



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA20/08702

Date and time of decision: 30 October 2020 11:51:00
C Wilson, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Tamil from Eastern Province, Sri Lanka. He arrived in Australia as an unauthorised maritime arrival [in] August 2012. He applied for a temporary protection visa (TPV) on 16 May 2017.
2. A delegate of the Minister for Home Affairs (the delegate) refused the application on 25 September 2020. The delegate did not accept the applicant was of adverse interest to the Sri Lankan authorities for the reasons claimed, and found he did not face a real chance or real risk of harm for reason of his ethnicity, religion, family or returning as a failed asylum seeker.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. No further information has been received from the applicant.
5. In the referred material is a summary of claims made in an invalid protection visa application lodged by the applicant in 2013.¹ The delegate makes no reference in their decision to the invalid 2013 application, nor has a copy of that application been included in the materials given to the IAA by the Secretary. The invalid application from 2013 appears not to have been before the delegate. I have considered whether I should exercise the discretion under s.473DC to get the invalid 2013 application as new information. From the summary of the 2013 claims before me, there are not any concerning inconsistencies between the 2013 claims and the 2017 TPV application. I note the applicant has not asked for the invalid application to be taken into account. He confirmed at the TPV interview there was nothing in his 2017 application that he wished to add or change. In all the circumstances I find it is not necessary to exercise my discretion to bring in an invalid protection visa application from 2013 as new information.

Applicant's claims for protection

6. The applicant's claims can be summarised as follows:
 - The applicant is a single man of Tamil ethnicity and Hindu religion from a village in Trincomalee, Eastern Province, Sri Lanka. His mother and sister continue to live in their home in the village.
 - His family fled to India in 1990, when he was about [age] years old, because of the civil war in Sri Lanka. At that time the Sri Lankan Army (SLA) burned houses in their village and an aunt was killed in a fire. The family returned to Sri Lanka in 1992.
 - In the 1990s a paternal and a maternal uncle were forcibly conscripted by the LTTE. Both uncles died fighting in the conflict.

¹ In a document titled 'Informed Referral to Status Resolution'.

- In 1986² his father was accused of being a supporter of the Liberation Tigers of Tamil Eelam (LTTE) by transporting goods for them. He was detained at [a] Camp by the Criminal Investigations Department (CID) for one year and then released.
- His father died in 2004 from complications caused by being [attacked]. He claims other families believed the father had complained about them to the Indian Army, leading to a person being shot by the Indian Army. As revenge they [attacked] his father and continued to carry out vengeful acts on his family.
- The applicant and his mother and sister fled again to India in 2006, where they lived in refugee camps. They fled with extended family, including an uncle KP the applicant fished with who was targeted for being a suspected LTTE member.
- The applicant returned to Sri Lanka with his mother and sister in 2008, with the assistance of the UNHCR.
- In 2012 his uncle KP was detained by the CID, and then released in 2013 only to be shot by them after release.
- The applicant left Sri Lanka for Australia in 2012 because he had lost his livelihood as a fisherman and he was being sought by the authorities as a suspected LTTE supporter because he had worked with his uncle.
- The boat used for his journey to Australia was registered in his name.
- The applicant fears returning to Sri Lanka because he is perceived to be an LTTE supporter because of his family and because he is a Tamil from Trincomalee, an area formerly controlled by the LTTE. As a failed asylum seeker it will be presumed he made allegations against the SLA and CID. He will be arrested, detained and tortured for these reasons on return.
- He will be unable to earn a living as a fisherman because of the restrictive fishing policies that discriminate against Tamils in favour of the Sinhalese population.
- Groups such as the Buddhist militant group Bodu Bala Sena (BBS) started a campaign of violence after the civil war ended. They target Hindu temples and shrines, and attack Hindus, Christians and Muslims. The BBS have the support of the Sri Lankan authorities.

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:

² In his written application the applicant said this occurred in 1996. This appears to have been a typographical error as he later provided a document to evidence the detention which gave the date as 1986.

- 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. I accept the applicant is a citizen of Sri Lanka from Trincomalee, Eastern Province. I make this finding on the basis of the variety of identity documents he provided to the Department. I find Sri Lanka is his receiving country. The applicant's mother and sister continue to live in the family home in the village in Trincomalee and I find this is the place he is likely to return to.

Imputed LTTE supporter

10. The applicant claims he is imputed with an association to the LTTE because of his family and because he is a Tamil man from a formerly LTTE controlled area.
11. I accept Trincomalee in the Eastern province was an area directly affected by the Sri Lankan civil conflict. In 1983 the LTTE launched an armed insurgency against the Sri Lankan state in 1983 and established and maintained de facto control of Tamil-populated areas of the north and east. The conflict was not resolved until the LTTE surrendered in 2009, at which time the SLA had regained control of the north and east of the country.³
12. Tamils faced considerable discrimination and violence during the civil conflict. As the LTTE was a Tamil militant group, the security forces imputed LTTE association in a discriminatory way. That is, association with the LTTE could be based merely on Tamil ethnicity and location in an LTTE controlled area. However the applicant was a child for much of the conflict and fled to India when he was [age]. His return to Sri Lanka at [age] was organised with the assistance of the Sri Lankan authorities. His ability to return to Sri Lanka without any adverse consequences indicates that even as a young Tamil man the Sri Lankan authorities did not consider him to have any association with the LTTE. When the applicant returned the LTTE had already retreated from Trincomalee, and the following year the conflict ended. There is nothing to indicate he would be imputed with an LTTE association in that brief time. At the end of the conflict the Sri Lankan authorities rounded up thousands of known and suspected LTTE members in the north and east of the country and detained them in rehabilitation centres. The applicant claimed at the TPV interview that he lived in hiding on return from India, but in fact he lived at his home address and continued to work as a fisherman and interact with the Sri Lankan Navy to obtain a fishing pass and undergo . I do not accept he lived in hiding. That the applicant continued to freely live and work from 2008 to 2012 in Trincomalee indicates he was not considered a known or imputed LTTE member for reason of being a young Tamil man from Trincomalee in the Eastern Province.

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

13. The applicant claims that in the 1990s two of his uncles were forcibly recruited to the LTTE and died during the civil conflict. As Tamil men it is plausible some of the applicant's uncles fought in the LTTE and died in the conflict. I do not accept this gives rise to the applicant having a profile as an LTTE member or supporter. Their alleged involvement in the LTTE occurred when he was a young child, and with no evidence the applicant was targeted for reason of these uncles in the past, I consider it too farfetched to amount to a real chance that he would be targeted for this reason in the reasonably foreseeable future.
14. The applicant claims his father was targeted both by the authorities because he was presumed to be an LTTE supporter, and by Sinhalese villagers because he was suspected to have made reports to the Indian Army. He claimed his father as a fisherman did sometimes transport goods for the LTTE. The applicant has provided documentary evidence his father was detained in 1986, and I accept this evidence. I note however the applicant was not even born at that time, and was still a minor when his father passed away in 2004. It is not evident how he knows whether or if his father did in fact transport goods for the LTTE. That he was released after a year however indicates the authorities did not have ongoing concerns about the father's level of actual or presumed support for the LTTE. The applicant's father fled Sri Lanka in 1990 with his family, but chose to return in 1992. That he did so, without adverse consequence on return, indicates he was not a person of interest to the Sri Lankan authorities. There is no evidence the applicant's father was detained, harmed or harassed in any way by the authorities from 1992 until his death in 2004. The applicant does not claim his father's death was due to any association with the LTTE or caused by the Sri Lankan authorities.
15. I accept the applicant's father was detained in 1986, and that this may have been for the actual or imputed act of transporting goods for the LTTE whilst working as a fisherman. I accept the applicant's father may have had a very low profile as an LTTE supporter for these reasons. I say very low as DFAT describes even low profile LTTE members as persons who provided a high level of non-military support. The applicant's evidence regarding his father does not suggest he provided high level support. His father passed away in 2004 when the applicant was only [age] years old. There is no evidence the applicant was targeted by the authorities for an imputed association with the LTTE because of his father. The applicant was assisted by the Sri Lankan authorities to return to Sri Lanka from India in 2008. That they assisted his family to return to Sri Lanka without being detained or receiving any adverse attention on return indicates they authorities did not impute the family with an association to the LTTE because of the father or for any reason. As there is no evidence the applicant was targeted in the past for an imputed association with the LTTE because of his father, and given the passage of time, I find there is not a real chance the applicant would be targeted for harm in the reasonably foreseeable future for reason of his late father's very low profile association with the LTTE.
16. The applicant claims he fled Sri Lanka for Australia because of his association to another uncle, KP, who he claims was being sought by the authorities for supporting the LTTE. The applicant says he worked as a fisherman with this uncle from 2003 to 2006 and 2008 to 2012, and the uncle was known to have transported goods for the LTTE during the conflict. Because the applicant went fishing with this uncle, he says he will be imputed with also transporting goods for the LTTE. The applicant doesn't provide details of himself getting involved in such work, but there may be an inference he is claiming that he did do such work with his uncle. However, he has never provided a detailed claim that he was personally involved in transporting goods for the LTTE and in the absence of such detail or evidence I am not satisfied that he did.
17. In his written application the applicant said he left Sri Lanka in 2012 because of an incident in May 2012 when the uncle KP was arrested and detained for transporting goods for the LTTE. The applicant said he feared the CID's investigation of his uncle would reveal he had fished

with him and reveal his involvement. He says his uncle was kept in prison under the Prevention of Terrorism Act (PTA) and was tortured and disappeared. The family believe he was killed in prison.

18. In his TPV interview in 2020 the applicant's claims regarding his uncle were markedly different. He said his uncle had fled to India in 2006 along with the applicant's family but had not returned in 2008 when the applicant did. He said his uncle was still in India when the applicant left Sri Lanka in 2012 and only returned to Sri Lanka after the applicant had left. The applicant left Sri Lanka at that time because he heard the authorities were looking for his uncle and because he had fished with him, he feared they would come looking for him instead. Sometime after the applicant left his uncle was on a boat to come to Australia, but the boat was intercepted by the Sri Lankan authorities and he was arrested and detained for 2 years. The uncle was released from detention but then deliberately shot by the authorities after his release.
19. The delegate put the inconsistencies to the applicant at the TPV interview. The applicant said he couldn't explain why it was written that way in his application. He said it occurred a long time ago. No further clarification or explanation was provided post-interview or to the IAA about the inconsistency in a core element of his claim. I acknowledge the applicant stated in his 2017 TPV application that he had PTSD and this should be taken into account when arranging an interview. However no medical evidence was ever provided to support this, nor has he relied on any mental health issues to explain the inconsistency. The applicant consented to participate in the interview in 2020 and did not raise any mental health issues at the interview. He did say he had trouble remembering the dates of whether his uncle returned to Sri Lanka in 2012 or 2013, because it had happened 9 years ago. But I do not accept his alleged difficulty remembering dates explains the very different accounts of whether the uncle was detained before he left and thus causing him to flee, or was only detained after he left. As the two accounts are so different and the applicant has not provided a satisfactory explanation for this, I find his claims regarding his uncle are not credible. I accept his uncle was a fisherman, and as a Tamil fisherman it is plausible at some point in the conflict he may have actually transported goods for the LTTE, or been imputed to have done so just because he was a Tamil fisherman. However I am not satisfied on the information before me that he had a known LTTE profile of interest. I do not accept the applicant would have voluntarily returned to Sri Lanka in 2008 if he had an uncle with such a profile. I do not accept his uncle was detained and killed for alleged association with the LTTE. It follows I do not accept the applicant is of adverse interest to the authorities for fishing with his uncle or any other association with his uncle.
20. As discussed above, Tamils in the north and east faced considerable discrimination and violence during the civil conflict because of actual or perceived associations to the LTTE. However, the LTTE are now a spent force in Sri Lanka, having been comprehensively defeated by the SLA. At the end of the war large numbers of LTTE members were detained, with most sent to rehabilitation centres and some prosecuted through the courts. The authorities remain sensitive to any re-emergence of the LTTE or Tamil separatist groups, but far less so now than in the aftermath of the conflict. Symbolic and practical changes have occurred in Sri Lanka. Restrictions have been relaxed on the public commemoration of Tamils who died fighting for the LTTE (Maaveerar Naal or Great Heroes' Day), an activity that was actively crushed in earlier years. The east and north of Sri Lanka have been largely demilitarised. The prevalence of monitoring Tamils in day-to-day life has significantly decreased. There was a commitment by the previous government to repeal the PTA, an act which allowed arrests for unspecified unlawful activities and detention for up to 18 months without charge, and which was widely used against Tamils during the conflict. The Act was effectively suspended from 2016 to April 2019 with an intention to replace it. However the PTA was again used following the events of the Easter Sunday terrorist attacks, and those attacks caused a pause in the support to repeal

it.⁴ Whilst the PTA has not yet been repealed, I do not consider there is anything in the applicant's profile that would give rise to a real chance he may be detained under it

21. Taking into account the applicant's background and family, I consider he is an ordinary Tamil from the Eastern province. I do not accept there is evidence before me that he nor any of his immediate or extended family were of adverse interest since the conflict ended in 2009. There is no claim his mother or sister have had any adverse interest since the applicant left Sri Lanka. The applicant says this is because they are women and the authorities are not interested in women but will be interested in him as a young Tamil man. However, DFAT reports women in female-headed households are vulnerable to official discrimination and harassment, and that the CID intimidated and harassed women connected to former LTTE members.⁵ That his mother and sister have not experienced any such harassment supports the conclusion the family are not considered to be associated with the LTTE. I do not accept the applicant will be imputed with an association to the LTTE merely because he is a young Tamil man and from Trincomalee. The Sri Lankan authorities collected and maintained sophisticated intelligence on former LTTE members and supporters, including 'stop' and 'watch' databases. The applicant's ability to be assisted to return to Sri Lanka in 2008 and his ability to hold fishing passes until he left Sri Lanka indicates he interacted with and was not considered of adverse interest to the authorities. Even considered cumulatively as a young Tamil man from Trincomalee, who had 2 uncles die fighting in the LTTE in the 1990s when he was a young child, with a father who may have been imputed with an association with the LTTE in 1986 but died for other reasons in 2004, and an uncle as a fisherman who may have had an actual or imputed low-level association with the LTTE in transporting goods for them during the conflict, I am not satisfied the applicant faces a real chance of harm for these reasons in the reasonably foreseeable future if he is returned to Sri Lanka.

Father's death in 2004

22. The applicant has provided his father's death certificate from 2004 which states the cause of death was '[deleted]'. At the TPV interview the applicant said this occurred because Sinhalese villagers [attacked] his father for revenge on him for reporting someone to the Indian Army, who was later shot by the Indians. He said his father eventually died after 2 years of suffering. I have some concerns about this claim however as while there were Indian Peace Keeping Forces in Sri Lanka earlier in the conflict, they left Sri Lanka in 1990. There is no evidence before me to indicate the Indian Army were in Trincomalee in or around 2002. There is no explanation why the villagers might wait 12 years or more to take revenge. There is also no medical evidence to support the claim [the] attack left his father suffering with [a condition] for a period of 2 years, if such a thing is medically possible. However, even if the applicant's father died [after being attacked] by Sinhalese neighbours, I do not accept this caused the applicant to be an ongoing target. There is no evidence the applicant was ever targeted in his home area by neighbouring Sinhalese villagers for reason of his father, or any other reason. He claimed there were ongoing acts of revenge but has not provided details of any alleged acts.
23. The applicant left Sri Lanka in 2006, two years after his father's death, but returned voluntarily to his home village in 2008. I do not accept he would have done so if he feared harm from neighbouring Sinhalese with an intent to target him. In any event there is no evidence he was of adverse interest to them when he returned. I consider it implausible Sinhalese living in or near his village would take an adverse interest in him now, 16 years after his father's death if

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

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

they were in fact even involved in his father's death, when there was no adverse interest in the applicant when he lived in Trincomalee from 2004 to 2006 and 2008 to 2012.

Tamil ethnicity

24. Tamils are the second largest ethnic group in Sri Lanka and make up about 15% of the population. They live throughout the country but are concentrated in the Northern and Eastern provinces.
25. The situation has improved generally for Tamils since the end of the conflict in 2009. The UNHCR assessed in 2012 that in post-conflict Sri Lanka there was no longer a presumption of a requirement for protection simply for being of Tamil ethnicity.⁶ The UK Home Office assessed in 2020 that Tamils are not persecuted just for being Tamil.⁷ DFAT reports Tamils have a substantial level of political influence and there are no barriers to their political involvement. Some Tamils have reported discrimination in employment, particularly in government jobs, but DFAT assesses there is no official discrimination against Tamils in public sector employment. The under-representation is said to be largely the result of language constraints and disrupted education because of the war.⁸
26. At the TPV interview the applicant said as a Tamil he was stopped, harassed and beaten by the authorities 'umpteentimes', although he was never detained overnight. No such claim had been made in his written application. Many Tamils, particularly in the north and east, reported being monitored, harassed, arrested or detained during the conflict.⁹ I accept it is plausible that as a young Tamil man in Trincomalee, in the immediate aftermath of the civil war, he faced occasional harassment including physical harassment by local Sri Lankan authorities. I consider the claim that it happened umpteentimes was an exaggeration at the interview. That he was never detained, and that the incidents were not even included in his written application, indicates they did not amount to serious harassment. I do not accept he has an adverse profile from any harassment he received prior to leaving Sri Lanka in 2012.
27. I note the applicant said at the TPV interview that he was never questioned or detained by the authorities from 2008 to 2012 because he was in hiding after returning from India. I do not accept he was in hiding. He did not come back to Sri Lanka in a clandestine manner; he was assisted to come home by the authorities. He returned to live in the family home in Trincomalee and this is the only address he lived at until departing for Australia. He worked as a fisherman and in doing so interacted with the Sri Lankan Navy, including being vetted for fishing passes by them. The applicant says the Navy are separate from the CID and do not share information with them. Noting the sophisticated monitoring of the Tamil population reported by DFAT, particularly in the aftermath of the conflict, I do not accept separate agencies and forces would not share information on persons or groups of interest. Based on the applicant's disclosed life in Sri Lanka from 2008 to 2012 I find he was living an ordinary life in his community and was not in hiding.
28. Tamil communities in the north and east of Sri Lanka claim the authorities continue to monitor the community, particularly in relation to public gatherings, protests, and targeted surveillance of high-profile individuals. In the aftermath of the conflict the authorities were sensitive to any re-emergence of the LTTE or other Tamil separatist movements. However, the LTTE is now

⁶ UNHCR, Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka, 1 December 2012.

⁷ UK Home Office, Report of a Home Office fact-finding missions to Sri Lanka, 20 January 2020.

⁸ DFAT, Country Information Report Sri Lanka, 4 November 2019.

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

seen as a spent force and whilst some monitoring and harassment continues it is targeted at individual Tamils linked to politically sensitive issues. Political activists, journalists, and some wealthy Tamils returning from abroad are reported to have been subjected to closer scrutiny.¹⁰ There is nothing to indicate the applicant has been or is likely to be involved in Tamil separatist activities. I do not accept that as an ordinary Tamil returning to his family in Trincomalee he would be of adverse interest to the authorities. I consider this finding is consistent with past treatment, that is, his return from India to Trincomalee in 2008 after which I do not accept he suffered any serious harassment nor attracted adverse interest from the Sri Lankan authorities.

29. I acknowledge there have been recent events, such as the Easter Bombings in 2019 and the election of Gotabaya Rajapaksa as President in November 2019, that have been of concern to the Tamil community. Emergency regulations and restrictions were introduced following the Easter terrorist attacks in 2019, and the military already present in the north and east of the country were on high alert in the aftermath. The focus of checkpoints and other restrictions were ostensibly to check for Islamist terrorists, and not directed at Tamils, although they were a reminder of past harassment. But the emergency regulations have since lapsed and local sources in the north report the heightened security has since eased.¹¹
30. The return of the Rajapaksa family in 2019 to power in Sri Lanka, some members of whom were implicated in alleged war crimes and human rights abuses, was concerning to the Tamil community.¹² Since being elected the Rajapaksa government has withdrawn from its international commitments to promote reconciliation and accountability within Sri Lanka. Those commitments, made in 2015, included the establishment of an Office of Missing Persons, and Office for Reparations, a truth and reconciliation commissions, and a tribunal to investigate war crimes. Rajapaksa has also acted to protect military officers accused of war crimes during the civil conflict, and created an environment where the courts are reluctant to act against the security forces for past war crimes.¹³ There is evidence people actively opposed to the Rajapaksa government have experienced intimidation, harassment or mistreatment by supporters of Rajapaksa and security forces.¹⁴ There is nothing before me to indicate the applicant intends to actively oppose the government and taking into account his lack of past political activity I do not accept that he would. I note also that although the Rajapaksa government has shown an interest in protecting the security forces against allegations of past war crimes, there is no evidence before me that it has demonstrated an anti-Tamil agenda or significantly wound back the considerable gains made by the Tamil community since the end of the conflict.
31. The applicant claimed he left Sri Lanka in part because he says as a Tamil he was no longer able to work as a fisherman. He claims the authorities settled Sinhalese fishermen from the south in Trincomalee who took over the fishing rights of the Tamils living there. DFAT reported in 2019 that Tamil sources had claimed Sinhalese had been resettled on desired coastal land and that Sinhalese fishermen in the north (where the Tamil population makes up 93.8% if the

¹⁰ DFAT, Country Information Report Sri Lanka, 4 November 2019; UK Home Office, Report of a Home Office fact-finding missions to Sri Lanka, 20 January 2020.

¹¹ DFAT, Country Information Report Sri Lanka, 4 November 2019; UK Home Office, Report of a Home Office fact-finding missions to Sri Lanka, 20 January 2020.

¹² 'Sri Lanka's new president has a worrying past', The Economist, 23 November 2019; UK Home Office, Report of a Home Office fact-finding missions to Sri Lanka, 20 January 2020.

¹³ 'Country Reports on Human Rights Practices 2019 – Sri Lanka', US Department of State, 11 March 2020; 'Sri Lanka: Resolution 30/1 Implementation Monitor Statistical and Analytical Review No. 4, 1 March 2019; 'Report of the UN High Commissioner for Human Rights on Sri Lanka', 18 February 2020.

¹⁴ 'Sri Lanka: and the crackdown begins', International Truth and Justice Project, Journalists for Democracy in Sri Lanka, January 2020; 'Sri Lanka's Presidential Election Brings Back a Polarising Wartime Figure', International Crisis Group, 18 November 2019; 'Government accused of embarking on process to silence critics', Colombo Gazette, 13 January 2020.

population) were supported by the Navy. There is no mention by DFAT however of Tamil fishermen being prevented from working by the Navy or any other Sri Lankan authorities. DFAT also stated they were unable to verify claims that Sinhalese settlers in the north and east have received preferential treatment to establish businesses. I accept that during the conflict Tamil fishermen faced restrictions and harassment because of suspicions they may be transporting goods or people for the LTTE, and that even after the conflict ended Tamils in the north were required to carry fishing passes and went through more onerous processes than Sinhalese fishermen to obtain them.¹⁵ However, from 30 December 2009 restrictions on times allowed for fishing off the Eastern coast were lifted and that the permit system was no longer compulsory but only recommended for identification purposes.¹⁶ In 2012 DFAT reported the requirement for fishing passes from the Navy had been lifted and that fishing licences were now just renewed annually with the Department of Fisheries. DFAT was not aware of any reports of Tamils being mistreated by the Navy if caught without a licence.¹⁷ On the information before me, I do not accept the applicant would be prevented from working as a fisherman in Trincomalee, if he chose to do so. I note that in Australia the applicant has not worked in the fishing industry, but has worked in construction and in a meat factory. Noting the applicant was able to work as a fisherman in Trincomalee even during and shortly after the conflict, and that restrictive practices have been lifted since the conflict, I do not accept he will suffer discrimination for reason of his ethnicity preventing him from earning a livelihood as a fisherman, should he choose to do so in Sri Lanka, in the reasonably foreseeable future.

32. Taking into account the improvement in the situation for Tamils in the Eastern Province since the end of the conflict more than 10 years ago, I find the applicant's chance of harm for reason of his ethnicity, including violence, mistreatment or significant discrimination, is too remote to amount to a real chance.

Hindu religion

33. The applicant says he identifies as Hindu, which I note is the religion for the majority of Tamils. He has not identified any past harm for reason of his religion, but in his 2017 claims he stated militant groups such as BBS were targeting Hindus, as well as Christians and Muslims.
34. DFAT reported in 2019 that Buddhism is the most common religion in Sri Lanka (around 70% of the population) and under the Constitution the state is obligated to 'protect and foster' Buddhism while protecting the rights of religious minorities. A number of extremist Buddhist groups, including BBS, operate in Sri Lanka and have engaged in acts of violence and hate speech against religious minorities, particularly Muslims. The former Rajapaksa government sanctioned religious discrimination and supported the BBS group. The Sirisena government was less tolerant of extremist Buddhist groups and BBS experienced some pushback. In August 2018 the General Secretary of BBS, Gnanasara, was given a 6 year prison sentence for contempt of court following a 2016 incident. Police used tear gas and water cannons on BBS monks who were protesting for Gnanasara's release. He was later pardoned by then President Sirisena.¹⁸ The current Rajapaksa government was backed by BBS during the elections in 2019. Gnanasara took credit for Rajapaksa's victory and spoke of the new government working for the majority Sinhala Buddhist population.¹⁹

¹⁵ 'Weakening the Tamils economically is yet another strategy of the Sri Lankan government', The Weekend Leader, 20 August 2011.

¹⁶ 'Restrictions on fishing in the East lifted from today', Daily Mirror (Sri Lanka). 20 December 2009.

¹⁷ DFAT, CIS Request Sri Lanka, 29 November 2012.

¹⁸ DFAT, Country Information Report Sri Lanka, 4 November 2019.

¹⁹ 'Our strategy brought Gota to power – Gnanasara', Republic Next, 19 November 2019.

35. In recent times, according to DFAT's 2019 report, there have been reports of construction of Buddhist shrines in the north and east in Hindu and Muslim areas with few, if any, Buddhist residents, and local sources reported that the Department of Archaeology routinely sided with Buddhist monks claiming Hindu archaeological sites in the north and east as Buddhist sites. DFAT has been unable to verify the reports.²⁰
36. DFAT reports Hindus are able to practice their faith freely in Sri Lanka. The incidents of hate speech and violence perpetrated by BBS have been primarily directed at Muslims, not Hindus. The evidence before me does not indicate any systematic threats or targeting against Hindus in Sri Lanka by BBS or other like groups, even since the Rajapaksa government came to power in late 2019. There are no claims the applicant's family or community have experienced harm at the hands of BBS or like groups. I do not accept the applicant faces a real chance of harm from BBS or any other group because he practices the Hindu religion or is a Tamil Hindu.

Returning failed asylum seeker who departed Sri Lanka illegally

37. The applicant claimed he would be detained and tortured on return to Sri Lanka because as a failed asylum seeker he would be presumed to have made allegations against the SLA or CID. He also claimed the boat used for the journey to Australia was registered in his name.
38. I accept the applicant left Sri Lanka illegally by boat. It is an offence under Sri Lankan law to depart other than via an approved port of departure: ss.34 and 45(1)(b) of the Immigrants and Emigrants Act 1949 (I&E Act). The penalty for doing so can be up to 5 years imprisonment and a fine of 200,000 Sri Lankan rupees (LKR). DFAT reports that for mere passengers who departed illegally the penalty is only a fine. Custodial sentences have only been imposed on persons facilitating or organising the boats.
39. The claim regarding the boat being registered in his name was raised for the first time at the TPV interview. There was no explanation why it was not raised in his entry interview or his TPV application. At the interview he said they went to get a boat for the journey and he gave his ID to secure the boat. I find this late claim lacks credibility. The applicant had never before claimed any involvement in the organisation of the boat. In his entry interview he said it was an uncle who organised and paid for everything. He has not explained why he was involved in organising a boat when previously he has spoken of his uncle organising everything with the agent and skipper of the boat. The delegate found the claim was not credible, and the applicant has not sought to provide further information or comment on the delegate's finding to the IAA. Having regard to the lateness of the claim and the lack of information and evidence to support it, I do not accept the boat used for the journey to Australia was organised by the applicant or registered in his name.
40. The applicant has admitted to leaving Sri Lanka illegally twice before. The first time he was an infant, but there is no claim his family suffered harm when they returned. The second time he was an adult. His return from India was organised by the UNHCR working with the Sri Lankan authorities. He was given emergency travel documents and assistance by the authorities to return. As someone without a passport, the authorities would have been aware he left illegally. There is no claim he was detained, charged or even questioned at the airport on return in 2008, nor that he was monitored or harassed for reason of being a returnee in his home area.
41. DFAT²¹ reports the following procedures can occur when an illegal departee returns to Sri Lanka: they are questioned at the airport and may be charged under the I&E Act; the police

²⁰ DFAT, Country Information Report Sri Lanka, 4 November 2019.

²¹ DFAT, Country Information Report Sri Lanka, 4 November 2019.

take their photograph, fingerprints, and a statement; checks are undertaken for any outstanding criminal matters; the police may make further enquiries if the returnee is a former LTTE member; returnees can be held at the Airport CID's office for up to 24 hours during processing; the returnee is taken to the closest Magistrate's Court; if a Magistrate is not available, because it's the weekend or public holiday, the returnee can be held for up to 2 days in an airport holding cell; if the returnee pleads guilty they are fined an amount usually between LKR15,000 and LKR20,000 (approximately AUD122 to AUD163). As noted above, the applicant was not subjected to such procedures when he returned in 2008, but it may have been the criminal checks were undertaken whilst he was still in India. DFAT states there are no reports of mistreatment during processing at the airport. The UK Home Office²² reports that in recent years returnees are no longer subjected to intensive questioning about what they were doing outside of Sri Lanka, and that the police are only interested in returnees if they have outstanding criminal offences. There is no suggestion this applies to the applicant. I find the applicant would be returning to Sri Lanka as an ordinary passenger who departed illegally, and that his processing on return does not amount to serious harm. In the unlikely event the applicant is returned and charged when a Magistrate is unavailable he may be briefly held in an airport cell, but even if the cell is uncomfortable or the applicant is distressed by the detention I do not accept it amounts to serious harm under s.5J(5) of the Act.

42. The applicant says he will be targeted by the authorities because as a failed asylum seeker they will assume he has made allegations against the SLA and CID. DFAT²³ advises thousands of Sri Lankans have returned from Australia and other western countries after unsuccessfully seeking asylum. IOM told the UK Home Office²⁴ It is not an offence in Sri Lanka to claim asylum abroad and returnees are not interrogated on such grounds. The Sri Lankan authorities are reported to have said refugees and failed asylum seekers are welcome to return.²⁵ There is no information before me that such returnees are targeted merely for seeking protection or being failed asylum seekers. I do not accept the applicant will be presumed to have made allegations against the SLA or CID or be of any interest for this reason. There are occasional reports of mistreatment or arrest of returning failed asylum seekers, but they were in cases where persons had actual links to the LTTE or were Tamil separatists or involved in other anti-government activity.²⁶ DFAT understands some returnees to the north and east with suspected links to the LTTE had been the subject of monitoring, but most failed asylum seekers are not actively monitored on an ongoing basis. Tamils returning to the Northern province had told DFAT they had no protection concerns and had not experienced harassment since returning from Australia.²⁷ I consider the applicant will be one of the many thousands of ordinary failed asylum seekers who have returned to Sri Lanka, and find that the information before me does not indicate ordinary returnees without a profile are of adverse interest. I find the applicant does not face a real chance of harm for reason of returning as a failed asylum seeker from Australia who left Sri Lanka illegally.

²² UK Home Office, Report of a Home Office fact-finding missions to Sri Lanka, 20 January 2020.

²³ DFAT, Country Information Report Sri Lanka, 4 November 2019.

²⁴ UK Home Office, Report of a Home Office fact-finding missions to Sri Lanka, 20 January 2020.

²⁵ 'Sri Lankan PM asks asylum seekers to return, says all if forgiven', Colombo Page, 15 February 2017; DFAT, Country Information Report Sri Lanka, 4 November 2019.

²⁶ 'SL military continues to arrest Tamils from East returning from Middle East', Tamil Net, 31 May 2015; '16 Batticaloa Tamils arrested within last 100 days at Colombo Airport', Tamil Net, 3 May 2015; 'Joseph Camp', International Truth and Justice Project, 16 March 2017.

²⁷ DFAT, Country Information Report Sri Lanka, 4 November 2019.

Refugee: conclusion

43. 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

44. 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

45. 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.
46. The expressions 'torture', 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' are in turn defined in s.5(1) of the Act.
47. I acknowledge the applicant may be charged under the I&E Act on return to Sri Lanka and there is a risk that should he arrive on a weekend or public holiday he may be detained in an airport holding cell for up to 2 days. I rely on the country information referred to earlier to find that the applicant would not be mistreated during such detention. I do not accept the detention, taking into account the short deprivation of liberty and possibly uncomfortable conditions, would amount to significant harm. In the unlikely event the applicant is detained for up to 2 days, I do not accept the detention itself amounts to significant harm or that he faces a real risk of significant harm during such detention.
48. I have found the applicant does not face a real chance of harm for reason of being a young male Tamil, from Trincomalee in the Eastern Province, with relatives with possible low-level links to the LTTE including uncles who were forced to fight and died in the conflict in the 1990s, being a Hindu, and returning as a failed asylum seeker who departed illegally. 'Real chance' and 'real risk' has been found to equate to the same threshold. For the same reasons given above, I find the applicant will not face a real risk of significant harm for any of the reasons claimed or at all.

Complementary protection: conclusion

49. 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.