



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA16/01368

Date and time of decision: 10 August 2017 13:44:00
Lorraine Hill, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a citizen of Sri Lanka. He applied for a Safe Haven Enterprise Visa (protection visa) [in] December 2015. A delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa [in] November 2016.
2. The delegate accepted that the applicant was a Tamil who had been a low-level supporter of the Tamil United Liberation Front (TULF) and whose family had links to the Liberation Tiger of Tamil Eelam (LTTE). However, the delegate found that there was not a real chance or real risk the applicant would be harmed on return to Sri Lanka for reasons of his ethnicity, his real or imputed political opinion, as a failed asylum seeker or his illegal departure from Sri Lanka.

Information before the IAA

3. I have had regard to the material referred by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. The applicant's representative provided a submission to the IAA on 7 December 2016. The submission contains discussion on why the applicant does not agree with the delegate's decision. To that extent those parts may be described as argument rather than new information. It also refers to a number of claims made by the applicant to the delegate which are already before me.
5. Attached to the submission was a statutory declaration signed by the applicant. The statutory declaration was not before the delegate and is new information. It provides new claims regarding his movements after his brother abduction in 1990.
6. More specifically, the applicant now contends that:
 - In 1990, approximately two days after his brother was abducted he and his brother fled into the jungle where they remained during the day and at night returned to various relatives homes and that it was during this period that he joined the TULF.
 - Sometime in about 1990, approximately four months before he relocated to Colombo, his father returned from [Country 1]. In 1991, in fear of the militant groups, he and his father then relocated to Colombo by train. The applicant's oral evidence was that his brother was abducted in 1990 and it was two years after this event when his father returned from [Country 1].
7. The applicant claims that as these events occurred approximately 26 years ago, he was unable to clearly recall his movements and that this led to the inconsistencies in his protection visa application and interview. He stated that this information should now be considered because it is clarifying information which the delegate considered to be inconsistent and a failure to take it into account may result in the delegate's decision being affirmed by the IAA. I have considered the applicant's explanation however I am unconvinced that the information is merely clarifying inconsistencies; rather the information adds to the basis on which the applicant claims were initially made before the delegate.
8. The two protection visa applications that have been submitted by the applicant have both been prepared with the assistance of a Legal Practitioner. The applicant was represented at the

protection visa interview. At the protection visa interview, the applicant was given an opportunity to provide details of the events he claimed to be involved in. The applicant was asked specific questions about each of his claims and the delegate clearly outlined to the applicant the aspects of his claims that he had concerns about and gave him an opportunity to respond. The applicant was asked at the end of the protection visa interview whether he had anything else he would like to add. The representative provided brief oral submissions and was given a further two weeks to provide any further submissions in writing. A post interview submission was received. While the claims may relate to events some time ago, I am satisfied the applicant has had an opportunity to present his claims orally at the protection visa interview. Having regard to all the circumstances, I am not satisfied that there are exceptional circumstances to justify the consideration of this new information.

9. Attached to the submission was an English translation for a Human Rights Commission of Sri Lanka complaint dated [May] 2014. The original complaint is already before me and I do not consider this document to be new information.

Applicant's claims for protection

10. The applicant's claims can be summarised as follows:

- The applicant is a male Tamil who was born in [Batticaloa] District in the Eastern Province of Sri Lanka.
- The applicant's older brother and another relative, E were members of the LTTE.
- In 1990, E left Sri Lanka and went to [another country] and his older brother was abducted by unidentified militant group and presumed dead. After the abduction of his older brother, in order to avoid the same fate the applicant went into hiding and later relocated to Colombo.
- In 1993, when residing in Colombo, the applicant was arrested and detained by the Sri Lankan authorities. He was detained for several days before being released without charge.
- In approximately 1994, on his return to Batticaloa district, the applicant joined TULF. He began attending and organising campaign rallies, volunteered assistance to Members of Parliament (MPs) and gave general assistance as required. As a result of his involvement with TULF in 2000, 2002 and 2008, an unidentified militant group sought the applicant's whereabouts by attending his family home. They also verbally abused and made threats towards the applicant and his family.
- In 2008, the applicant was travelling for work when he "rounded up" by the SLA. He was arrested and taken to the police station where he was questioned and detained. He was released the next day.
- In 2012, the applicant assisted TULF with their preparation for the upcoming provincial council elections. In June 2012, an unidentified armed militant group attended the applicant's and his father's home and told his family members that the applicant had been warned to cease campaigning for TULF; they also made threats against the applicant's life. After hearing about the visits, the applicant approached a local MP and told him what had happened. The MP advised him to hide. While in hiding the applicant organised his travel to Australia.
- Since arriving in Australia, unidentified persons have sought his whereabouts.

- The applicant fears on return to Sri Lanka he will be harmed on basis of his ethnicity, his imputed political opinion as a Tamil from the Eastern Province, his actual and imputed political opinion arising from his involvement in activities in support of TULF, his previous detention and questioning by the Sri Lankan authorities on suspicion that he was involved with the LTTE, his brother's and other relative's involvement in the LTTE, his illegal departure and because he will be returning to Sri Lanka after seeking asylum in Australia.

Refugee assessment

11. 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

12. 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.
13. I accept the applicant's identity is as claimed. I accept the applicant is a male Tamil from the Batticaloa District in the Eastern Province of Sri Lanka, and a Sri Lankan national. Sri Lanka is the receiving country for the purpose of this assessment.
14. The applicant claimed that his older brother and another relative were members of the LTTE. His older brother held [a certain] role and his relative, E was a high level member of the LTTE. Due to the LTTE membership of these two family members his family was "well known" as having a connection with the LTTE.
15. The applicant claimed that in 1990, E family was attacked by an unidentified militant group who were against the LTTE. During the attack, E's brother and father were abducted and killed and their house burnt. E departed Sri Lanka and the applicant has not spoken to him since. Shortly after, an unidentified armed militant group went to the applicant's home and kidnapped his older brother. The applicant's older brother has not been heard from since and presumed dead.

16. I accept the applicant's older brother was a member of the LTTE and that in 1990 he was abducted by an unidentified armed militant group. I accept that in 1997, as over a year had lapsed since the applicant's older brother had gone missing, he was officially declared as deceased by the Sri Lankan authorities. The applicant's evidence regarding the past circumstances of his brother has been consistent throughout his interactions with the Department. The applicant has also provided an official Sri Lankan death certificate in support of his older brother's death.
17. However, I do not accept the applicant's relative E, was a member of the LTTE. At the entry interview the applicant was asked whether he or any members of his family had been associated, or involved with, any political groups or organisations. He provided details about his brother LTTE membership but made no reference to anyone else. The applicant did provide details of E's involvement in both his protection visa applications; however I find the details to be vague and unconvincing. The applicant made no mention of how E was related to him nor did he specify E's position in the LTTE as anything more than as "high level member".
18. I do not accept that the applicant's familial connections to the LTTE led to his family being "well known". On the evidence before me, I find these claims to be exaggerated and unsubstantiated. While I accept the applicant's older brother was an LTTE member, I am not satisfied that this fact alone forms a credible basis to the applicant's claim that his family were then considered to be "well known".
19. The applicant claimed that in order to avoid the same fate as his older brother he went into hiding. In or around 1991, in fear of the unidentified armed militant groups who were targeting him he relocated to Colombo. He claimed when residing in Colombo, the armed militant groups from his village who would watch his house and taking note of his movements.
20. In the applicant's entry interview, when he was asked why he had left Sri Lanka, he referred to the event involving the abduction of his older brother and as a result he was being sought. He made no mention that this event had made him go into hiding.
21. At the protection visa interview, the applicant stated after his brother abduction he went into hiding in the jungle in the LTTE controlled area for three months before he moved to Colombo. He stated his father was in [Country 1] and did not return until two years later. In contrast, his protection visa statement indicates that while in hiding he spent significant time with his father who was [doing jobs] throughout the Eastern Province. The applicant was asked to comment on this apparent contradiction by the delegate. The applicant stated he couldn't remember as it happened a long time ago. The delegate put to the applicant that his protection visa statement created the impression that after his brother's abduction he went into hiding and joined his father, yet his oral statements indicated that his father was not in [Country 1] at that time. He stated that it was after he came back from Colombo that he worked with his father.
22. I agree with the delegate that while there is an absence of any dates against the applicant's claims regarding when he went into hiding in both his protection visa applications, it appears from the manner in which his claims are set out, that the reference to the applicant going into hiding and working with his father was immediately after his older brother was abducted in 1990. The protection visa application also makes reference to these events occurring at a time when the Indian Peacekeeping Forces (IPKF) departed Sri Lanka which the country information before me indicates was in 1990.
23. At the protection visa interview, the applicant also claimed that when residing in Colombo he was under threat from the armed militant groups from his village and they would watch his

house and take note of his movements. He stated that he knew that he was being watched because he saw them and got scared. These claims were not provided by the applicant at any of his previous interview with the Department nor were they included in the two protection visa applications lodged which were prepared with the assistance of a legal practitioner and interpreter.

24. Having regard to the evidence as a whole, including the inconsistencies in the applicant's evidence, the new claims and the country information before the delegate, I am not satisfied these claims are true. I do not accept that in 1990, after the applicant's brother was abducted the applicant went into hiding. I do not accept the applicant's relocation to Colombo was in any way associated to this event. I do not accept that in Colombo the applicant was watched and his movements noted by any armed militant groups.
25. The applicant claimed due to the hardships experienced by his family arising from militant violence, he looked towards politics and joined TULF. He began to attending and organising campaign rallies, volunteered assistance to MPs and gave general assistance as required. He claimed that as a consequence of his involvement with TULF in 2000, 2002, and 2008 unidentified armed militant group sought his whereabouts, verbally abused his family and made threats. He feared he was being targeted because of his increased political activism but maintained his support and activities for TULF.
26. The applicant claimed that in 2012, he began assisting TULF with their preparations for the upcoming provincial council elections and generally became known as a strong TULF supporter. At rallies and events he would be harassed and threatened by those who opposed TULF. In or around June 2012, unidentified armed militant group attended his home, told his wife that the applicant had been warned on many occasions to cease his campaigning for TULF and made threats against the applicant's life. The unidentified armed militant group then attended his father's home and made similar threats and indicated that they were looking for the applicant. After being told of the visits the applicant returned home. Two days later he approached his local MP and told him about the visits and the problems he had faced. The MP advised him to go into hiding and that he would speak to some people to help him out. While in hiding the applicant made contact with a people smuggler and later travelled to Australia.
27. The applicant claimed after his arrival in Australia in April 2014, two men visited his family home and spoke to his wife and sought his whereabouts. The men threatened his wife and demanded money. A month later, a woman went to the applicant's family home and handed a mobile phone to his wife. The people on the phone asked his wife where the applicant was, threatened her and demanded money. The next day his wife reported these incidents to the Human Rights Commission of Sri Lanka.
28. At the protection visa interview, the applicant explained that he would work for TULF during the elections. His work involved him gathering people from the areas and getting them to attend meetings and as a group they would raise their voices against the other militant groups.
29. The delegate asked the applicant when he started to support TULF. He stated it was after his brother was abducted, he was in Colombo and had moved areas and started to work for his father and that is when he started to show interest. He stated the incident with his brother was in 1990 and in 1994 there was an election and he started to support them.
30. The applicant's oral evidence that he started to support TULF in 1994 appears to contradict his statements in the two protection visa applications. In the two protection visa applications, when the applicant first introduces his claims regarding TULF it is under the heading "1990:

Several members of my family are killed” and then later again under the heading “2000 to 2008: Problems with unknown militant groups.

31. The applicant was asked whether he officially joined TULF, he stated he was not a member but supported from the outside. He stated his father was also a strong and long-time supporter. The delegate asked the applicant what activities he undertook in support of TULF. He stated that during the election he worked for them by distributing and putting up political posters and organising meetings. He stated he organised the meetings for his area and he did this by inviting people, selecting the area to have the meeting and setting up the stage and decorations and gathering people to inform them of the meeting.
32. The delegate asked the applicant how was he able to undertake the activities for the TULF given his protection visa application statement that he spent “significant period of time away my family home” due to his work commitments and fear. He stated he would only cross the river to his home area at night, undertake the activities and then go back. The delegate queried the applicant’s response and asked how was he able to undertake such activities in support of TULF if he only visited his home area at night and in secret. He stated he could do this at night as many party supporters and people were active at night and this was the time when the militant groups did not move around.
33. The delegate also told the applicant that he had concerns about the applicant’s evidence that for six to seven years he was able to keep a low profile by only visiting his home area at night and in secret yet was able to engage in public election campaigning which he claimed then brought him to the attention of armed militant groups. He stated that he not only campaigned in his home area but that he also did his in the LTTE controlled area and it was because he organised the campaigns in both in his home and nearby areas that he became known to the militant groups as the main person.
34. I have considered the applicant’s evidence in response to the delegate’s concerns; however I find the applicant’s evidence regarding his activities in support of TULF to be vague and unconvincing. The details of his claimed activities are also inherently incompatible with his claims that he would enter and leave his home area discreetly to ensure he did not come to the attention of the militant groups. I do not accept as plausible, the applicant’s explanation that in order to avoid the militant groups he undertook the activities at night.
35. The delegate also sought to clarify with the applicant his motivation for supporting TULF. The applicant stated that TULF was contesting the elections back then and as he was an LTTE sympathiser he supported TULF. He stated it is a political party and he should have a right to support a political party and that through his support the political party could achieve things for people. He stated he had suffered a lot of hard times and so had many people in his area and by supporting TULF they could achieve something. He stated it was a way for people with political problems to raise their voice and that TULF would also try to rescue people who were arrested.
36. The applicant said he had not kept in contact with TULF since his arrival in Australia. He stated he no longer wants to be involved in such activities now and has told his family not to have anything to do with them. The applicant was asked why after his arrival in Australia he had changed his opinion about supporting TULF. He stated when he was there he did things for them to ensure he had protection and he is safe now and he no longer wants to put himself in trouble. The delegate put to the applicant that his responses did not make sense as his claimed that the activities he undertook placed him in more danger not less. He stated the reason he joined the political party was to reduce the other militant groups’ strength.

37. I have considered the applicant's evidence regarding his motivation for supporting and undertaking the activities for TULF to be simplistic. Notably, the applicant was specifically asked was there anything he particularly liked about TULF's ideology or philosophies, he responded that they worked against other militant groups and that's what he liked about them. His overall responses to questions were relatively basic when considered against his claimed level of involvement. I find the applicant's evidence regarding his abandonment of his support to TULF since his arrival in Australia surprising when considered against his claims that he had previously supported TULF for at least eighteen years prior to his departure from Sri Lanka.
38. At the protection visa interview the applicant was able to provide the names of TULF candidates however I am not satisfied that his ability to articulate such details sufficiently remove my concerns regarding his ability to undertake his claimed activities while in hiding. It is not uncommon for people to know the names of candidates running in elections and the Members of Parliament for their local area without necessarily needing to have provided any tangible support to such individuals and/or their political parties.
39. In support of the applicant's claims two supporting documents have been provided. The first letter is signed by a Member of Parliament dated [in] July 2013, written in English and addressed "to whom it may concern". The signatory states that the applicant is "well known to me" and that his brother was abducted, and after this incident the applicant was subjected to "intimidation and threat to his life by unknown opponent groups". It provides no other details of the threats. The letter is dated prior to both protection visa applications but makes no mention of the applicant's political activism in support of the signatory or TULF. The second document is a Human Rights Commission of Sri Lanka complaint dated [in] May 2014, written in both Tamil and English and addressed to the applicant's wife. The complaint merely states that a complaint had been lodged. It is silent on the details of the complaint. I am not satisfied that either document provides credible support for the applicant's claims to be at risk of harm because of his claimed involvement with the TULF.
40. Having regard to the evidence as a whole, including the inconsistencies in evidence, the applicant's relatively basic responses to questions about his motivation and support to TULF, and the letters provided in support, I am satisfied these claims are not true. I do not accept the applicant was a supporter of TULF. I do not accept the applicant was involved in any activities for TULF. I do not accept the applicant was a member of TULF. I do not accept the applicant's father was a long term supporter of TULF. As a consequence, I do not accept the applicant's or his parent's home were visited by unidentified armed militant groups because of his support or his involvement in TULF or that the applicant was in hiding prior to his travel to Australia. I do not accept since his arrival in Australia the applicant's family home has been visited by unknown people and his whereabouts sought for any reason associated with the applicant's involvement in TULF activities. I am not satisfied the applicant faces a real chance of harm on this basis on his return to Sri Lanka now or in the reasonably foreseeable future.
41. The applicant claimed that in 1993 and 2008, he was arrested and detained by the Sri Lankan authorities on suspicion of his involvement with the LTTE and/or other groups. He claimed in 1993, when residing in Colombo he was detained for several days before being taken to a local court where he was questioned then released without charge. He claimed in 2008, he was travelling for work when he "rounded up" by the SLA. He was questioned and then taken to the police station where he was questioned further about his involvement in the LTTE and other political parties. He claimed that his political involvement was of particular interest to the men who had arrested him. He was released the next day after his wife contacted an MP

who she asked to assist to secure the applicant's release, although the applicant claimed he does not know whether the MP assisted in his release.

42. The information before the delegate indicates that many Tamils reported being monitored, harassed, arrested and/or detained by security forces under the Rajapaksa government. During the civil conflict, more Tamils were detained under emergency regulations and PTA than any other ethnic group. While this was primarily due to LTTE members and supporters being almost entirely Tamil, there were also likely instances of discrimination in the application of these laws, with LTTE support at times imputed on the basis of ethnicity.¹
43. I accept that in 1993, the applicant was arrested, questioned and detained for several days by the Sri Lankan authorities, before he was taken to the court, questioned and released without charge. I accept that in 2008, the applicant was "rounded up" by the SLA, questioned and detained overnight before being released. I am satisfied that in 2008, he was released without charge as he made no mention of attending a court, being charged or having any reporting requirements after his release.
44. I accept that the applicant's arrest, questioning and detention by the Sri Lankan authorities in 1993 and 2008 were on suspicion of his involvement in the LTTE. However, I refer to my findings above, I have not accepted the applicant was being watched by armed militant groups when he was residing in Colombo and nor have I accepted that the applicant was a support, member or involved in any activities for TULF; and it follows that I do not accept that when the applicant was arrested in 1993 it was because of his "involvement with... other militant groups"; and when the applicant was arrested in 2008 when questioned he provided details of his political involvement with TULF.
45. At the protection visa interview, the applicant claimed that during the civil conflict he gave meals to the LTTE. The applicant has not previously made mention of providing any assistance to the LTTE in his past interactions with the Department or in his two protection visa applications. I do not accept the applicant gave meals to the LTTE and I find that the applicant has included this in order to enhance his claims for protection. I am not satisfied the applicant had any involvement with the LTTE.
46. The applicant claimed that on return to Sri Lanka he will be harmed and/or mistreated by the Sri Lankan authorities because he is perceived to have been involved with the LTTE on the basis of his older brother's LTTE membership, his Tamil ethnicity and his past travel between LTTE and government controlled areas.
47. The information before the delegate indicates that the overall situation for Tamils in Sri Lanka has improved considerably since the applicant's departure from Sri Lanka. Tamils have a substantial level of political influence and their inclusion in political dialogue has increased since the Sirisena government came to power in 2015.² Under the Sirisena government, the monitoring and harassment of Tamils in day-to-day life has significantly decreased.³ The UNHCR, since 2012, no longer refers to a presumption of eligibility for protection simply on the grounds of Tamil ethnicity.⁴

¹ DFAT, "DFAT Country Information Report: Sri Lanka", 18 December 2015, CISEC96CF14143.

² Ibid.

³ DFAT, "DFAT Country Information Report: Sri Lanka", 18 December 2015, CISEC96CF14143 and DFAT, "DFAT Country Information Report: Sri Lanka", 24 January 2017, CISED850AD105.

⁴ UN High Commissioner for Refugees (UNHCR), "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183EA8.

48. I accept that as a Tamil, in the past the applicant has experienced a degree of discrimination however the most recent DFAT reporting states that there is no evidence of official laws or policies that discriminate based on ethnicity or language, including in the context of access to education, employment and housing.⁵
49. Country information indicates that the focus of the Sri Lankan government in power at the time of the applicant's departure⁶ and of the current Sri Lankan government is the prevention of the resurgence of the LTTE and any actions towards Tamil separatism.⁷ The UNHCR and the UK Home Office identify that it is persons suspected of certain links with the LTTE who may be in need of international refugee protection, depending on the individual circumstances of their case.⁸
50. I accept the applicant is a male Tamil from the Eastern Province of Sri Lanka. I accept that in 1993 and 2008, the applicant was arrested, detained and questioned by the Sri Lankan authorities on suspicion of his involvement with the LTTE. I accept on each occasion he was detained for a short period which was no longer than several days before being released without charge. I accept prior to the civil war ending the applicant travelled frequently between LTTE and government controlled areas.
51. The applicant's evidence is that in 2012, he departed Sri Lanka legally using his own passport and travelled to India for prayer. The applicant returned to Sri Lanka approximately fifteen days later. The applicant has made no mention of being stopped, questioned or detained by the Sri Lankan authorities. The country information before the delegate indicates that the Sri Lankan authorities collect and maintain a 'stop' and 'watch' electronic database and the names of those whom they consider to be of interest for both separatist and criminal activities can be added. I am satisfied that had the applicant been of continued interest to the Sri Lankan authorities, even on suspicion of his involvement with the LTTE, his name would have been added to this database and he would have been stopped at the airport.
52. I accept that the applicant's brother was a LTTE member. I accept the applicant is a Tamil male from a former LTTE controlled area who was arrested, questioned and detained during the war and that such consequence were because of his ethnicity and for the reasons given earlier, I am not satisfied that this familial association with the LTTE of itself gives rise to the applicant being imputed with a pro-LTTE opinion.
53. I accept there is credible evidence of serious harm being perpetrated against Tamils associated with, or perceived to be associated with, the LTTE by the Sri Lankan authorities in pre and post-war Sri Lanka.⁹ However, on the evidence before me, I am not satisfied the applicant has such a profile, nor would one be imputed to him on return. A considerable period has now passed since his brother has been declared dead. His experience of being arrested, questioned and detained was during the civil war which was also some time ago and as noted earlier I am not satisfied it indicates any ongoing interest in the applicant. I am not satisfied the applicant faces a real chance of serious harm on these bases.

⁵ DFAT, "DFAT Country Information Report: Sri Lanka", 18 December 2015, CISEC96CF14143 and DFAT, "DFAT Country Information Report: Sri Lanka", 24 January 2017, CISED50AD105.

⁶ UN High Commissioner for Refugees (UNHCR), "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183EA8.

⁷ UNB0183EA8 and UK Home Office, "Country Information and Guidance. Sri Lanka: Tamil separatism. Version 2.0", 19 May 2016, OGD7C848D17.

⁸ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183EA8 and UK Home Office, "Country Information and Guidance. Sri Lanka: Tamil separatism", 1 August 2014, CIS29809.

⁹ DFAT, "DFAT Country Information Report: Sri Lanka", 24 January 2017, CISED50AD105.

54. The applicant claimed to fear harm on return to Sri Lanka because he left illegally and has come to Australia and applied for asylum.
55. Upon arrival in Sri Lanka, returnees are processed en masse, and individuals cannot exit the airport until all returnees have been processed, which may take several hours due to administrative processes and staffing constraints at the airport.¹⁰
56. DFAT advice is that those returning to Sri Lanka are issued a temporary travel documents and are subject to police investigations to confirm the person's identity.¹¹ I accept, as a person returning on a temporary travel document, the applicant may be detained en masse with other returnees for processing on return. I accept as part of the processing the Sri Lankan authorities will acquire a history of the applicant's past. As discussed above, I have found that the applicant has no relevant profile as a Tamil with actual or perceived links to the LTTE or Tamil separatism. The applicant has no outstanding court orders, arrest warrants or a criminal or terrorist background. I am satisfied that it would be determined that the applicant has no adverse profile or other profile of interest.
57. DFAT and other sources considered by the delegate advise that returnees are treated according to the standard airport procedures, regardless of their ethnicity and religion and that they are not subject to mistreatment during processing.
58. The information indicates that the Sri Lankan authorities do not perceive former asylum seekers, even those that are Tamil, as being LTTE members or supporters on return; and I am not satisfied that having lived outside Sri Lanka for a considerable period, or seeking asylum in Australia there is a real chance that on return the Sri Lankan authorities would perceive the applicant to have an LTTE connection or other profile. Reports indicate that as the LTTE is now considered a spent force, the Sri Lankan government's objective has shifted to identifying activists in the Tamil diaspora who are working for Tamil separatism and to destabilise the Sri Lankan state.¹² On the evidence before me, I am satisfied the applicant has no such profile, nor would one be imputed to him on return.
59. I am not satisfied the applicant faces a real chance of serious harm as an asylum seeker and who is returning from Australia now or in the reasonably foreseeable future.
60. I accept that the applicant left illegally by boat. I accept on return the applicant may be charged under the *Immigration and Emigration Act 1988* (I&E Act) for departing Sri Lanka other than via an approved port of departure.
61. According to DFAT, returnees who have been charged under the I&E Act can remain in police custody at the airport for up to 24 hours after arrival and should a magistrate not be available before this time – for example, because of a weekend or public holiday – those charged may be held at a nearby prison. Information from DFAT does not indicate that detention is selectively applied to returnees, that returnees are processed in any discriminatory manner or that those who committed an offence under I&E Act, such as the applicant, face a higher risk of torture or other mistreatment.¹³

¹⁰ DFAT, "DFAT Country Information Report: Sri Lanka", 24 January 2017, CISED50AD105.

¹¹ Ibid.

¹² UK Home Office, "Country Information and Guidance. Sri Lanka: Tamil separatism. Version 2.0", 19 May 2016, OGD7C848D17.

¹³ DFAT, "DFAT Country Information Report: Sri Lanka", 24 January 2017, CISED50AD105.

62. I accept while being questioned and processed at the airport the applicant will face a brief period of detention. The information before me indicates there is a possibility he may be detained more than a day while awaiting an opportunity to appear before a magistrate. While I am satisfied that this would depend on the timing of his arrival, I find the chance of the applicant being detained for more than a brief period is remote, however I accept that if the applicant's detention did extend to more than a day that it may occur in a Sri Lankan prison.
63. Information before the delegate¹⁴ indicates that conditions in Sri Lankan prisons are poor due to economic and resourcing conditions and old infrastructure. The information indicates that any such detention would only continue until the applicant was given an opportunity to appear before a magistrate; and I am satisfied this period of time would likely be brief.
64. Penalties for persons who depart illegally can include imprisonment and a fine. According to the Sri Lankan Attorney-General's Department, returnees who were merely passengers on a people smuggling venture are fined on a discretionary basis, with fines payable by instalment.¹⁵ There is nothing before me to indicate that the applicant would be perceived and treated as anything other than a mere passenger on the people smuggling vessel, who DFAT assesses, the Sri Lankan authorities tend to view as victims.
65. Country information indicates if the applicant pleads guilty to departing illegally, he will be required to pay a fine (which he can do by instalment) and will subsequently be released. In most cases if a person pleads not guilty, they will be granted bail on their own personal surety immediately by the magistrate, or may be required to have a family member act as guarantor and wait for their family member to collect them. The applicant has not claimed and there is no evidence before me to indicate he would not be granted bail on his own personal surety or that he would not have a family member to act as guarantor if required. If bailed, there are rarely any conditions, and if there are, they are imposed on a discretionary basis. An accused will only need to return to court when the case against them is being heard, or if summonsed as a witness in a case against the organiser/facilitator of a boat venture. There is no general requirement to report to police or police stations between hearings.¹⁶
66. I am not satisfied the questioning, imposition of a fine and possible brief detention amounts to serious harm.
67. In addition, the information before me does not indicate that I&E Act is discriminatory on its terms, that it is applied in a discriminatory manner or that it is selectively enforced. Accordingly, I am satisfied that any investigation, prosecution and punishment of the applicant under the I&E Act would be a law of general application and would not amount to persecution for the purpose of ss.5H(1) and 5J(1) of the Act.
68. I am not satisfied the applicant faces a real chance of serious harm in Sri Lanka as a Tamil asylum seeker, who departed illegally and is returning from a Australia on his return to Sri Lanka now or in the reasonably foreseeable future.

Refugee: conclusion

69. The applicant does not meet the requirements of the definition of refugee in s.5H(1) of the Act. The applicant does not meet s.36(2)(a) of the Act.

¹⁴ US Department of State, "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320.

¹⁵ DFAT, "DFAT Country Information Report: Sri Lanka", 24 January 2017, CISED850AD105.

¹⁶ DFAT, "DFAT Country Information Report: Sri Lanka", 24 January 2017, CISED850AD105.

Complementary protection assessment

70. 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

71. 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.

72. As the applicant would be travelling to Sri Lanka as person who departed illegally (whether involuntary or otherwise) on a temporary travel document, I have accepted he may be detained en masse with other returnees for processing on return. I have found he has no adverse profile and would not face any additional detention or adverse treatment and after the processing is complete he will be cleared. I am satisfied that the brief detention and questioning, and imposition of a fine, related to the processing of his return would not constitute significant harm. I do not accept it would amount to the death penalty, or result in an arbitrary deprivation of life, or torture. Nor do I accept that it would constitute pain or suffering that could be considered cruel or inhuman in nature, severe pain or suffering or extreme humiliation. I am also not satisfied he faces a real risk of significant harm on return to Sri Lanka as a returnee, former asylum seeker, returnee from Australia or a person returning on a temporary travel document, or for any of the reasons claimed.

73. I have otherwise found the applicant does not otherwise face a real risk of significant harm by the Sri Lankan authorities or any armed militant group or person on return to Sri Lanka on the basis of his ethnicity, as a male Tamil from the Eastern Province of Sri Lanka, his residence in a former LTTE controlled area, his previous interactions with the Sri Lankan authorities, his brother past involvement with the LTTE, on the basis of any actual or imputed political opinion or profile, or as returning asylum seeker. Based on the same information, and for the reasons set out above, I am also not satisfied that there is a real risk that he would face significant harm for these reasons.

Complementary protection: conclusion

74. 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) of the Act.

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.