



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA16/00941

Date and time of decision: 19 January 2017 10:21:00
Rebecca Mikhail, 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 473ED(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 Sri Lanka. [In] February 2016 he lodged an application for a Safe Haven Enterprise Visa (application for protection). [In] September 2016 a delegate of the Minister for Immigration and Border Protection refused the grant of the visa.

Information before the IAA

2. I have had regard to the material referred by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
3. On 5 October 2016 the IAA received a submission from the applicant.
4. In part, the submission refers to uncited information about a pro-Tamil demonstration held on 25 September 2016 and a related article from a non-English website published on 28 September 2016 which he claims reported that the General Secretary of the Bodu Bala Sena allegedly threatened the Chief Minister of the Northern Province that Tamils will be deported to India if they continue to demonstrate. He also refers to an uncited article he read on a Tamil news website about the kidnapping in August 2016 of a former LTTE member and his wife by men in a white van. I accept that this is new information as it was not before the Minister when the Minister made the decision. There is already recent information before me about situation of Tamils in 2016 and that former members of the Liberation Tigers of Tamil Eelam (LTTE) continue to be targeted by the Sri Lankan authorities. There is also information already before me indicating that Tamils still have considerable concerns that they wish addressed by the Sri Lankan government since the end of the civil war. Further, as the applicant has not provided the sources for two of these articles or a translation of the articles, I cannot confirm the subject matter of the articles. For these reasons I am not satisfied that there are exceptional circumstances for considering this information.
5. The applicant also claims that he has come into possession of video footage on YouTube of a pro-Tamil demonstration he participated in, held [in] October 2003, where he is visible in the footage. He claims that, at that time, he was [in a certain role] of [Organisation 1] and other committees joined with the LTTE in protesting against the government. He claims that when the fight between the LTTE and Sri Lankan government started, the Government started hunting down people who were involved in this demonstration as the government had recorded it on video and audio. I note that the applicant raised this claim, in part, during his protection visa interview. That is, that he participated in an event organised by the LTTE in 2003 which was filmed and in the media. However, he did not claim that the Government started hunting down people who were involved in this demonstration and that he was [in a certain role] of [Organisation 1] at the time and did not provide the video footage to the delegate. I consider these aspects of his claims and evidence to be new information. I note that the YouTube video was uploaded [in] September 2011, prior to the applicant's departure from Sri Lanka. The applicant has not indicated when he came into possession of the video and why it could not have been provided earlier or why he did not elaborate further on this claim at the protection visa interview when he first raised it or in the post-interview submissions sent to the delegate. For these reasons I am not satisfied that there are exceptional circumstances for considering this information.

Applicant's claims for protection

6. The applicant's claims are contained in the information referred to the IAA. They can be summarised as follows:

- He was born on [date] in [District 1], Northern Province and is a Tamil and national of Sri Lanka. He is of Roman Catholic faith.
- He was displaced for one year in [Country 1] in 1990/1991.
- From approximately 1999 until 2006 he worked as [occupation] at [Organisation 2]. One of his main roles was to supply [product] and [other] needs to local fishermen. [Organisation 2] was formed under the auspices of the government.
- Between 2002 and 2005, during the civil war ceasefire, [District 1] was controlled by the LTTE who were able to buy and take [product] from [Organisation 2] during this period. Fishermen would also sell [product] to the LTTE on the black market to make more money. The Criminal Investigation Department (CID) came to the office of [Organisation 2] and told them to stop giving [product] and other assistance to LTTE members. The army suspected that the applicant was helping the LTTE by supplying [product] to them as he was in charge of [product] provision and suspected that he was financially supporting the LTTE.
- In 2003 he participated in a demonstration organised by [Organisation 2] on behalf of the LTTE which was filmed.
- In 2006 an army officer was killed outside his shop and approximately [number] people were arrested including the applicant where he was held for one day. The following day there was a fight between the Sri Lankan Navy and the LTTE at sea and many Navy officers were killed and five members of [Organisation 2] were killed. Two or three hours after the incident a large group of people in military uniform came to [Organisation 2] and burnt approximately [number] boats. At the same time a local Catholic Church was bombed and the people congregating in the church were shot at. The military were looking for the applicant suspecting that he had some kind of involvement.
- In 2006 he fled to [Country 1] with his family where he remained until 2010 after which he returned to Sri Lanka.
- In 2007 his [relative] disappeared and was later found dead.
- In 2008 [number] of his friends were abducted and have never been found.
- He had a friend in the LTTE who passed away in 2008.
- In 2010 his friend who shared the same name as the applicant was mistakenly arrested instead of the applicant and detained for a year.
- He campaigned on behalf of the TNA during elections in 2010 and 2012.
- In 2012 his business partner was arrested and physically and sexually abused and tortured. After he was released he was required to report to the authorities once a month. When he reported he was asked about the applicant's whereabouts.
- In 2012 he fled to [Country 1] by air after which he travelled to Australia by boat.
- He also fears being abducted, disappeared, interrogated, tortured and killed by armed groups associated with the government.

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.

Applicant’s Background

9. On the basis of the applicant’s evidence and documents provided, I accept that he was born in [District 1] in the Northern Province of Sri Lanka on [date]. I accept that he is an ethnic Tamil of Roman Catholic faith. I accept that he is a Sri Lankan citizen.
10. I accept that the applicant has spent periods of time as a refugee in [Country 1] and he returned to Sri Lanka voluntarily in 2010. There is no information before me that he has the right to enter and reside in [Country 1]. I am satisfied that Sri Lanka is the receiving country for the purpose of this assessment.

Fear of harm due to role in [Organisation 2]

11. I accept that, from approximately 1999 until 2006, the applicant worked as [occupation] at [Organisation 2] and that one of his main roles was to supply [product] to local fishermen. I accept that, during the ceasefire between 2002 and 2005, the LTTE would buy and take [product] from [Organisation 2]. I also accept, as plausible, that fishermen would sell [product] on the black market to the LTTE. I accept that the CID came to the office of [Organisation 2] and told them to stop giving [product] and other assistance to the LTTE. The applicant claims that the army suspected that he was helping the LTTE by supplying [product] to them as he was in charge of [product] provision and suspected that he was financially supporting the LTTE. During the protection visa interview the applicant claimed that the CID looked for him a number of times during which he would escape. I do not accept this claim as the applicant further claims that he was subsequently arrested for one day after an army officer was killed outside his shop but did not claim that it was in relation to his role at [Organisation 2] in

relation to providing [product] to the LTTE and did not claim to have been questioned about his role at [Organisation 2] when he was detained. For this reason I do not accept that, during this period, the CID suspected the applicant of financially assisting the LTTE or was helping the LTTE by providing [product] to them or because other fisherman had sold [product] to the LTTE on the black market and do not accept the CID was actively looking for him, during this period, for any of these reasons.

12. I accept the applicant was arrested with a number of people in 2006 after an army officer was killed outside his shop. However I do not accept that this was related to the fact that the applicant previously sold [product] to the LTTE. During the entry interview he claimed that he escaped after being arrested but did not repeat this assertion in his application for protection or during the protection visa interview. He also claims to have been at the [office] the following day where he observed subsequent events. Given he returned to his workplace the following day and did not repeat his claim to have escaped in his application for protection or during his interview, I am not satisfied he escaped from detention but was likely released after being held for a day. As the applicant was released after a short period I am not satisfied that he is of any further interest to the Sri Lankan authorities because of this incident. I am not satisfied the applicant faces a real chance of harm from the Sri Lankan authorities because he was previously arrested in relation to the murder of an army officer outside his shop in 2006.
13. The applicant claims that, the following day after his arrest, there was a battle between the Sri Lankan Navy and the LTTE in the sea. The military then came to [Organisation 2] and burnt [number] boats. The applicant claims that he observed these events from the window of [Organisation 2]. I am willing to accept that the above events occurred as they are plausible in the context of information regarding the conflict in Sri Lanka. The applicant claims the Sri Lankan government subsequently blamed [Organisation 2] and started to target everyone who worked there. I accept, as plausible, that, after their battle with the LTTE at sea, the Sri Lankan authorities may have taken an adverse interest in [Organisation 2] and its employees, including the applicant, as they were known to have provided [product] to the LTTE during the ceasefire.
14. I accept that the applicant fled to [Country 1] in July 2006 due to his fear of being implicated in the above events. I also accept that the applicant returned with his family to Sri Lanka in May 2010.
15. The applicant claims that he had no problems in the first four months after his return to Sri Lanka. After four months people told him that the CID were asking questions about him and asking around if the applicant hid any weapons. The applicant stated that an agent of the CID visited his house and in a friendly way told him that the CID was still interested in him because of the events six years ago and asked him if he knew the whereabouts of LTTE weapons or members. The applicant claims that he went into hiding and lived in a church compound between 2010 and 2012. However, during this period, he also claims to have participated in campaigns for the Tamil National alliance (TNA) including doorknocking. I am willing to accept that he assisted in these campaigns. However, I find his campaign activities to be implausible and inconsistent with his claim to have been hiding during this period. In his entry interview he also noted that from 2010 to 2011 he was the coach of a local [sports] team. If he had a genuine concern and fear for his safety from the Sri Lankan authorities who he claims were seeking him out, I do not accept that he would participate in public campaigning for the TNA or coach a local [sports] team. When the delegate raised such concerns about his campaign activities, he responded that he only campaigned in the area around the Church compound and everyone in his village is related to each other. In a post-interview written submission he also claimed that he would campaign exclusively in Tamil areas where there was predominant TNA. I do not accept his explanation as sufficient and still consider it implausible that he would

be involved in public community activities such as political campaigning and coaching a [sports] team that would clearly draw attention to him if he were in hiding from the Sri Lankan authorities. For these reasons I do not accept that the applicant lived in hiding between 2010 and 2012. It is plausible that the applicant may have been questioned by the Sri Lankan authorities on his return from [Country 1] as the United Nations High Commissioner for Refugees post-return monitoring data indicate that in 2011, upon arrival in the village of destination, 75% of the refugee returnees were contacted at their homes by either a military or police for further "registration".¹ However, given I have not accepted that he was living in hiding, and that he does not claim to have been further detained, I am not satisfied he was of any further adverse interest to the Sri Lankan authorities due to his former role at [Organisation 2] or for any perceived link to the LTTE. Given this, I do not accept the applicant's claim that his friend who had the same name was mistakenly arrested in his place in 2010.

16. The applicant has provided a letter purporting to be from the [official] of [a] Committee of [District 1] which notes that the applicant came to their office in 2012 and complained about the issues and events that led to his departure from Sri Lanka consistent with his claims. However, I am not satisfied that this letter is sufficient to outweigh the concerns I have outlined in respect of the remainder of the applicant's evidence.
17. At the end of the protection visa interview the applicant claimed that he participated in a demonstration in 2003 organised by [Organisation 2] on behalf of the LTTE and the demonstration was filmed and was in the media. Although this demonstration occurred in 2003, the applicant has not claimed to have suffered any harm or was of any adverse interest to the Sri Lankan authorities or any group as a result of this event in the years since it occurred. For this reason I am not satisfied the applicant faces a real chance of harm from the Sri Lankan authorities or any group as a result of his participation in this demonstration.

Fear of harm as a TNA supporter/campaigner

18. The applicant has not claimed to have experienced any harm from the Sri Lankan authorities or any other group as a result of his support for, and campaigning, for the TNA during elections in 2010 and 2012 or claimed to have been identified by the Sri Lankan authorities or paramilitary groups as having supported, and campaigned, for the TNA during these periods. Given this, I am not satisfied the applicant faces a real chance of harm from any group on return to Sri Lanka on the basis of his support for, and campaigning, for the TNA in 2010 and 2012. Country information before me indicates that the TNA currently leads the opposition and has sixteen members of parliament and holds the majority of seats in the Northern Provincial Council.² DFAT has also assessed that there are no official laws and policies that discriminate on the basis of political opinion nor is there systemic political discrimination against any particular group.³ In a recent report by the International Truth and Justice Project (ITJP) which referred to twenty recent cases of abduction, detention and torture, some of the victims claimed they were questioned by their abductors about their political activities in support of the TNA although I note there is insufficient information in the report as to whether they were targeted for additional reasons and/or had some other profile that was of adverse interest.⁴ However, other country information before me does not reflect the systematic targeting of TNA

¹ United Nations High Commissioner for Refugees (UNHCR), "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183EA8, p.7

² Australian Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143, p.2

³ Ibid, p.12

⁴ International Truth & Justice Project Sri Lanka (ITJP), "Silenced: survivors of torture and sexual violence in 2015", 7 January 2016, CIS38A801275, pp.15, 17

supporters and campaigners. In the absence of this, even if the applicant were to continue to support or campaign for the TNA on return to Sri Lanka, I am not satisfied he would face a real chance of harm from the Sri Lankan authorities or any other group.

Fear of harm due to arrest of business partner

19. The applicant claims that, in 2012, the person he was doing business with was arrested and that, since his release, he was required to report to the Sri Lankan authorities once a month during which he was asked about the applicant's whereabouts. In post-interview submissions he further claims that the authorities told his business partner to tell the applicant that they will take care of him when he comes back from Australia. As I have not accepted that the applicant was of any adverse interest to the Sri Lankan authorities due to his former role in [Organisation 2] for any other reason, I do not accept that his business partner was questioned about his whereabouts in 2012 by the Sri Lankan authorities. Even if I were to accept that his business partner had been arrested at this time, I do not accept that it had anything to do with the applicant. For these reasons I am not satisfied the applicant faces a real chance of harm from any group because his business partner was arrested in 2012.

Fear of harm due to association to LTTE member and other incidents

20. I accept that the applicant's [relative] was killed in 2007 and that, in 2008, [number] of his friends disappeared after being abducted. However I am not satisfied, on the information before me, that these incidents were related to the applicant in any way including as a result of his role at [Organisation 2] or because he was arrested in 2006 after an army officer was killed outside his shop. I am not satisfied the applicant faces a real chance of harm from the Sri Lankan authorities or any other group because his [relative] was killed in 2007 or because [number] of his friends disappeared in 2008.
21. During the applicant's entry interview he claimed that his friend was in the LTTE but died in 2008. I am willing to accept this claim. The applicant has not claimed to have experienced harm from the Sri Lankan authorities or any other group as a result of his friend's membership in the LTTE and has not claimed that the Sri Lankan authorities were even aware of their friendship. I am not satisfied the applicant faces a real chance of harm on return to Sri Lanka because his friend was in the LTTE and passed away in 2008.

Fear of harm as a Tamil/Tamil Male from the Northern Province

22. During the protection visa interview the applicant claimed that [District 1] was controlled by the LTTE during the ceasefire between 2002 and 2005. In 2012, the United Nations High Commissioner for Refugees stated that originating from an area that was previously controlled by the LTTE does not in itself result in a need for international refugee protection.⁵ Although I accept that the applicant may have been questioned by the Sri Lankan authorities on return to Sri Lanka in 2010, as was the case for the majority of refugee returnees, I have not accepted that he was of any further adverse interest to the Sri Lankan authorities for any reason including because he previously resided in a former LTTE-controlled area. I am not satisfied the applicant will face a real chance of harm from the Sri Lankan authorities or any group for any reason including being imputed to be a member of, or supporter/sympathiser of, the LTTE because he is from, or lived in, a former LTTE-controlled area.

⁵ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183EA8, p.26

23. In its 2010 Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka, the UNHCR assessed that there is no longer a need for group-based protection mechanisms or for a presumption of eligibility for Sri Lankans of Tamil ethnicity originating from the north of the country.⁶ On 8 January 2015, Maithripala Sirisena defeated President Mahinda Rajapaksa in the presidential election winning 51.3 per cent of the vote, with a historically high voter turnout of 81.5 per cent. Analysis of the election indicated that the Tamil vote was significant in Sirisena's victory.⁷ In 2015 the Australian Department of Foreign Affairs and Trade (DFAT) assessed that the security situation in the north had greatly improved since the end of the conflict and there has been an overall decrease in monitoring in 2015 though some individuals in the north still report being questioned and observed by the military.⁸ The United States Department of State also claimed that Tamils in the north reported security forces regularly surveilled or harassed members of their community, especially young and middle-aged Tamil men in 2015.⁹ Nonetheless, I am not satisfied, on the information before me, that young/male Tamils from the North are imputed to be supporters/sympathisers/members of the LTTE or are targeted and subject to harm for this reason. Although the applicant can be considered young, I am not satisfied that he was of any interest to the Sri Lankan authorities when he first returned to Sri Lanka in 2010 or that he has a profile that would be of interest to the Sri Lankan authorities such that he would be subject to harassment by security forces. I am not satisfied the applicant faces a real chance of harm from any group because he is a young/Tamil male from the Northern Province.
24. The United States Department of State also claimed that, in 2015, Tamils maintained that they suffered longstanding, systematic discrimination in university education, government employment, and other matters controlled by the government.¹⁰ I accept that Tamils are likely to complain of ongoing systemic discrimination given the historical context that brought about the civil war.¹¹ I have given weight, however, to DFAT's more recent assessment that there are currently no official laws or policies that discriminate on the basis of ethnicity or language ('official discrimination') and that implementation of laws and policies by the Sirisena government is generally without discrimination. It notes, however, that there is a moderate level of discrimination between ethnic groups ('societal discrimination'), largely as a result of the civil conflict and its causes.¹² DFAT has not elaborated further in relation to what form or context societal discrimination occurs. However, I have given consideration to the applicant's evidence that he was able to complete his education and work for [Organisation 2] and manage his own business up until he left Sri Lanka for the first time in 2006 and continued to work in fishing on his return between 2010 and 2012. The applicant also originates from the Northern Province, where, in 2012, Tamils constituted 93% of the population¹³ and the applicant lives in a small Christian village where everyone is related. On the basis of the applicant's circumstances, I am not satisfied that there is a real chance the applicant will be subject to a level of discrimination, as a Tamil, so serious as to amount to serious harm, in relation to employment, language, basic services, or in his dealings with Sinhalese people, the police and other Sri Lankan authorities.

⁶ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 6 July 2010, 1698, p.1

⁷ DFAT, "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143, p.4

⁸ Ibid, p.8

⁹ US Department of State (USDOS), "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320, p. 33

¹⁰ Ibid.

¹¹ DFAT, "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143, p.4

¹² Ibid, p.9

¹³ Ibid.

25. The applicant claims to be a Roman Catholic Christian but has not raised any claims of fear in relation to his religion and has not claimed to have suffered any past harm for this reason. In 2015 DFAT noted there is little official discrimination on the basis of religion. The former Rajapaksa government sanctioned religious discrimination, particularly through support provided to Buddhist group Bodu Bala Sena but DFAT is not aware of any similar reports since the change of government in 2015. The Sirisena government has publicly said it is committed to ethnic and religious reconciliation. DFAT has assessed that most members of religious groups in Sri Lanka are able to practise their faith freely. However, the risk of harassment or violence increases where practitioners attempt to proselytise or to carry out 'unethical conversions' which generally involves a financial inducement to convert religion.¹⁴ The applicant has not claimed to have engaged in such activities and I am satisfied that he will not do so on return to Sri Lanka. I am not satisfied the applicant faces a real chance of harm on return to Sri Lanka on the basis that he is a Roman Catholic Christian.

Fear of harm has returned failed asylum seeker from Australia

26. I accept that the applicant departed Sri Lanka through Colombo airport. In Post-Interview submissions sent to the delegate he claimed that he "assumed" but does not know for sure whether the passport he used to depart Sri Lanka was genuine. He claims he did not have any problems at the airport because he bribed an agent to facilitate his travel until the boarding gate and the airport was busier than usual which may have reduced the risk of him being prevented from leaving. As I have not accepted that he was of any adverse interest to the Sri Lankan authorities at the time of his departure I do not accept that he did not have any problems departing Sri Lanka through the airport because he bribed an agent or because the airport was busy and it is more likely he had no issues departing because he departed on a genuine passport. For this reason I am satisfied the applicant departed Sri Lanka legally on a genuine passport.

27. I accept that the applicant will be identified as a failed asylum seeker from Australia by the Sri Lankan authorities if forcibly returned to Sri Lanka.

28. In 2012, a number of non-government organisations claimed that some failed Tamil asylum seekers from the United Kingdom and other countries have been subjected to arbitrary arrest and torture upon their return to Sri Lanka due to actual or perceived links to the LTTE or due to their political activities abroad.¹⁵ Human Rights Watch further claimed that the Sri Lankan security forces have long used torture against people deemed to be linked to the LTTE.¹⁶ There are also more recent reports before me by non-government organisations claiming that Tamil returnees have been detained and tortured on return due to actual or perceived links to the LTTE.¹⁷ However, as I have not accepted that the applicant was of any adverse interest to the Sri Lankan authorities after his return to Sri Lanka in 2010 and up and until he left in 2012 for any reason including any perceived links to the LTTE, I am not satisfied that he will be arrested on return at the Sri Lankan airport or in his home area for any reason.

29. In December 2015, DFAT provided the following information in respect of returnees. Article 14(1) (i) of Sri Lanka's Constitution entitles any citizen to 'the freedom to return to Sri Lanka'

¹⁴ Ibid, p.10

¹⁵ UK Home Office, "Sri Lanka December 2012 - Bulletin: Treatment of Returns", 1 December 2012, CIS28615 , pp. 5-24; Freedom from Torture, "Sri Lankan Tamils tortured on return from the UK", 13 September 2012, CIS24086

¹⁶ UK Home Office, "Sri Lanka December 2012 - Bulletin: Treatment of Returns", 1 December 2012, CIS28615 , p6

¹⁷ ITJP, "Silenced: survivors of torture and sexual violence in 2015", 7 January 2016, CIS38A801275; Freedom from Torture, "Sri Lanka - Update on torture since 2009", 6 May 2016, CIS38A8012881; "16 Batticaloa Tamils arrested within last 100 days at Colombo airport", Tamilnet, 3 May 2015, CXBD6AODE602

and entry and exit from Sri Lanka is governed by the Immigrants and Emigrants Act 1949 (the I&E Act). Under Sections 34 and 45(1) (b) of the Act, it is an offence to depart other than via an approved port of departure, such as a seaport or airport.¹⁸ For reasons already given, I am satisfied the applicant departed Sri Lanka legally via air on a genuine passport so I am satisfied the applicant will not be charged for illegal departure on his return to Sri Lanka.

30. Upon arrival in Sri Lanka, involuntary returnees are processed by the Department of Immigration and Emigration (DoIE), the State Intelligence Service (SIS) and a unit of the CID based at the airport. The CID verifies a person's identity to determine whether the person has any outstanding criminal matters. For returnees travelling on temporary travel documents, police undertake an investigative process to confirm the person's identity, which would address whether someone was trying to conceal their identity due to a criminal or terrorist background or trying to avoid court orders or arrest warrants. This often involves interviewing the returning passenger, contacting the person's claimed home suburb or town police, contacting the person's claimed neighbours and family and checking criminal and court records. Detainees are not subject to mistreatment during their processing at the airport.¹⁹ As the applicant no longer has his passport, he will likely return on a temporary travel document and I am satisfied he will be subject to the above investigative process.
31. In its December 2015 report, DFAT noted that returnees are treated according to standard procedures regardless of their ethnicity and religion.²⁰ For this reason I am not satisfied the applicant will be deemed to be, or viewed as, a LTTE member/sympathiser/supporter for having sought asylum abroad and/or as a result of his Tamil ethnicity.
32. I accept that there is a real chance the applicant will be questioned by the Sri Lankan authorities on return. However, I have given weight to DFAT's recent assessment that returnees are not subject to mistreatment during processing at the airport and, although, it does not routinely monitor the situation of returnees, it assessed that the risk of torture or mistreatment for the majority of returnees is low, including those suspected of offences under the Immigrants and Emigrants Act.²¹ I have already found that the applicant was not of adverse interest to the Sri Lankan authorities prior to his departure from Sri Lanka in 2012. For these reasons I am not satisfied the applicant will face a real chance of harm whilst being questioned by the authorities on return to Sri Lanka. I also consider that being questioned does not arise to the level of serious harm.
33. I have also considered the applicant's claim cumulatively in respect of his profile as a young/Tamil male from the Northern Province/former LTTE controlled area, who worked for [Organisation 2] which previously provided [product] to the LTTE during the civil war ceasefire period and was implicated in a battle between the Sri Lankan Navy and LTTE in 2006, who was arrested after an army officer was killed outside his shop in 2006, who participated in a demonstration organised on behalf of the LTTE in 2003, whose business partner was arrested in 2012, whose [relative] was killed and whose friends disappeared, who had a friend in the LTTE, who campaigned for, and supports, the TNA, who is a Roman Catholic Christian and who will be returning as a failed asylum seeker from Australia. Assessing his claims cumulatively I find they do not give rise to a real chance of serious harm.

¹⁸ DFAT, "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143 p.29

¹⁹ Ibid.

²⁰ Ibid, pp.24,29

²¹ Ibid.

Refugee: conclusion

34. 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

35. 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

36. 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.

37. I have not accepted that the applicant will face a real chance of harm because of his Tamil ethnicity or as a young/Tamil male from the Northern Province/former LTTE-controlled area or because he worked for [Organisation 2] which previously provided [product] to the LTTE during the civil war ceasefire period and was implicated in a battle between the Sri Lankan Navy and LTTE in 2006, or because he was arrested after an army officer was killed outside his shop in 2006, or because he participated in a demonstration organised on behalf of the LTTE in 2003, or because his business partner was arrested in 2012, or because his [relative] was killed and friends disappeared, or because he had a friend in the LTTE, or because he campaigned for, and supports, the TNA and is a Roman Catholic Christian. As 'real chance' equals 'real risk',²² I am also not satisfied the applicant will face a real risk of significant harm for these reasons.

38. Nor do I accept, having considered the applicant's circumstances, that there is a real risk that he would be subject to discrimination as a Tamil that amounts to an arbitrary deprivation of his life, the death penalty, or the intentional infliction of cruel, inhuman or degrading treatment or punishment.

39. I accept that there is a real risk the applicant will be questioned by Sri Lankan authorities to determine his identity at the airport as a failed asylum seeker who is being forcibly returned from Australia. I do not find being questioned arises to the level of significant harm as I am not satisfied that being questioned, in such circumstances, is intended to cause physical and/or mental pain or suffering or extreme humiliation which is unreasonable.

40. I also do not accept that the applicant will face a real risk of significant harm on the basis of being a failed asylum seeker from Australia based on the country information cited above and

²² *MIAC v SZQRB* (2013) 210 FCR 505

having taken into account the particular circumstances of the applicant. As I am satisfied the applicant left Sri Lanka legally on a genuine passport I do not accept he will be charged with illegal departure on return.

41. I have considered the applicant's claims cumulatively and I do not find that he will face a real risk of significant harm. I have taken into account he is a young Tamil/Tamil male from the Northern Province/former LTTE controlled area, who worked for [Organisation 2] which previously provided [product] to the LTTE during the civil war ceasefire period and was implicated in a battle between the Sri Lankan Navy and LTTE in 2006, who was arrested after an army officer was killed outside his shop in 2006, who participated in a demonstration organised on behalf of the LTTE in 2003, whose business partner was arrested in 2012, whose [relative] was killed and whose friends disappeared, who had a friend in the LTTE, who campaigned for, and supports, the TNA and who will be returning as a failed asylum seeker from Australia and is a Roman Catholic Christian. Assessing his claims cumulatively I find they do not give rise to a real risk of significant harm.

Complementary protection: conclusion

42. 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

...

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.

91W Evidence of identity and bogus documents

- (1) The Minister or an officer may, either orally or in writing, request an applicant for a protection visa to produce, for inspection by the Minister or the officer, documentary evidence of the applicant's identity, nationality or citizenship.
- (2) The Minister must refuse to grant the protection visa to the applicant if:
- (a) the applicant has been given a request under subsection (1); and
 - (b) the applicant refuses or fails to comply with the request, or produces a bogus document in response to the request; and
 - (c) the applicant does not have a reasonable explanation for refusing or failing to comply with the request, or for producing the bogus document; and
 - (d) when the request was made, the applicant was given a warning, either orally or in writing, that the Minister cannot grant the protection visa to the applicant if the applicant:
 - (i) refuses or fails to comply with the request; or
 - (ii) produces a bogus document in response to the request.
- (3) Subsection (2) does not apply if the Minister is satisfied that the applicant:
- (a) has a reasonable explanation for refusing or failing to comply with the request or producing the bogus document; and
 - (b) either:
 - (i) produces documentary evidence of his or her identity, nationality or citizenship; or

- (ii) has taken reasonable steps to produce such evidence.
- (4) For the purposes of this section, a person produces a document if the person produces, gives, presents or provides the document or causes the document to be produced, given, presented or provided.

...

91WA Providing bogus documents or destroying identity documents

- (1) The Minister must refuse to grant a protection visa to an applicant for a protection visa if:
 - (a) the applicant provides a bogus document as evidence of the applicant's identity, nationality or citizenship; or
 - (b) the Minister is satisfied that the applicant:
 - (i) has destroyed or disposed of documentary evidence of the applicant's identity, nationality or citizenship; or
 - (ii) has caused such documentary evidence to be destroyed or disposed of.
- (2) Subsection (1) does not apply if the Minister is satisfied that the applicant:
 - (a) has a reasonable explanation for providing the bogus document or for the destruction or disposal of the documentary evidence; and
 - (b) either:
 - (i) provides documentary evidence of his or her identity, nationality or citizenship; or
 - (ii) has taken reasonable steps to provide such evidence.
- (3) For the purposes of this section, a person provides a document if the person provides, gives or presents the document or causes the document to be provided, given or presented.

...