



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA19/07307

Date and time of decision: 12 November 2019 11:56:00
J Jennings, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Tamil from the Northern Province, Sri Lanka. In 2013 the applicant lodged an invalid protection visa application. On 31 March 2017 he lodged an application for a temporary protection visa and stated that he continued to rely on his 2013 statement. A delegate of the Minister for Immigration refused to grant the visa on 9 October 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. The review materials include information regarding a driving offence in Australia in 2017 for which the applicant incurred a fine. He has not advanced any protection claims in regard to this matter and I do not consider it to be relevant to the review.
4. I have also obtained the Department of Foreign Affairs and Trade (DFAT), Country Report, Sri Lanka, dated 4 November 2019.¹ This report was published after the delegate's decision and the delegate relied on the then current 23 May 2018 DFAT report for Sri Lanka which the 2019 report has updated. It has been prepared specifically for the purpose of protection status determinations. I am satisfied that there are exceptional circumstances to justify considering this new information.

Applicant's claims for protection

5. The applicant's claims can be summarised as follows:
 - The applicant is a Tamil from the Northern Province of Sri Lanka.
 - The applicant contracted [Medical Condition 1] as a child.
 - The applicant's father disappeared in 1992 and is presumed dead.
 - The applicant was a [Occupation 1] and [worked] at events for the Liberation Tigers of Tamil Eelam (LTTE). Although he was not a member of the LTTE through this public activity he was well-known in the community.
 - From 2002 the applicant moved to the Vanni area where he worked for an organisation manufacturing [specified items] for LTTE members.
 - Around 2008 the applicant decided to leave the Vanni area because of the escalating civil war conflict.²

¹ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244

² During the protection visa interview the applicant referred to leaving the Vanni in 2006 however, noting he has otherwise consistently stated this was 2008, which is also consistent with the residential and employment history he has recounted, and that this would be consistent with the escalating violence in the area in 2008, I consider the 2006 reference at that interview to be in error.

- With a group of others he travelled to [City 1] by boat. On arrival in [City 1] the group was met questioned about their activities and the reasons for returning to [City 1].by the authorities and was registered by them. They were
 - Around three to four months after his return to [City 1] the applicant was taken to a location where he was detained for three days and questioned about his activities in the Vanni. On release he was told not to leave the area.
 - The applicant was consistently harassed and questioned. At the protection visa interview he estimated he was questioned approximately 45 times and stated that he was asked “so many questions”.
 - On one occasion the applicant was kicked by army soldiers. He has been advised by doctors in Australia that he requires [surgery].
 - The applicant could no longer tolerate the ongoing harassment and decided to leave Sri Lanka. He made arrangements to leave illegally by boat. He initially left Sri Lanka [in] June 2012 but the boat in which he was travelling was intercepted and he was returned to Sri Lanka and detained for 20 days. He was released [in] August 2012 and was supposed to attend court [in] January 2013 however that night he departed Sri Lanka again and came to Australia.
 - Around October or November 2012 people/the police visited the family home and asked about the applicant and other people have also visited the family to ask about the applicant.
 - The applicant fears that as a Tamil he will be subject to ongoing harm in Sri Lanka. He left Sri Lanka despite being told by the authorities not to leave the area. He fears that he will be imputed with a political opinion because of his humanitarian work in the Vanni [and] his [work] at LTTE events puts him at greater risk of harm. He fears that he would be easily detected by the authorities on return in part because his disability is a distinguishing feature.
 - It is also advanced that he may face harm for reason of seeking asylum in the west and returning to Sri Lanka as a failed asylum seeker and that his age, place of origin and ethnicity would be factors that add an additional dimension to his risk of harm. The applicant fears he will face harm for reason of his illegal departures from Sri Lanka and that because of his disability any period of time he may spend in detention will be worse for him than for others. He fears that even if he was released he would be required to attend for questioning regularly and would be treated badly.
 - In the representative’s submission accompanying the invalid 2013 application it is posited the applicant would remain vulnerable to extortion and intimidation in Sri Lanka.
6. The applicant is somewhat estranged from his mother and siblings and although there was some discussion in his wife’s family about her remarrying after his departure he considers himself still married to his wife and is in regular contact with her. The applicant did not raise any protection claims in relation to his estrangement from his family.

Refugee assessment

7. Section 5H(1) of the Act provides that a person is a refugee if, in a case where the person has a nationality, he or she is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or in a case where the person does not have a nationality—is

outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Well-founded fear of persecution

8. Under s.5J of the Act 'well-founded fear of persecution' involves a number of components which include that:
 - the person fears persecution and there is a real chance that the person would be persecuted
 - the real chance of persecution relates to all areas of the receiving country
 - the persecution involves serious harm and systematic and discriminatory conduct
 - the essential and significant reason (or reasons) for the persecution is race, religion, nationality, membership of a particular social group or political opinion
 - the person does not have a well-founded fear of persecution if effective protection measures are available to the person, and
 - the person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour, other than certain types of modification.
9. The applicant has consistently claimed to be a Tamil from [City 1], Northern Province, Sri Lanka and has provided identity documents in support of his claimed identity. I accept the applicant's identity as stated and that Sri Lanka is the receiving country for the purpose of this review.
10. I accept that the applicant had [Medical Condition 1] as a child. However I note that despite his description of ongoing handicaps as a result of [Medical Condition 1] the indications are that this did not prevent him working or living independently in Sri Lanka. I also note he completed his O Levels and undertook some tertiary level training courses, he was able to drive and was self-employed in different businesses in Sri Lanka and was able to travel within the Northern Province for work purposes. The applicant has also worked and been living independently in Australia. I note his statement that he requires surgery [however] there is no indication this has prevented him working in Australia.
11. I accept that the applicant's father has been missing since 1992 and is presumed dead; this claim is consistent with the reporting of large numbers of people who went missing during the civil war.³ However there is no indication that the applicant or other family members have incurred any harm as a result of the disappearance of his father or that they have come to any adverse attention from the authorities or others for reason of links to the applicant's father.
12. The applicant claims to have [worked] at public LTTE events. At various times the LTTE have held propaganda or promotional events and living in the LTTE dominated north it is plausible that the applicant was involved in such events.⁴ The indications are that he did not attract any adverse attention from the authorities at the time of these activities, despite his claim to

³ Danish Immigration Service "Human Rights and Security Issues concerning Tamils in Sri Lanka", 1 October 2010, CIS19345

⁴ 2013 representative's submission; ICG, Sri Lanka's North I: The Denial of Minority Rights, Asia Report N°219, 16 March 2012; UN High Commissioner for Refugees, UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka, 21 December 2012, HCR/EG/LKA/12/04

have [worked] at events over an extended period of six to seven years, and at the protection visa interview he stated he was able to travel around freely to [work] at these events.

13. The applicant's claim to have worked in the Vanni making [specified items] for LTTE members is plausible; the LTTE dominated the Vanni area and in the later period of the civil war based its administration in the area. After the end of the ceasefire in 2006 the fighting escalated in the area and the Sri Lankan forces pressed further into the LTTE occupied areas and I accept that around 2008 the applicant decided to leave the area and return to government controlled [City 1]. The indications are that those crossing from LTTE controlled territory into government controlled territory were subject to scrutiny, and the applicant's account that he was questioned on arrival about his activities in the Vanni and his knowledge of LTTE people in the Vanni is consistent with such scrutiny. Tamils were subject to registration throughout Sri Lanka at this time and from the applicant's account I find he was registered on arrival in [City 1] as part of the general monitoring of the Tamil population at that time. The applicant's account of his return to [City 1] in 2008 is consistent with the independent country information reporting on the conditions at the time.⁵ Noting the intensity of the fighting at this time and that the applicant was crossing into government controlled territory from LTTE controlled territory I accept that he and his travel companions were met by officials on arrival.⁶ I accept the applicant's claim that he was questioned by the authorities about his activities and his knowledge of LTTE people or activities in the Vanni, and registered by the authorities. I accept that they took his Vanni identity documents from him.
14. However, despite his [work] in the Vanni and his residence in that LTTE controlled area for a number years, he was released by the authorities on his arrival in [City 1] and able to freely go about re-establishing his life in [City 1]. This being a time of heightened conflict and when Tamils suspected of being LTTE fighters or supporters or of having LTTE links were subject to detention or placement in the rehabilitation camps being established in the last months of the civil war to manage Tamils of concern to the authorities, I consider it significant that the applicant was not so detained.⁷ The applicant fears that because of his [work] for the LTTE at public events he was well known in the community, and that his discernible disability makes him easily identifiable to the authorities, however despite this he was not detained on return to government controlled [City 1] in 2008. I find this indicates he was not a security concern to the authorities. In fact in his 2013 statement of claims the applicant refers to the army providing assistance to the applicant and his travel companions on arrival and that they were provided food, water and medicine by the army.
15. The applicant claims that after his return to [City 1] and this initial questioning and registration he was subject to ongoing and persistent harassment, including being taken and detained for a period of three days. I accept that within three to four months of his return to [City 1] the applicant was taken for further questioning and that he was detained for a period of three days for this purpose. The applicant had lived and worked for a significant period in the LTTE controlled Vanni and it is plausible the authorities interviewed him to obtain information about his experience and his knowledge of the LTTE. However, it is important to note he was released and not charged with any offences. I note he was advised not to leave the area, which is consistent with the process of registration of the residence of Tamils at the

⁵ 2013 representative's submission; ICG, Sri Lanka's North I: The Denial of Minority Rights, Asia Report N°219, 16 March 2012; DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064

⁶ 2013 representative's submission; ICG, Sri Lanka's North I: The Denial of Minority Rights, Asia Report N°219, 16 March 2012; UN High Commissioner for Refugees, UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka, 21 December 2012, HCR/EG/LKA/12/04; Danish Immigration Service "Human Rights and Security Issues concerning Tamils in Sri Lanka", 1 October 2010, CIS19345

⁷ Danish Immigration Service "Human Rights and Security Issues concerning Tamils in Sri Lanka", 1 October 2010, CIS19345;

time and this in itself does not signify any specific interest in the applicant or concern about him being a security risk.⁸ The fact of his release at this time indicates that following this questioning the authorities had no concern about him living openly in the community. I accept that the Sri Lankan authorities abused and mistreated the general Tamil population and independent reporting notes accounts of arbitrary detention of Tamils and ongoing harassment of the population, particularly in the highly militarised areas such as [City 1]. But I am not persuaded that the applicant was of ongoing interest to the authorities, beyond being a Tamil who had spent time in the Vanni, or that he was considered to be a security concern and therefore subjected to the ongoing targeted harassment claimed by the applicant.

16. At his protection visa interview the delegate asked the applicant about the claimed ongoing interrogations and the questions he was asked; the applicant's response was that he was asked many questions. The delegate requested more specific detail about the questioning to which the applicant responded he was asked "so many questions", without providing any further specific detail of the information the authorities were seeking from him. I accept that a significant period of time has elapsed since these events and that the applicant's memory of the specific questioning may be marred by the passage of time, but the applicant is claiming to have been specifically targeted for questioning, that people came to his home "any time of the day or night" to ask the "same questions", stopped him on the street, came to his workplace, called him on the telephone, and in the light of this claimed "incessant" questioning I am concerned that when asked to recount this at the interview his response was so limited and lacking detail. My concern in this regard causes me to doubt the applicant was subjected to the sustained and targeted attention claimed.
17. The country information reports that Tamils were subject to arbitrary identity checks and questioning and that the authorities regularly conducted street cordon exercises to conduct checks.⁹ I accept that the applicant would have been subject to such checks, and it is plausible that from the period of his return in 2008 until his departure in 2012 he was subject to approximately 45 such checks, particularly as his [specified work] would have necessitated him being out in public and on the street. It is also plausible that on one occasion he was kicked by the authorities. But I am not satisfied that this indicates the authorities had an adverse interest, or any particular interest, in the applicant, rather this was indicative of the general monitoring in place at that time. It is important to note that he was released on each occasion after being checked and questioned and was free to go about his business and he lived and worked openly in [City 1] from 2008. That he was not detained, or prosecuted, or subject to any orders under the wide ranging Emergency Powers in force at the time indicates he was not viewed as a security concern after checks were conducted or that he was of ongoing interest to the authorities.¹⁰ The military presence in [City 1] at the time the applicant returned in 2008 was high and the security situation in the last months of the civil war was tense and I accept that in this environment the applicant was subject to regular security checks and was physically assaulted on one occasion, but I am not satisfied that he was considered to be a security risk. Had he been so I consider he would have been detained under the Emergency Powers which gave the authorities powers to detain on mere suspicion.
18. In his 2016 statement of claims the applicant stated that he "tried many times to move to another part of Sri Lanka to seek safety" but the authorities kept finding him as they have his records. I have significant concerns about this statement. Apart from his period of residence in the LTTE controlled Vanni the applicant has consistently provided the same [City 1] address

⁸ 2013 representative's submission; UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka, 21 December 2012, HCR/EG/LKA/12/04

⁹ Danish Immigration Service "Human Rights and Security Issues concerning Tamils in Sri Lanka", 1 October 2010, CIS19345

¹⁰ *ibid*

for his residence in Sri Lanka, from birth to 2002 and then again from 2008 to 2012. There is no indication in his 2013 statement of claims or his Arrival Entry interview that he moved around Sri Lanka many times and that the authorities located him. Nor did he repeat this claim when asked at the protection visa interview if he could relocate to another part of Sri Lanka. I do not accept that the applicant made attempts to relocate in Sri Lanka and that the authorities located him. I consider that this claim is an embellishment of the applicant's circumstances made by him to enhance his claim to have a profile of interest to the authorities.

19. I accept that the applicant departed Sri Lanka illegally in June and August 2012, was detained for 20 days and required to attend court in February 2013 as result of the June departure and that he failed to attend this hearing and will further address this matter below. The applicant fears that although he has left Sri Lanka the threat against him has not reduced and he claims the authorities have made enquiries about him since his departure. I have significant concerns about the applicant's account of these claimed visits. His recount of these claimed visits has been inconsistent across his various accounts and is confused and implausible in part:

- The applicant claims he was released from detention in August 2012 in relation to his June illegal departure with instructions to attend court in January 2013. The applicant failed to attend court in January 2013 and I accept such a failure may cause the authorities to make enquiries about the failure to attend, but the applicant's claim is that the visits from the authorities occurred before he failed to attend the court hearing in January 2013. I have already found that the applicant did not have a profile of being a security concern to the authorities at the time of his departure in June 2012 and if he was of concern I am not persuaded he would have been released from detention in August 2012. There is no indication he was subject to any reporting requirements or monitoring at the time he was released or other conditions that would give rise to further interest from the authorities leading up to the January 2013 court date and necessitating visits in October or November 2012.
- In the 2013 statement of claims the applicant stated his wife was visited by the authorities in October or November 2012. In the 2017 statement of claims he stated the authorities had come specifically looking for him on four occasions since his departure. At his protection visa interview the applicant stated that the police had visited the family home on two occasions, first to his mother and secondly to his wife, that they tried a lot to know where he was and after the police visits unidentified people came to the family home a lot of times.
- In the 2013 statement there was no mention of the claimed visit to his mother when it is claimed they took his documents from her, although in this statement he did mention the claimed visit to his wife. The claimed visits by unidentified people was not advanced by the applicant until the protection visa interview conducted in August 2019, and noting his claim that these occurred on many occasions I have concerns that he did not recount these, if true, in his earlier written statements of claims.
- In addition to my concerns about the variation in the number of visits, the applicant's account of the visits lacks coherency to the point where it casts doubt that he is recounting genuine events. In this regard I note in particular he stated that the visits stopped when the authorities confirmed he was no longer in the country, yet it is unclear when or how the authorities became aware he had left the country as in the 2013 statement of claims he stated his wife told them he was in Colombo and showed

them his passport to prove he was still in the country and according to the protection visa interview account this was the second, and last, of the two police visits.

- Furthermore when questioned at the protection visa interview his account of the visits by the unidentified people was limited and is not convincing; he stated the people did not speak proper Tamil and told his wife they were trying to locate the applicant to attend [specified] programs with them. Yet, as the applicant noted at the protection interview, his wife was concerned that as these people did not speak proper Tamil they were not linked to his [specified] program or activities as they claimed. The applicant did not mention these visits in his earlier accounts and first raised them at the protection visa interview when asked about the police visits and after he had stated “they” had tried a lot to know where he was. I am concerned as to the veracity of these claimed visits and that the applicant has put forward this information to support his claim that the authorities had an ongoing interest in him. If the authorities had an ongoing interest in the applicant there is no apparent reason to believe they would not simply continue to visit his mother or wife, or other family members or neighbours, in pursuit of their enquiries rather than as a ruse using non-Tamil speakers purporting to be linked to the applicant’s [employment] activities. While the country information reports the authorities often resorted to using paramilitary groups at this time to conduct enquiries on their behalf these were Tamil paramilitary groups and Tamil speakers.¹¹ Nor is it plausible that non-Tamil speakers would have been linked to the applicant’s [employment] activities, and in fact the applicant’s own evidence discounts this in that he relates a claim that his wife was dubious as to their connection to the [specified] program. Overall the claim of visits by unidentified people lacks plausibility and I do not accept it.
20. I have not accepted that the applicant was a security concern to the authorities at the time he left Sri Lanka in 2012 and I am not satisfied that the authorities had an interest in him that would have resulted in visits to his home in October/November 2012. The applicant had been released from detention in August 2012 with instructions to attend court in January 2013 in relation to the June 2012 illegal departure and there is no indication there were any matters in regard to this that would have necessitated the claimed October/November 2012 visits. These concerns, considered together with my concerns about the inconsistencies and confusion in the applicant’s accounts lead me to doubt the veracity of his claims and I am not satisfied that these visits occurred. I do not accept the applicant’s claim that after his departure from Sri Lanka the authorities or other people made attempts to locate him and visited his home.
21. I have accepted that the applicant was subject to ongoing security checks in [City 1] from 2008 and that he was physically assaulted on one occasion. While I accept that living in the repressive security environment in [City 1] from 2008 would have been upsetting for the applicant and that he decided to leave Sri Lanka in 2012 I note that the security situation in the country has improved significantly and I am not satisfied he would experience any harm in the foreseeable future in Sri Lanka. The 2013 representative’s submission draws attention to the abuses experienced by Tamils during the repressive Rajapaksa regime, but there has been a significant change in the security situation in Sri Lanka since the applicant left in 2012, and since the change of government in 2015, and I am not satisfied that his fear is well-founded.

¹¹ Danish Immigration Service "Human Rights and Security Issues concerning Tamils in Sri Lanka", 1 October 2010, CIS19345

22. I note reports from Freedom From Torture¹² and other agencies that report ongoing harassment and mistreatment of Tamils, particularly those involved with the LTTE, however the indications are that the Sri Lankan government has moved away from the systematic program during and in the aftermath of the civil war of identification, registration and harassment of the general Tamil population. The Emergency Powers widely used in the civil war have been allowed to lapse. I note the applicant's concern regarding the remaining military presence in the north and the country information before me confirms the military maintains a strong presence in the area, but the indications are that military involvement in civilian life has diminished, travel to the north is no longer restricted and military checkpoints on major roads have been removed. Overall the Sirisena government elected in 2015 has taken steps to curb the excesses of military power exercised under the authoritarian Rajapaksa government.¹³
23. In its fact finding mission in 2016 the UK Home Office spoke with a range of agencies about conditions and the security situation in Sri Lanka, particularly for Tamils. Overall agencies reported an improvement, although many referred to slow progress with many reforms and the continued arrest, detention and mistreatment of Tamils.¹⁴ Reporting in June 2017 the UK Home Office commented that being of Tamil ethnicity in itself would not warrant international protection and that generally a person who evidences past membership or connection to the LTTE would not be regarded as a concern unless they have or are perceived to have had a significant role in the LTTE or to have been active in post-conflict Tamil separatism.¹⁵
24. Taking account of the country information that indicates the current focus of the Sri Lankan authorities is those involved with Tamil separatism I am not satisfied that the applicant has a profile, or would be perceived as having a profile of concern should he return to Sri Lanka now or in the foreseeable future, even considered together with his disability, age, ethnicity, place of origin, humanitarian work as a [specified item] maker for LTTE members and [working] at LTTE events or for links to his father who went missing and is presumed dead.
25. I note the comment in the 2013 representative's submission that the applicant would be vulnerable to extortion and intimidation. I have not accepted that the applicant would be of ongoing interest to the authorities should he return to Sri Lanka and I am not satisfied that the chance he would be subject to extortion or intimidation is more than remote. I am not satisfied there is a real chance he would experience harm on this basis.
26. The applicant further claims that he fears harm in Sri Lanka for reason of his illegal departures and asylum claim. I note the country information cited in the 2013 representative's submission regarding the treatment of returnees to Sri Lanka but take into account the passage of time since the submission and the advances in the security situation in Sri Lanka

¹² Freedom From Torture, "Tainted Peace: Torture in Sri Lanka since May 2009", August 2015, CISEC96CF13070; International Truth & Justice Project, "Unstopped: 2016/17 Torture in Sri Lanka", 14 July 2017, CISED50AD4849; Freedom From Torture, 'Sri Lanka – Update on torture since 2009', 6 May 2016, CIS38A8012881

¹³ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism (version 5.0)", 15 June 2017, OG6E7028826; Country of Origin Information Section (COIS), 17 'Situation Update: Sri Lanka Tamil Returnees', 5 September 2017, CRF00C22F109

¹⁴ UK Home Office, "Report of a Home Office Fact-Finding Mission Sri Lanka: treatment of Tamils and people who have a real or perceived association with the former Liberation Tigers of Tamil Eelam (LTTE)", March 2017; and Human Rights Council, "Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka", 10 February 2017; cited in Country of Origin Information Section (COIS), 17 'Situation Update: Sri Lanka Tamil Returnees', 5 September 2017, CRF00C22F109

¹⁵ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism (version 5.0)", 15 June 2017, OG6E7028826

since that time. On the evidence before me I am not satisfied that the applicant's status as a failed asylum seeker from the west would bring him to adverse attention on return to Sri Lanka. I accept that there are reports of mistreatment of returned asylum seekers who have an actual or imputed profile of concern to the authorities¹⁶, but I have not accepted that the applicant was so imputed or that he would be now or in the foreseeable future as a returning asylum seeker even together with his illegal departures and failure to attend court in 2013 and the factors of his disability, age, ethnicity, place of origin, humanitarian work as a [specified item] maker for LTTE members and [working] at LTTE events and links to his father which he considers may exacerbate his profile. I am not satisfied that the applicant would face any harm as a returning failed Tamil asylum seeker from the west.

27. I accept that the applicant made two illegal departures from Sri Lanka in 2012 as a passenger on a boat and was intercepted on the first of these and detained as a result. I accept that because of his illegal departures the applicant would be subject to the provisions of the Immigrants and Emigrants Act 1949 (I&E Act) on return.
28. Returnees travelling on temporary travel documents, such as the applicant would, are subject to an investigative process to confirm identity on arrival and checks are made to identify those suspected of concealing a criminal or terrorist background. This may involve interviewing the returnee or checking with local police in the returnee's home area. These checks may take several hours to complete and as involuntary returnees are processed in groups further delays may occur until all returnees are processed. DFAT advises that at the earliest possibility after investigations are complete police transport persons charged under the I&E Act to the closest Magistrate's court. Persons can remain in police custody at the Criminal Investigation Department office at the airport for up to 24 hours after arrival and in cases where a magistrate is not available, such as a weekend or public holiday, may be detained at an airport holding cell for two days. DFAT assesses that returnees are treated according to these standard procedures, regardless of their ethnicity and religion, and are not subjected to mistreatment during their processing at the airport.¹⁷
29. The penalties under the I&E Act for persons who leave Sri Lanka illegally include imprisonment of up to five years and a fine of up to 200,000 Sri Lankan rupees (around AUD 1,633). In practice, penalties are applied to such persons on a discretionary basis and are almost always a fine and the Sri Lankan Attorney-General's Department advises no fare-paying passenger on a people smuggling venture has been given a custodial sentence. DFAT reports that as a deterrent fines, rather than custodial sentences, are issued to persons who were passengers on a people smuggling boat with the amount of the fine varying on a case-by-case basis. The applicant has made two such departures but DFAT advises that the severity of the fine does not necessarily increase for those who have departed illegally on more than one occasion.¹⁸
30. DFAT advises that the Attorney-General's Department has directed that passengers of people smuggling ventures be charged under the I&E Act and appear in court. The country information indicates that if a person who departed illegally pleads guilty, they will be fined and released. In most cases, if they plead not guilty, they are immediately granted bail on personal surety by the Magistrate, or may be required to have a family member act as

¹⁶ Sri Lanka Mirror, "Another Tamil returnee arrested", 1 July 2015, CXBD6A0DE16698; Tamil net, "SL military continues to arrest Tamils from East returning from Middle-East", 31 May 2015, CXBD6A0DE7540; Freedom From Torture, 'Sri Lanka – Update on torture since 2009', 6 May 2016, CIS38A8012881; Country of Origin Information Section (COIS), 'Situation Update: Sri Lanka Tamil Returnees', 5 September 2017, CRF00C22F109

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

¹⁸ *ibid*

guarantor. They may sometimes need to wait until a family member comes to court to act as guarantor. Bail conditions are imposed on persons who departed illegally on a discretionary basis, and may include reporting to police at the returnee's expense.¹⁹

31. Persons are required to appear in court in the location where the offence occurred and may incur legal and transport costs to travel to the point of departure for court appearance. The frequency of court appearance depends on the Magistrate and DFAT understands that most persons charged under the I&E Act appear in court every three to six months. Cases are only progressed in court when all members of a people smuggling venture have been located and there are protracted delays in finalising cases.²⁰
32. Should the applicant be held over a weekend or public holiday until seen by a Magistrate, I am satisfied he would face only a brief period in detention. I note his concern regarding his disability and his comment that any period in detention would be worse for him than for others and the 2013 representative's submission reports "the poor conditions in prisons including 'deplorable levels of overcrowding' and a lack of hygiene, inadequate medical care, the non-separation of convicted and remand prisoners and the failure to keep adult detainees and juvenile offenders separate. In many cases prisoners reportedly slept on concrete floors and often lacked natural light or sufficient ventilation." Beyond his statement that because he is handicapped detention would affect him worse than others the applicant has not specified how his disability may impact on him in the event he was to be detained. There is no indication that he requires or receives any ongoing medical treatment, medication or therapy that may be difficult to access in detention facilities. I have already noted that despite his disability he has lived an independent life, has been able to study and has been in regular employment. I accept that detention may be difficult for the applicant but on the information before me I am not satisfied that any such difficulties would amount to him experiencing serious harm. Even having regard to general detention conditions, I do not consider that a brief period in detention would amount to serious harm for the applicant for the purposes of s.5J of the Act. Similarly, I do not consider any likely questioning of the applicant by the authorities at the airport on arrival, any surety imposed, or the imposition of a fine, to constitute serious harm.
33. Additionally, the country information states that all persons who depart Sri Lanka illegally are subject to the I&E Act. That law is not discriminatory on its terms, and the evidence does not support a conclusion that the law is selectively enforced or that it is applied in a discriminatory manner. I find that the investigation, prosecution, punishment or detention of the applicant under the I&E Act would be the result of the non-discriminatory application of a generally applicable law and does not amount to persecution for the purpose of ss.5H(1) and 5J(1) of the Act. Similarly I find that any investigation or penalty the applicant may face as a result of his failure to attend the court case in 2013 would be the result of the non-discriminatory application of a generally applicable law and does not amount to persecution.
34. Considering the totality of the material before me, I am not satisfied that there is a real chance that the applicant would be persecuted on return to Sri Lanka. I am not satisfied that the applicant has a real or imputed profile that would attract adverse attention should he return to Sri Lanka now or in the foreseeable future. I have considered his disability, age, ethnicity, place of origin, humanitarian work as a [specified item] maker for LTTE members and [working] at LTTE events and links to his father who went missing and is presumed dead together with his status as a failed asylum seeker in the west who left Sri Lanka illegally on

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

²⁰ *ibid*

two occasions and I am not satisfied that the applicant would experience persecution on return to Sri Lanka.

Refugee: conclusion

35. 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

36. 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

37. 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.
38. I accept that the applicant will be identified on return as a person who departed illegally on two occasions and failed to attend court in 2013 and that he will be investigated and detained for several hours at the airport, and possibly detained on remand for some days pending bail, and then fined. The 2013 representative's submission draws attention to the poor conditions in places of detention in Sri Lanka. I accept that the applicant may be subjected to poor conditions during any possible brief period of detention but country information confirms that this is due to overcrowding, poor sanitation and lack of resources.²¹ I have also accepted that the applicant will be questioned, charged, briefly detained and fined under the I&E Act with the offence of leaving Sri Lanka illegally and may face further investigation or penalty for reason of his failure to attend the court hearing in January 2013. But this questioning, charges and fine or briefly being detained does not amount to the death penalty, arbitrary deprivation of life or torture and the evidence does not indicate there is an intention to inflict pain or suffering or severe pain or suffering or cause extreme humiliation. I am not satisfied that this treatment, either during the investigation process or while being held at the airport or on remand, amounts to significant harm. Similarly I am not satisfied that any difficulties he may face because of his disability should he be detained would amount to significant harm.
39. I have otherwise found there is not a real chance that the applicant faces harm on any of the bases claimed. Noting that the "real risk" test for complementary protection is the same

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

standard as the “real chance” test,²² and based on the same information, and for the reasons set out above, I am also satisfied that there is not a real risk that he would face significant harm for these reasons.

Complementary protection: conclusion

40. There are not substantial grounds for believing that, as a necessary and foreseeable consequence of being returned from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm. The applicant does not meet s.36(2)(aa).

Decision

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

²² *MIAC v SZQRB* (2013) 210 FCR 505

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.