusion

68. 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

69. 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

70. 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.
71. As the applicant would be travelling to Sri Lanka (whether involuntarily or otherwise) on temporary travel document, I have accepted he may be detained at the airport for processing on return and questioned. I have also accepted he may be detained briefly in an airport holding cell, fined and incur costs associated with regular court appearances. I am not satisfied these measures constitute significant harm as defined. I do not accept they would amount to the death penalty, constitute or result in an arbitrary deprivation of life, or torture. Nor does the evidence before me indicate that these processes, or the penalties implemented as a result involve any intention to inflict pain or suffering that could be considered cruel or inhuman in nature, severe pain or suffering or to cause extreme humiliation. I am not satisfied that it amounts to cruel or inhuman treatment or punishment or degrading treatment or punishment as defined.
72. I accept that the applicant as a returning failed asylum seeker in the East he may face some reintegration issues that being difficulties finding employment and accommodation and some social stigma. The evidence does not suggest that the applicant will suffer the death penalty, arbitrary deprivation of life, or torture as a consequence of being a returnee. I am not

satisfied that any social stigma the applicant may face amounts to pain or suffering that is cruel or inhuman in nature, severe pain or suffering, whether physical or mental, or extreme humiliation, as required in the definitions of cruel or inhuman treatment or punishment or degrading treatment or punishment. I am not satisfied there is a real risk of significant harm on this basis.

73. Furthermore, having regard to the evidence as a whole, I am also not satisfied that the applicant being detained at the airport for processing and questioned or detained briefly in an airport holding, fined or costs incurred with regular court appearances or reintegration issues that being difficulties finding employment or accommodation or facing some social stigma on return amounts to significant harm.
74. I have otherwise found the applicant does not face a real chance of harm on any or the bases claimed now or in the reasonably foreseeable future. As 'real risk' involves the same standard as 'real chance', I am also not satisfied that the applicant faces a real risk of significant harm on these bases.

Complementary protection: conclusion

75. 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.