



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA19/06673

Date and time of decision: 17 July 2019 14:42:00
M Simmons, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Tamil, Hindu and a national of Sri Lanka. He lodged an application for a safe haven enterprise visa on 14 March 2017, which was refused by a delegate of the Minister for Immigration on 29 May 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). No further information has been obtained or received.

Applicant's claims for protection

3. The applicant's claims can be summarised as follows:
 - He was born in [year]. He originates from Trincomalee in Sri Lanka's Eastern Province, is Tamil and a follower of Hinduism.
 - Due to the ongoing conflict between the Sri Lankan authorities and the Liberation Tigers of Tamil Eelam (LTTE), Indian Peace Keeping Forces were brought to Sri Lanka. The peace keepers attacked ordinary Tamils who were not aligned to the LTTE movement, which inspired individual's, including the applicant's brother 'M', to join the LTTE.
 - To escape from the conflict the applicant's family fled Sri Lanka for India in 1989. M stayed behind with the LTTE. The family remained in India for around 4 years before returning to Sri Lanka.
 - The applicant's father was a fisherman. After he completed his schooling the applicant began working with his father. The LTTE controlled Trincomalee at the time, and Tamils in the area generally helped and were supportive of the movement. As the Sri Lankan authorities restricted the movement of food into LTTE areas, all fishermen were required to provide the LTTE with a portion of their catch regularly which the applicant and his father did. The applicant's father also tried to persuade the LTTE to release M, but was unsuccessful.
 - In 1997 M returned home with his wife and infant son. He asked the applicant and their parents to look after his family because he felt he was unable to do so while working as an LTTE militant. They wanted M to remain in Trincomalee and work as a fisherman with the applicant and his father, but M feared he may be killed if he left the LTTE. M was subsequently arrested on suspicion of LTTE involvement, and the applicant's father had to bribe officers to secure his release. Following this, M fled to LTTE controlled territory.
 - The LTTE often tried to persuade the applicant to join the movement, but because M was already a member he was not forced to join. His father also encouraged the applicant to become married so the LTTE would be less likely to force him to join then, and so he wed his wife in October 2000.
 - In 2002 a peace accord was signed between the LTTE and the government, after which the LTTE controlled most of the Tamil population. The LTTE ordered fisherman to provide three quarters of their catch to the movement. The applicant resisted pressure

from the LTTE to work for them smuggling arms and goods from India. When he refused they took his entire catch.

- Fighting between the Karuna group and the LTTE increased in 2006. The applicant's [sibling] was killed in a bomb blast at the market. Due to the deteriorating security situation the family again fled to India. In India they were not permitted to reside in the refugee camps because they previously left those camps and returned to Sri Lanka. Q Branch police officers threatened to hand them over to the Sri Lankan authorities. After a few months they decided to return to Sri Lanka in November 2007.
 - On return the applicant was arrested by officers from the Criminal Investigation Department (CID) and held in a police station in Trincomalee for one week. He was tortured and threatened for past involvement with the LTTE including providing them fish. He was also questioned about M and his LTTE activities. His photograph and finger prints were taken. His father secured his release by bribing a police officer. He was advised not to leave the area without first obtaining permission from the CID.
 - In 2008, M left the LTTE and returned home to his family. [In] April 2008 he was abducted by a white van, who the family later learned were CID officers. The family has not heard from M since his abduction.
 - The LTTE were defeated in 2009. The authorities, searching for LTTE cadres, arrested and interrogated many Tamils. To avoid the CID the applicant began fishing again. However the Navy stopped him and accused him of transporting LTTE members to India. He was handed over to the CID. He was held in prison and beaten until his father secured his release by bribing the CID officers. After his release he continued fishing and did casual jobs to keep earning a living; however he took care to avoid the Navy.
 - In 2011 he was arrested in a roundup by CID officers and detained at a police station for 3 days. He was tortured and accused of transporting LTTE members to India. The applicant was released after his father met with politicians. He was released on the condition that he report to the police station every month.
 - In January 2012 his cousin, 'K', was abducted by a white van and has not been heard from since.
 - Around one month after K's abduction the applicant was arrested by the Navy along with 12 other Tamil boys. They were questioned about suspected LTTE involvement then handed over to the CID. The CID tortured and abused the applicant, and accused him of being involved in the war and transporting LTTE members to India. They also asked him about M. His father secured his release by bribing senior officials through a politician. The politician advised him to leave Sri Lanka.
 - The applicant made arrangements to flee Sri Lanka by boat. After he left, his father could not stand the separation and died of a heart attack. Since his departure the CID have visited his home and asked his wife about him.
 - When he arrived in Australia he did not mention his arrest or the charges laid against him for saving former LTTE militants, as he feared he could be deported back to Sri Lanka.
4. At the interview with the delegate the applicant provided further information in support of his application, which included that:
- That M left the LTTE in 1994 and returned to live with the applicant and his parents in 1997 and that he had not have further involvement in the LTTE.

- He was arrested and held by the authorities on two occasions, in 2007 for three days and 2011 for two days.
- His father passed away in June 2012 while the applicant was in Sri Lanka.
- His wife left him for another man two years after he departed Sri Lanka.

Factual findings

Identity and background

5. The applicant has provided evidence in support of his claimed identity and nationality including a Sri Lankan national identity card and birth certificate. The details of these documents generally align with his evidence in his visa application and at interview. I accept that the applicant's claimed identity accurate and I am satisfied he is Tamil Hindu, originates from Trincomalee and previously worked as fishermen. I accept that he is a Sri Lankan national and find that Sri Lanka is the receiving country for the purpose of this assessment.

Events in Sri Lanka

6. The applicant has detailed his experiences in Sri Lanka on various occasions since entering Australia, including during an Entry Interview, in an invalid Subclass 866 Protection Visa application, in his Subclass 790 Safe Have Enterprise Visa application and in an interview with the delegate. During the interview the delegate advised that he considered the applicant had provided inconsistent information in his visa applications compared to his evidence at interview. The applicant responded that whatever he said at the interview was the truth. The delegate decided to only consider claims mentioned during the interview and not those which were raised in the application. The applicant has not made any submissions to the IAA responding to the delegate's decision, including in respect of his determination to only consider certain claims, nor has he expressly disavowed the claims raised in his visa applications. I have considered the claims arising on the entirety of the material before me including the visa applications.
7. Generally, I found the applicant's evidence in respect of certain past experiences to be unpersuasive, vague and on occasion contradictory. For instance, evidence was provided indicating that the applicant's father died when he was in Sri Lanka and after his arrival in Australia. At interview he stated that after his father's death his family pushed him to leave Sri Lanka as he was the only man left in the family. Whereas the statement in his Subclass 790 application states his father died of a heart attack after the applicant arrived in Australia because he was unable to bear the separation. The applicant also did not disclose that his wife had left him in Subclass 790 visa application which was submitted in May 2017. His visa application form indicated that they continued to be married and were not separated. However at the interview the applicant stated his wife left him around 2 years after him came to Australia, which would have been some time in 2014 and well prior to the Subclass 790 visa application being submitted. While these matters do not on their face appear to be material to the applicant's claims for protection, the shifting nature of the applicant's evidence causes me to doubt his general credibility.
8. His narrative has also varied at different junctures in respect of a number of material claims relating to his reasons for seeking asylum. Notably, the applicant has been inconsistent in the

number of times he claims to have been subject to arrest or detention in Sri Lanka and the particular circumstances of those events. In the Subclass 790 application he claims:

- To have been detained for a week by the CID in November 2007 on return from India;
 - That after the LTTE was defeated in 2009 he was caught by the Navy handed over to the CID and held in prison;
 - That in 2011 he was arrested by the CID during a round up and detained for three days;
 - In February 2012 he was arrested by the navy with 12 others boys during a round up and detained until his father bribed senior officials.
9. At the delegate's interview the applicant stated that he and his brother were arrested with five others in a round up in 2007 or 2008 and were released after three days. He also indicated he was arrested in 2011 and held at a police station for two days, and that that was the last time he was arrested in Sri Lanka. These two varied accounts also differ to his earlier evidence in respect of his claimed arrests from the arrival interview and the Subclass 866 visa application. I have listened to the recording of the arrival interview, and at that interview he stated he was arrested three times during roundups; in 2002 for five days, in 2006 for seven days in 2008 for one day. Information provided in his Subclass 866 application in respect of the first two incidents aligns with his arrival interview evidence, however in respect of the 2008 detention he claimed he was held for one month not one day. These discrepancies are not insignificant. I am mindful that the applicant was recalling events that purportedly occurred some time ago and that such matters, if they occurred, could be troubling for the applicant to reflect upon. I am also cognisant that the circumstances of the arrival interview, where he was not represented and had only recently arrived in Australia, could have inhibited the full and frank disclosure of pertinent information.¹ I note that the applicant has on occasions received assistance with his application from legal professionals. The evolving and irreconcilable accounts provided by the applicant causes me serious doubt as to the veracity of his evidence in respect of his claimed arrests and detentions. I am not satisfied that the applicant was in fact arrested or detained while in Sri Lanka in the circumstances claimed. It is likely the applicant would have had some dealings with the authorities, particularly given the large-scale government effort to identify LTTE members after the war;² as such he may have on occasion been stopped, held briefly and questioned. However I do not accept he was ever arrested or detained, that he was ever subject to torture, or that his father ever had to pay a bribe to secure his release. The applicant's evidence in respect of these claims has varied significantly and I am not satisfied he has provided a truthful account regarding his purported arrests and detentions.
10. Having accepted he worked as a fisherman while in Sri Lanka, I accept the applicant was on occasion required to provide the LTTE with a portion of his catch. I also accept that he may have been stopped by the authorities on occasion while fishing. However, I am not satisfied that the applicant was ever accused or charged in relation to purportedly transporting weapons or LTTE members to India. I note this claim was not mentioned at the interview with the delegate or in his Subclass 866 application, in that application he only states the authorities suspect that Tamil fisherman transport food and render other services for the LTTE. His evidence at the interview was that he has never been charged with an offence in any country.

¹ *MZZJO v MIBP* [2014] FCAFC 80.

² DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064.

11. The narrative provided in respect of M's claimed LTTE involvement has also varied considerably and lack detail; such that I am not satisfied M in fact had any LTTE involvement. In the Subclass 790 application the applicant asserts that M left the LTTE and returned to his family in 2008. The applicant's evidence at interview, restated more than once, was that M left the LTTE in 1997 and returned home to live with the family and had no further LTTE involvement after 1997. These two versions of events are irreconcilable. Given the applicant partially attributes his claimed difficulties with the Sri Lankan authorities to M's LTTE involvement, that his recollection of this involvement various so significantly creates serious doubt as to the veracity of his evidence. While M's abduction is mentioned in the applicant's invalid Subclass 866 application, which was prepared with assistance from a lawyer, he did not disclose in that application that M was involved in the LTTE. Additionally, in both the Subclass 790 and the invalid Subclass 866 application the applicant did not mention that he and three other people were also purportedly detained when M was arrested. However, his evidence at interview, which was confirmed through questioning by the delegate, was that he and M were detained as part of a larger round up during which the applicant was also detained. In the statement accompanying his Subclass 790 application the applicant asserts that: "When I arrived here I was in great fear to mention about my arrest by the SLN and the CID and charges laid against me for saving former LTTE militants". This explanation does not account for the failure to mention M's LTTE involvement until the Subclass 790 application. I do not accept M was in fact part of the LTTE.
12. I note the applicant has however consistently asserted since entering Australia that M was abducted [in] April 2008. Documentation indicating inquiries were made with different agencies and organisations into M's whereabouts after his disappearance on this date are before me. Reports before me note that in the final stages of the conflict and during the years following the defeat of the LTTE, the Sri Lankan government has managed a large-scale rehabilitation process for former LTTE members which was used to screen and profile LTTE members to assess individuals' depth of involvement, period of involvement and activities.³ Disappearances and abductions were common at the time M was purportedly taken, and Tamils suspected of working with the LTTE were targeted, and such suspicions were on occasion inferred from a combination of factors including ethnicity, gender, age and location.⁴ That the circumstances surrounding M's abduction have been described differently by the applicant on different occasions casts doubt over his narrative. However, given independent reports noting the prevalence of disappearances at the time, and the material before me indicating M's disappearance was reported to various bodies, I accept that M was abducted in 2008 and has not been heard from since.
13. While I accept M was abducted I am not satisfied this caused the applicant to be of any interest to the Sri Lankan authorities. The applicant continued residing at the same address following M's abduction, and there is evidence before me that the applicant's family made various inquiries into M's whereabouts, including with government authorities. Despite M being abducted in April 2008, the evidence in the Subclass 790 application was that the applicant was not stopped by the authorities again until purportedly being arrested in a roundup in 2011. Noting my concerns with the applicant's claimed arrests set out above, even if this round up did occur, it was roughly three years after M's abduction and on its face does not appear to be targeted against the applicant personally or in any way linked to M.

³ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064.

⁴ 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; Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD), "Sri Lanka: COI Compilation", 31 December 2016, CIS38A80123251.

14. The Subclass 866 application states that the applicant's cousin, K, was abducted by the authorities in June 2012. In the Subclass 790 application the applicant states that this abduction occurred in January 2012. At the interview with the delegate the applicant indicated he could not recall with this abduction occurred but believed it was in April 2012. The applicant left Sri Lanka in July 2012, and at the interview attributed his cousin's abduction to part of his reason for fleeing Sri Lanka when he did. If this were the case I consider he would have been able to accurately and consistently recall the month when K was abducted. The applicant has offered little detail on the circumstances of this abduction, given this and the variation in his evidence as to when K was purportedly abducted, I am not satisfied that this abduction actually occurred.
15. The applicant has never claimed to be sent to a rehabilitation centre, despite his claims to have had numerous dealings with the authorities in the period following the war. His residential history indicates he resided at the same address in Sri Lanka after returning from India in 2007 until travelling to Australia around four years later. I consider if the applicant was ever suspected of any LTTE involvement or affiliation of significance there would have been ample opportunity for the authorities to refer him to rehabilitation, but their disinclination to do so suggests he was not perceived as being materially involved in Tamil separatist activities. Overall I am not satisfied the applicant was ever perceived to have any LTTE affiliation or involvement of interest to the authorities while present in Sri Lanka. There is no suggestion he has been involved in any LTTE or Tamil separatist activities while in Australia.

Illegal departure, returning asylum seeker

16. I accept that the applicant left Sri Lanka by unofficial means as claimed, contrary to Sri Lankan law including the Immigrants and Emigrants Act 1949 (I&E Act). I am satisfied that the Sri Lankan government may assume that, due to his mode of departure, the applicant sought asylum from Sri Lanka in Australia. I find that if he were to return to Sri Lanka he may be identified as a returning asylum seeker.

Refugee assessment

17. 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

18. 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.
19. Information before me indicates that the situation in Sri Lanka has shifted considerably since the end of the civil war. While reports suggest that the government remains sensitive to the potential re-emergence of the LTTE or other Tamil separatist groups, its' present focus is on identifying persons who pose a current threat to the country's unity rather than identifying a person's past LTTE links. Although reports persist of some ongoing monitoring and surveillance of the Tamil community, security measures such as military checkpoints and restrictions on travel to the north and east have been lifted and monitoring in day to day life has decreased.⁵ The UK Home Office concluded in 2017 that the current focus of the Sri Lankan authorities was on identifying Tamil separatist activists in the diaspora and that returnees who had a previous connection with the LTTE were generally able to return to their communities without suffering ill-treatment. The LTTE in Sri Lanka itself is a spent force, generally past LTTE connection would not warrant protection and persons most at risk are those perceived to have a significant role in relation to post conflict separatism.⁶
20. Reports before me do not support a conclusion that originating from, or residing in, areas previously under LTTE control would cause a person to be of adverse interest in Sri Lanka. Nor does the country information I have considered indicate that Tamils are currently at risk of harm in Sri Lanka on account of their race, religion or language.⁷ It does not support a finding that in recent times Tamil ethnicity or identity of itself imputes LTTE membership or a pro-LTTE opinion, even when combined with other factors such as gender, age, occupation, or place of origin.⁸ There is no indication that the applicant has ever been politically active or that he had any material involvement in any Tamil separatist activities. The extent of his LTTE related activities was being required to provide a portion of his fish to the LTTE. Reports before me indicate that the Sri Lankan authorities are aware that persons resident in LTTE controlled areas necessarily had dealings with the LTTE.⁹ The material before me does not support a conclusion that being required to provide a portion of his catch to the LTTE more than 10 years ago would cause the applicant to be a presumed LTTE member or supporter in present day Sri Lanka. Nor I am satisfied he would be imputed with a pro LTTE opinion for any other reason were he to return to Sri Lanka.
21. The applicant has claimed to fear harm in Sri Lanka as a Tamil fisherman. It is plausible that were he to return to Sri Lanka he may return to his previous vocation. However, current country information does not support a conclusion that he would be subject to any harm for this reason. The fishing restrictions, which were previously in force in the Eastern seas were

⁵ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826; ACCORD, "Sri Lanka: COI Compilation", 31 December 2016, CIS38A80123251.

⁶ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826.

⁷ ACCORD, "Sri Lanka: COI Compilation", 31 December 2016, CIS38A80123251; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826.

⁸ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826.

⁹ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826.

lifted with effect from 20th June 2012.¹⁰ During the conflict the navy issued mandatory passes for fishing boats, however, in 2012 it was reported the requirement for fishing vessels to have a pass was lifted.¹¹ DFAT also indicated at that time that it not aware of any reports of the authorities taking fishermen's catch.¹² A high military presence in the North and East of Sri Lanka previously prevented individuals in some areas from accessing work and livelihood opportunities, particularly fishing and farming, given the extensive spread of High Security Zones which enclose vast tracts of lands captured during military operations.¹³ The government has now released most land from the High Security Zones, although slow progress on the matter in some area has sparked protests.¹⁴ DFAT reports that the military continues to occupy some fertile farming land in the north and restricts access to some fishing areas.¹⁵ On balance the country information before me does not support a finding that Tamil fishermen in Sri Lanka are subject to harm for reasons of their occupation, ethnicity or a combination of these factors. The removal of the requirement to obtain a pass and the ongoing release of land and progressive removal of High Security Zones indicates fewer and decreasing impediments for fishermen. Furthermore, in addition to fishing the applicant has pursued various forms of alternate employment both while in Sri Lanka and Australia, including in [deleted]. There is no indication he would be unable to pursue such alternate employment again should he be disinclined to fish for any reason on return to Sri Lanka. I am not satisfied there is a real chance his capacity to earn a livelihood or to subsist would be undermined were he to return to Sri Lanka, or that he would face of real chance of any other form of harm were he to resume fishing.

22. The material before me also does not support a conclusion that a person, including Tamil males with the applicant's background, has a real chance of harm on return to Sri Lanka because they requested asylum in another country. DFAT reports that between 2008 and 2017, over 2,400 Sri Lankan nationals departed Australia for Sri Lanka, including nationals 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.¹⁶ DFAT reported there is anecdotal evidence of CID visits to returned asylum seekers in Sri Lanka's north as recently as 2017. A UNHCR survey in 2015 reported that 49 per cent of refugee returnees surveyed had received a visit at their homes for a purpose other than registration, with almost half of those visits from the police. However, only 0.3 per cent of refugee returnees interviewed by UNHCR (including UNHCR-facilitated and voluntary returns) in 2016 indicated that they had security concerns following their return.¹⁷ Less than one percent of refugee returnees who were interviewed indicated they had security concerns following their return. Despite the reports of visit from the authorities, the material before me does not indicate returnees are routinely harmed during such visits. I am not satisfied any post return visits by the authorities, were they to occur, may expose the applicant to a real chance of suffering serious harm. The applicant does not a have real chance of any harm for because he has requested asylum.

¹⁰ Daily Mirror, "Fishing restrictions lifted in Trinco", 20 June 2012, CX296937; Sri Lanka Navy, "Fishing Restrictions lifted in Eastern Seas", 20 June 2012, CX0D38E8E19861.

¹¹ DFAT, "Country Information Report No. 12/67 – CIS Request Sri Lanka: Questions arising from recent applications", 29 November 2012, CX299951.

¹² DFAT, "Country Information Report No. 12/67 – CIS Request Sri Lanka: Questions arising from recent applications", 29 November 2012, CX299951.

¹³ ACCORD, "Sri Lanka: COI Compilation", 31 December 2016, CIS38A80123251.

¹⁴ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064.

¹⁵ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064.

¹⁶ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064.

¹⁷ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064.

23. There are some reports that returnees to Sri Lanka experience social stigma in their community upon return, including resentment directed at the financial support offered to returnees; and for some individuals that has restricted their employment and housing options on return.¹⁸ The applicant's mother continues to reside in the family home with his [child], and the applicant has demonstrated a sound ability to secure employment in various industries both in Sri Lanka and in Australia. As such I am satisfied on return he would be able to secure appropriate accommodation and find a way to support himself financially. I am not satisfied that any stigma would amount to serious harm.
24. Given his illegal departure, I accept the applicant may be arrested and charged, have his photograph and fingerprints taken and enquiries may be made about his departure and his activities while abroad. DFAT assesses 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 this processing. Notably, the most recent information from DFAT does not indicate the applicant would be detained in a prison while awaiting any court appearance. According to DFAT, returnees will be brought before the Magistrate's Court at the earliest opportunity but subject to magistrate availability, he or she may be detained for up to two days in an airport holding cell.¹⁹ I have found the applicant would not be returning with an adverse profile that would be of interest to the authorities. There is nothing to suggest there would be extant criminal charges or proceedings against him. Having regard to all the circumstances I am not satisfied that the applicant would for any reason face a real chance of suffering harm amounting to serious harm during returnee processing or if he is detained in a holding cell awaiting court transfer.
25. Should the applicant plead guilty to departing illegally, he may be fined a penalty of up to LKR 200 000 and may then be free to go. The I&E Act does allow for imprisonment but there is no evidence to suggest the authorities will perceive the applicant as having been anything other than a mere passenger and according to the Sri Lankan Attorney-General's Department no custodial sentences have ever been issued to such persons.²⁰ If a not-guilty plea is entered, usually in these circumstances the magistrate would grant bail either on the basis of personal surety or guarantee by a family member. I am not satisfied there is any reason the applicant would not be granted bail if required. DFAT notes that, while the fines issued for passengers of people smuggling ventures are often low, the cumulative costs associated with court appearances over protracted lengths of time can be high. The applicant indicated at the interview with the delegate that he is employed in Australia and he is providing support to his family. On the evidence I am not satisfied the applicant could not pay a fine, even if by instalment and manage arrangements for court appearances (if further ones are required) and I do not consider that any surety imposed or reporting conditions, the imposition of fines, or any other costs associated with the applicant's court appearances would constitute serious harm in the present case.
26. Additionally, I am satisfied the arrest and judicial processes the applicant may face result from a lawful prosecution and there is no evidence before me that laws or processes relating to illegal departure are discriminatory on their terms, are applied in a discriminatory manner or are selectively enforced. It does not amount to persecution for the purpose of ss.5H(1) and 5J(1) of the Act. There is no real chance of persecution related to his unlawful departure from Sri Lanka.

¹⁸ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064.

¹⁹ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064.

²⁰ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064.

27. There is not a real chance of the applicant being subjected to serious harm for any reason on return to Sri Lanka. The applicant does not have a well-founded fear of persecution.

Refugee: conclusion

28. 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

29. 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

30. 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.
31. I have accepted that because of his illegal departure from Sri Lanka, the applicant may be subject to treatment including questioning, possibly detention of up to two days in an airport holding cell and may be subject to a monetary fine. I am having accepted he may experience some stigma within his community as a returnee. However reports do not suggest,²¹ and I am not satisfied, such treatment amounts to or may expose the applicant to a real risk of significant harm in the relevant sense. Country information also does not suggest that any post return visit by the Sri Lankan authorities would attract a real chance of significant harm as defined, or that any social stigma would attract a real chance of such harm, and I am satisfied that is the case. Reports do not indicate a real risk of returnees having their life or liberty threatened, experiencing significant physical harassment or ill treatment, or any reason related to their illegal departure. As such I do not accept the applicant faces a real risk of experiencing significant harm on return to Sri Lanka for this reason.
32. I am also not satisfied that the applicant faces a real risk of any harm, including significant harm, for any of the other reasons claimed. The requirement for there to be a "real risk" of significant harm applies the same standard as the "real chance" test.²² As per my findings set out above, the applicant does not face a real chance of any harm for any of the reasons advanced, including because of any actual or imputed LTTE affiliation, because of his Tamil ethnicity, identity and links to an LTTE controlled area, for being Tamil fishermen, or for

²¹ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064.

²² *MIAC v SZQRB* (2013) 210 FCR 505.

having requested asylum in Australia. As I have found there is not a real chance of any harm to the applicant for these reasons were he to return to Sri Lanka, I am also satisfied that he does not face a real risk of any harm amounting to significant harm.

Complementary protection: conclusion

33. 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.