



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA17/02758

Date and time of decision: 20 December 2017 09:27:00
Susannah McNeill, 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) is a national of Sri Lanka. [In] October 2016 he lodged an application for a Safe Haven Enterprise visa (Protection Visa application). He claims to fear persecution from the Sri Lanka Freedom Party (SLFP) because he was a loyal supporter of the Tamil National Alliance (TNA).
2. [In] May 2017 a delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa. The delegate accepted the applicant was a member of the TNA but was not satisfied he had a well-founded fear of persecution because of any association with the TNA.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. On 30 June 2017 the IAA received a submission from the applicant via his representative along with two media articles. This submission mostly consists of argument as to why the delegate's decision was wrong and to that extent it may be considered as argument rather than information, which I have noted.
5. Within the submission the applicant has stated due to his profile he will not be able to set up a business again. The authorities will not allow him and for the same reason he will not be able to find work in Sri Lanka, he will suffer significant economic hardship that threatens his capacity to subsist. He also has no capacity to prove his innocence at trial because he will be denied access to basic services where his denial threatens his capacity to subsist and the denial of a capacity to earn a livelihood will threaten his capacity to subsist. I consider this claim he will not be able to set up a business again, find work in Sri Lanka and be denied basic services to be new claims and new information. I note from his Protection Visa (PV) application and evidence given at this PV interview the applicant has had a steady history of employment as [Occupation 1] employing others and establishing businesses in his hometown, Colombo and [Town 1]. The applicant stated in his statutory declaration (claims) dated [in] September 2016 that [in] September 2012 'although it was a huge financial loss to [him], he made the difficult decision of shutting [his] shop permanently as [he] was too afraid to return to work.' The delegate discussed his work history at his PV interview and his various claims. The applicant was asked a number of times during the interview if he had anything else he might wish to add. I am of the view the applicant was on notice, and had the opportunity to make these claims prior to the delegate's decision being made. That he did not do so calls into question the credibility of these new claims. No explanation has been provided as to why this information could not have been provided prior to the delegate's decision being made and no reasons have been given as to why it may be considered credible personal information. The applicant has not satisfied me that the requirements of s.473DD(b)(i) or s. 473DD(b)(ii) are met in relation to this country information. Furthermore, I am not satisfied there are exceptional circumstances to justify considering this information.
6. The two media articles received by the IAA from the applicant were not in the referred material. They are new information. The first article "SL forces continuing to operate with impunity: Sooka" is dated 14 March 2017. The second article "'Not safe' for asylum seekers to

return, says Wigneswaran' and includes a video is dated 5 October 2016. Both articles contain general country information and pre-date the delegate's decision. No explanation has been provided as to why the information could not have been provided prior to the decision being made or that why it may be considered credible personal information. The delegate considered a range of country information sources some of which contain similar information about the treatment of Tamils by Sri Lankan authorities including returning asylum seekers and the new information is not distinguishable from the information contained within his decision. The applicant has not satisfied me that the requirements of s.473DD(b)(i) or s. 473DD(b)(ii) are met in relation to these two articles. Taking everything into consideration, I am not satisfied that there are exceptional circumstances which would justify my consideration of this information.

Applicant's claims for protection

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

- He was born in [a village in] Amparai District, Eastern Province of Sri Lanka in [birth year].
- He is an ethnic Tamil and a Hindu and is married with [a number of] children. Prior to coming to Australia he worked as [Occupation 1] and had his own business.
- He fled Sri Lanka because he received threats against his life from the SLFP.
- He was a loyal supporter of the TNA from 2006, helping them with their campaigns. He attended meetings or speeches set up by the TNA and implored those who attended to support the TNA (usually [a number of] people). The SLFP would come and interrupt these meetings.
- Sometimes he would give speeches at such meetings to tell people to support the TNA. People would come to him and ask him for help if they needed help from the TNA (financial assistance) and he would pass these messages on to the TNA leaders.
- Because of his TNA support he was harassed by what he strongly suspects is the Karuna paramilitary group. On one occasion they took him and threatened to harm him if he did not give money. He obliged with this request.
- He is [a senior] of his local temple. As he had a good reputation and was influential in his village the ruling SLFP perceived him as a threat. Men have approached him demanding he stop supporting the TNA.
- He assisted with organising the election campaign starting in April 2012. He supported the TNA candidate in his electorate by giving speeches to the public.
- During the three months he was once beaten by the SLFP while at the temple. The SLFP came to his home when he was not there and entered his house forcefully shoving his mother to the ground.
- On two separate occasions men he believes were sent by SLFP came to his [house] and attacked it. On the first occasion they broke into his house and took information on his ID. He was not at home on both occasions.
- After the election concluded (8 September 2012) he continued to receive threats. [In] September 2012 a group of men came and attacked his house for the third time. He fled his home and has not returned since. He went to hide in his shop in [Town 1] (Northern Province.)

- Soon after men with guns came to his shop while he was not there and demanded his employees to tell them his whereabouts. Too frightened to speak his employees said nothing. This angered the men who then beat them up. He left straight away and [in] September 2012 he closed his shop permanently causing him huge financial loss.
- Afterwards he hid at a friend's house. A few days after men told his wife that if she did not pay them [an amount], they would kill him. They asked her where he was and verbally abused her. This happened two times more whilst he was in hiding.
- He did not seek police protection as they would provide information to the SLFP.
- A friend introduced him to a smuggler and he [paid] to leave by boat [in] October [2012].
- Between November 2012 until January 2013 men came to his house on several occasions to threaten his wife about his whereabouts. They stopped when they found out he had left the country.
- He fears harm because he left Sri Lanka illegally, because of his Tamil ethnicity and his public support for the TNA.

Refugee assessment

8. 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

9. 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.
10. There is no issue as to the nationality of the applicant. I accept that the applicant is a national of Sri Lanka and that Sri Lanka is the receiving country for the purpose of this review.

Member and supporter of the TNA

11. The applicant claimed to fear harm because of his support and membership of the TNA. Included with his PV application, the applicant provided a certified copy of his SL Federal Party [Ampara] District membership card and translation. The card is in the applicant's name, includes his Permanent Membership number and National ID number, his addresses and is signed by both him and the President. In his claims, the applicant explained that his political ID card states that he is a member of the Federal Party not the TNA but the Federal Party joined with other minor parties to form the TNA and the TNA was predominantly formed by the Federal Party. There were also three letters, one from his wife, one from a member of the [local government] and the other a [judicial officer].
12. The letter from his wife dated [in] November 2012 declares her husband's profession is that of [Occupation 1]. The letter does not state anything with regards to her husband's problems as a result of his support or membership of the TNA, only that when he worked in [Town 1] 'he was facing lot of tortures and harassments from other's due money transitions working conditions from [goods] to [goods]'; that he received 'warnings from the enemies over the telephones in the night' and had to leave Sri Lanka. The applicant did not claim to have problems due to money transitions and his [business] and I give this letter no weight. The second letter from the member of the [local government] states the applicant has for the past 10 years been a member of the Illanka Tamil Arasu [Kadchichi] (a reference to ITAK the name under which the TNA contested the 2015 election).¹ The third letter from the [judicial officer] again confirms the applicant is a [Occupation 1] and this letter is more of a character reference and makes no mention of the applicant's political affiliations or his claims. I am unable to test the veracity of these letters; however, given they do not confirm the central elements of his claims, that he fears harm as a TNA member or supporter, I give them no weight to them as corroboration of the claimed harm.
13. At his PV interview [in] May 2017 the applicant said he became [an official] of his temple in 2006 and he did it until 2012 when he had problems, not that he stopped but he was scared and had to live in hiding and then leave the country. The delegate pointed out that he had said in his arrival interval that he had been temple [official] from 1996 until 2006 and he was now saying 2006 until 2012. The applicant responded he didn't know but the truth was he was there from 2006 until 2012. In 1997 he was only [age] years old and he would have had no chance of becoming a temple [official] at that young age. He commenced his relationship with the TNA in 2006.
14. The applicant said he joined the TNA because he was a temple [official] and he wanted to do some good for the village. [A number of] people would attend the temple depending on the days of worship and there were about [a number of] families in his village, on average there were [a number of] members in each family. Asked about the TNA, the applicant said they were the only group to represent the Tamils and they gave a lot towards the temple, he could depend on them as a political party.
15. Asked when the TNA formed, the applicant said they came from the Tamil Arasu, which had been there forever, the original party. The delegate asked the applicant multiple times the names of the groups in the TNA alliance. At first the applicant said they were all Tamil groups. Initially there were other marginal groups but they had left. Finally the applicant stated the LTTE, Karuna Group, EPDP, ENDLF, PLOT were all groups representing the Tamil factions but most of them had been annihilated; Karuna was the only one remaining but most had moved away from the group.

¹ Department of Foreign Affairs and Trade (DFAT), "Country information Report Sri Lanka", 24 January 2017, CISED50AD105, 2.23.

16. He worked as an organiser for the TNA organising meetings and he also received help from the TNA and gave it to other groups in need including struggling families. He was able to negotiate with the TNA to ensure aid was given to those in need. Asked who he campaigned for or whether he ever campaigned, the applicant said he was able to mediate on behalf of groups that came to the temple not strong enough to advocate for themselves and he would advocate on their behalf. He would speak to the Member of Parliament (MP) [who] was the conduit through which aid came through. It was a mutual arrangement in return he would ask for help getting votes from the people in the village. The applicant himself had never stood for an election but he had helped. [The MP] lost his seat in the 2012 parliamentary election and after that he didn't know what happened after that.
17. Asked what the worst harm he experienced as a result of his work with the TNA was, the applicant said he wasn't assaulted but they came to his house and harassed him and after that he couldn't stay home. They beat his mother and damaged his house. Asked when they attacked his mother and house, the applicant said they knocked at his door, his mother went to open the door and with the force they entered the doorway his mother got thrown out and injured. They had come in search of him but he wasn't there. Asked why they were looking for him, he said he didn't know but he was in [Town 1] at the time. Asked when it was, the applicant said it could have been July or August 2012.
18. The delegate told the applicant there had been a significant decrease in political violence in Sri Lanka in recent years demonstration by the Presidential and parliamentary elections of 2015, the TNA was now the ruling party in the Northern Province and shared power in the Eastern Province. The TNA had won 16 seats in the national parliament and the TNA leader was leader of the opposition; given the power now wielded by the TNA why would a low level organiser be at risk of harm now. The applicant stated he had heard of a person from [another country coming] to Sri Lanka who had been attacked by unknown groups. He had been attacked and his [shop] destroyed and the same group had gone to see his wife after he left. Asked who these people were, the applicant said it could have been the SLFP people. They asked where he was and said they would kill him if they saw him, they also went to [Town 1] looking for him but he wasn't there. They went to see his wife about three to four times. The first time they visited his wife was [in] September 2012 the time of the elections and the last time was after he came to Australia in 2012. His wife was too scared to report it to the police and to report that people came after him. He didn't want to live elsewhere in Sri Lanka; the only language he knew was Tamil.
19. [In] January 2013 the applicant participated in an "arrival entry" (arrival) interview. I note a number of inconsistencies between this interview and information given in his PV application, claims and PV interview. The applicant said in his arrival interview that he spoke Sinhalese as well as Tamil. In giving the reasons why he left Sri Lanka, the applicant explained that he had respect in his village, he was supporting the TNA and telling people in his village to vote for them and because of this the opposition parties started 'torturing him'. [In] July they took him from his house [where] and beat him up and told him to tell the people to vote for their party. After the election finished on September 13th he went to Colombo to buy [goods], he returned to his village [later in] September and there was a meeting at the temple [later in] September about [temple matters] and an unidentified man came to his house. He went to a function after the meeting and his wife rang him scared telling him not to return home but stay at a friend's. They had already [vandalized his house] and beaten up his mother. The SLFP or the governing party did this.
20. Asked about his political involvement, the applicant said he became a member of the TNA in 2003. He would help bring chairs or put up posters and set up the stage for meetings to

happen. He would buy things if the asked. He was also the [an official] at this temple. He had been [an official] from 1997 until 2006 and even since then he had been assisting. The responsibilities were handled by someone else as he had to go to [Town 1] regularly but he was still the [senior official]. Asked whether the police, security or intelligence impacted on his day to day life, the applicant responded 'yes', they would come looking for him at his house and ask about him. The applicant otherwise provided consistent information in relation to his work as [Occupation 1].

21. Having regard to the evidence presented by the applicant, I am of the view he has substantially embellished his position and profile within his village as a respected [official] and person of influence, the assistance he gave to the TNA and I am of the view the applicant has fabricated his claims of persecution. There are a number of inconsistencies which I consider significant and fatal to his claims. I am willing to accept the applicant is a member of the TNA and former SLFP (Federal Party), being of Tamil ethnicity it is natural he would support a party that represented Tamil interests. In this respect I give some weight to his party membership card. The applicant has been inconsistent as to when he became a member of the TNA 2003 (arrival interview) and 2006 (PV interview). The applicant did not display a spontaneous understanding of the TNA's composition or background although I consider his responses were more a lack of knowledge rather than anything contrived. Whilst I accept his actual membership and connection to the TNA I am not so persuaded by his claims of past harm.
22. The applicant clearly stated in his arrival interview that he had the role of temple [official] from 1997 and this role continued until his departure except from 2006 when he handed over the responsibilities because of work obligations but maintained his title. From listening to the recording it can be understood the applicant said he was still [an official] up until the time he left Sri Lanka. However it can also be clearly understood in his arrival interview, that the applicant stated he held the position from 1997 which is in sharp contrast to his precise statement at his PV interview that in 1997 he would have been too young to hold the position of temple [official]. Given this conflicting evidence I consider the applicant has exaggerated his importance within his own community. The applicant left Sri Lanka in October 2012 at the age of [age] years, even if he became temple [official] in 2006 as he stated in his PV interview he would only have been [age] years old. It is plausible that the applicant had an involvement in the temple but I am not convinced it was a [senior] role. I am not satisfied he would be considered a threat by the opposition ruling party or SLFP.
23. Another discrepancy is the varying answers he has provided in relation to his being beaten by SLFP supporters. In his arrival interview they came to his house [in] July and beat him up. In his claims he stated in the three months before the election (8 September 2012) the SLFP once beat him up at temple, they came to his home once while he was not at home, entered his house forcefully shoving his mother to the ground (this would have been [June] 2012). At his PV interview when asked if he had ever been harmed because of helping the TNA, the applicant unequivocally stated he wasn't assaulted but they came to his house and harassed him.
24. At his arrival interview he stated in relation to the incident [in] September he was not at home when an unidentified man came to his house; he was at a meeting at a temple and his wife called to warn him was the reason he was compelled to not return to his house. In his claims, they came to his house three times, the first two times he was not at home but on the third time, it was on or about [a date in] September 2012 (a [duration] after the 8th September election) they came to his house, this time he was there but he fled and had not returned since. At his PV interview they came to his house but he was in [Town 1]; stating rather indecisively 'it could have been July or August 2012.' The inconsistencies given as to when

(early June or [July]) and where he was beaten up (temple or his home) or not at all, in my opinion, undermines the applicant's credibility.

25. I also find it far-fetched that his alleged persecutor whose party had already won the election would increase their threats against him after the election was over (claims) and would pursue him with such vigour. I also find it rather implausible that despite being pursued so many times both a home and at work the applicant has either managed to escape, was absent on business or at the temple and forewarned so as to avoid all his attacks.
26. The applicant also made no mention in his arrival interview of the beating up of his employees at his shop in [Town 1] which as he later stated frightened him so much he left straight away. It also seems rather implausible that he would leave his employees in control of his shop when they had just been beaten up (as per his claims). The applicant stated he sold his business and shut his shop permanently at a huge financial loss in his claims but then at this PV interview, he stated they destroyed his [shop] (a new claim).
27. Lastly, I note the applicant has provided varying evidence in relation to his attackers coming to his house and threatening his wife after his departure from Sri Lanka. In his claims the applicant said during November 2012 and January 2013 they came to his house several times but at his PV interview he said the last time they came to his house looking for him was only in 2012.
28. I am not satisfied the applicant is a dependable witness; the applicant has been unable to provide a coherent and consistent account of the claimed attacks against him by the SLFP. The applicant's contradictions surrounding these events belie the credibility of his evidence. Whilst I accept the applicant was a member of the TNA and may have on a limited scale provided some support to the TNA I am not satisfied he was ever considered a threat by the SLFP and I do not accept that he was ever harassed, beaten, threatened or extorted for money as claimed. I am also not satisfied his mother was harmed or even that she was thrown to the ground when intruders forced their way into his house, or that his employees were harmed or that his shop was destroyed in any way or that his wife has been visited on several occasions since his departure and they attempted to extort [an amount] for her otherwise they would kill him. I am of the view the applicant made a conscious decision to travel to Australia and deliberately wound down his business.
29. I have accepted the applicant supports the TNA and is a likely to be a member despite the differing dates given as to when he joined. I also share the same view as the delegate having considered the country information in the referred material that there has been a significant decrease in political violence in Sri Lanka with the elections of 2015. The presidential election of 9 January 2015 which saw Maithripala Sirisena elected and the 17 August 2015 general parliamentary election was considered 'fair and free' and undertaken in a democratic atmosphere.² The Report on election related violence in Sri Lanka on the 2015 elections noted there were 148 major incidents compared to 232 in the 2010 parliamentary elections and 279 major incidents surrounding the 2015 presidential election a decrease from 2010 when there were 366 incidents. No incidents of violence or intimidation were recorded in the applicant's place or origin and there is no indication that TNA members were specifically targeted more than other political party members or supporters.³ The Australian Department of Foreign Affairs and Trade (DFAT) Sri-Lanka Country information report of 2017 noted there was a historically high voter turnout of 81.5 per cent. Sirisena resigned from President Rajapaksa's

² Centre for Monitoring Election Violence, "Parliamentary General Election 2015 – Final Report on Election Related Violence", 11 February 2016, CIS38A8012508

³ Ibid p. 43.

cabinet thus dividing the SLFP into two factions, the Rajapaksa faction and Srisena faction; a strong Tamil vote was significant to Srisena's victory.⁴ DFAT also stated the 17 August 2015 was deemed credible by international and domestic election observers. Of the divided SLFP factions, the United Front for Good Governance (UNFGG), a coalition of parties including the Sirisena SLFP faction, won the majority of the seats. Former President Rajapaksa's party won the United People's Freedom Alliance (including his SLFP faction) won 95 seats. The TNA (contesting as the Ilankai Thamil Arsu Kachi (ITAK) won 16 seats. TNA Leader leader Rajavaroatham Sampanthan was appointed Opposition Leader.⁵ The TNA currently holds the majority of seats in the Northern Provincial Council and the Chief Minister is a prominent Tamil leader.⁶

30. Symbolic changes have also contributed to a more positive outlook for reconciliation. The 2015 Independence Day ceremony was attended by Tamil National Alliance (TNA) leaders for the first time since 1972 and President Sirisena delivered a trilingual Declaration for Peace in Sinhala, Tamil and English, paying respect to all victims who had lost their lives during the civil conflict (a significant step toward acknowledging losses on both sides).⁷ There is no country information in the referred material to suggest that ordinary members and supporters of the TNA are currently being targeted. I am not satisfied the applicant has a well-founded fear of persecution if he were to return to Sri Lanka on account of his past association with TNA including his membership of the SL Federal Party and his ongoing support for them.

Fear of harm based on Tamil ethnicity

31. The applicant claimed to fear harm because of his Tamil background and said that despite the change in government there is still a lot of harassment to Tamils. DFAT states the overall situation for Tamils in Sri Lanka has improved markedly since the end of the conflict in 2009. The security situation in the north and east has improved dramatically since the end of conflict, with greater freedom of movement and a reduction of the military's involvement in civilian life.⁸ Military checkpoints on major roads leading to the north and east were removed in 2015 and there are no restrictions on travelling to the north and east. DFAT advises that monitoring and harassment of Tamils in day-to-day life has decreased significantly under the Sirisena Government.⁹ Members of the Tamil community have also described a positive shift in the nature of interactions with authorities; they feel able to question the motives of, or object to, monitoring or observation activities.¹⁰
32. I note the Sri Lanka Constitution provides that no citizen should be discriminated against on the grounds of their race, religion or language; despite this, ethnicity along with communal issues surrounding language and religion is still a source of division in Sri-Lanka.¹¹ Positive developments are taking place in Sri Lanka to lessen these issues. In 2012, the Trilingual Policy was introduced, which provides the right to communicate in Sinhala, Tamil or English throughout Sri Lanka.¹² Monolingual Tamil speakers, including in the Northern Province, can have difficulty communicating with the police, military and other government authorities. DFAT assesses that these practical difficulties are the result of a lack of qualified language

⁴ DFAT, "Country information Report Sri Lanka", 24 January 2017, CISED50AD105, 2.22.

⁵ Ibid 2.23.

⁶ Ibid 2.25.

⁷ Ibid 2.30.

⁸ Ibid 2.39.

⁹ Ibid 3.9.

¹⁰ Ibid.

¹¹ Ibid 3.1.

¹² Ibid 3.3.

teachers, the disruption to civilian life caused by the conflict, and the legacy of earlier discriminatory language policies rather than official discrimination.¹³

33. DFAT assesses that Sri Lankans of all backgrounds generally have a low risk of experiencing official discrimination as there are currently no official laws or policies that discriminate on the basis of ethnicity, including in relation to access to education, employment or access to housing. However, DFAT further assesses that societal discrimination on the basis of ethnicity can occur but it doesn't specify discrimination against ordinary Tamils.¹⁴ Tamils have a substantial level of political influence and their inclusion in political dialogue has increased since Sirisena came to power in 2015. There are a number of Tamil political parties including, with the largest coalition of parties operating under the Tamil National Alliance (TNA).¹⁵
34. Based on this evidence, and having regard to my earlier findings as to the applicant's profile, I am not satisfied the applicant faces a real chance of any harm because of his Tamil ethnicity.

Returning Tamil asylum seeker who departed Sri Lanka illegally

35. The applicant claimed to fear harm having left the country illegally by boat [in] October 2012. The applicant provided the same information in both his arrival interview and PV application with regards to his departure from Sri Lanka and I accept that he departed Sri Lanka on a boat without a valid passport. The applicant claimed he will be detained for an unknown period of time if they found out how he left as he knew a number of others who this happened to. He was also scared because of his Tamil background and his public support for the TNA would put him at great risk of harm while being detained. Additionally upon his release he will be required to sign in at the police station on a monthly basis where he would be extorted. At his PV interview said he believed that on his return to Sri Lanka he would be attacked, a few weeks ago people had returned and after the airport they had disappeared. A Tamil MP [has] said it was not safe to return and asylum seekers had no protection.
36. Under the Sri Lankan Immigrants and Emigrants Act 1949 (the I&E Act) it is an offence to depart other than via an approved port of departure.¹⁶ I accept that if the applicant was returned to Sri Lanka from Australia, he would be considered a returning asylum seeker who left Sri Lanka illegally. Having regard to the country information in the referred material, I am not satisfied there is a real chance the applicant would be harmed by the Sri Lanka authorities because his return as a failed asylum seeker. Thousands of asylum seekers have returned to Sri Lanka since 2009, including from Australia, the US, Canada, the UK and other European countries, with relatively few allegations of torture or mistreatment.¹⁷ Whilst I note there are reports in the referred material of returning Tamils being arrested and in some cases there have been allegations of torture not long after returning, those arrested present as having a strong profile with either previous LTTE involvement or strong links and include former LTTE members who may have undergone rehabilitation or those who have protested against the Sri Lanka government whilst overseas.¹⁸ There are no reports of TNA supporters or members being specifically targeted on return. I am not satisfied the applicant faces a real chance of

¹³ Ibid 3.7.

¹⁴ Ibid 3.4.

¹⁵ Ibid 3.6.

¹⁶ Ibid 5.17.

¹⁷ Ibid 4.22.

¹⁸ "16 Batticaloa Tamils arrested within last 100 days at Colombo airport", Tamil net, 3 May 2015, CXBD6A0DE6027; "Another Tamil returnee arrested", Sri Lanka Mirror, 1 July 2015, CXBD6A0DE16698; "10 Tamils arriving in Lanka arrested", Sri Lanka Mirror, 4 March 2015, CXBD6A0DE6065; Freedom from Torture, "Sri Lanka - Update on torture since 2009", 6 May 2016, CIS38A8012881.

harm due to being a failed asylum seeker or a failed Tamil asylum seeker or a public supporter of the TNA now or in the reasonably foreseeable future if he returns to Sri Lanka.

37. The DFAT Report indicates returnees are processed by the Department of Immigration and Emigration (DOIE), the State Intelligence Service (SIS) and CID and their identities are checked against various databases including for criminal and security matters. Processing returnees can sometimes take several hours including interviews.¹⁹ I am satisfied on the information before me that applicant has no relevant profile, identity concerns, or otherwise that would raise the concern of the authorities.
38. The applicant may be charged under the I&E Act because he departed illegally. DFAT understands that in most cases individuals will be arrested at the airport, they will be fingerprinted and photographed; those arrested can remain up to 24 hours in custody at the IDC office at the airport. Returnees are then transported by police to the closest Magistrates Court where a magistrate will make a determination. If a magistrate is not available a returnee might be held on remain at a nearby prison for a few days.²⁰
39. Penalties include a custodial sentence or a fine of up to 200, 000 Sri Lanka rupees (AU\$2000) which can be paid in instalments.²¹ DFAT assesses ordinary passengers on a people smuggling venture are generally viewed as victims and no returnee who was merely a passenger has ever been given a custodial sentence.²² Those who plead guilty are fined and then free to go. If the applicant pleads not guilty he is likely to be granted bail on the basis of a personal surety or have a family member act as a guarantor. He may have to wait for a family member comes to court to collect him and there are rarely any conditions imposed on bail. There is no requirement to report to the police between hearings.²³ I do not consider the applicant would be required to report regularly to his local police station and as such, I am satisfied that he is not at risk of harm in those circumstances including any threats of extortion from the police. I accept that on his return the applicant will be interviewed and may brought before a magistrate, and he may be detained for a limited period of time whilst waiting for a magistrate. I accept there is a real chance that the applicant will be fined but that this fine can be paid off in instalments and that he will then be released or if he pleads not guilty he may be detained for a brief period of time until one of his family members collects him. Section 5J(5)(a) refers to a threat to a person's liberty as an instance of serious harm; however, the Australian courts has determined that whether a risk of a loss of liberty constitutes serious harm requires a qualitative judgement, including an evaluation of the nature and gravity of the loss of liberty.²⁴
40. Whilst I note prison conditions in Sri Lanka do not meet international standards because of a lack of resources, overcrowding and poor sanitary conditions²⁵, I am of the view any questioning and detention the applicant may experience would be brief and would not in this case constitute serious harm. I also find the imposition of a fine, surety or guarantee does not of itself constitute serious harm.
41. In addition, I am also satisfied that the provisions and penalties of the I&E Act are laws of general application that apply to all Sri Lankans equally. The law is not discriminatory on its

¹⁹ DFAT, "Country information Report Sri Lanka", 24 January 2017, CISED50AD105, 5.17.

²⁰ Ibid 5.21.

²¹ Ibid 5.22 and 5.26.

²² Ibid 5.22.

²³ Ibid.

²⁴ *MIBP v WZAPN; WZARV v MIBP* [2015] 320 ALR 467; see also *SZTEQ v MIBP* (2015)

²⁵ DFAT, "Country information Report Sri Lanka", 24 January 2017, CISED50AD105, 4.25.

terms, nor does the country information indicate that the law is applied in a discriminatory manner or enforced selectively.

42. Having regard to the applicant's claims individually and cumulatively, I find that he does not have a well-founded fear of persecution within the meaning of s.5J.

Refugee: conclusion

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

Complementary protection assessment

44. A criterion for a protection visa is that the applicant is a non-citizen in Australia (other than a person who is a refugee) in respect of whom the Minister (or Reviewer) is satisfied Australia has protection obligations because there are substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm.

Real risk of significant harm

45. Under s.36(2A), a person will suffer 'significant harm' if:

- the person will be arbitrarily deprived of his or her life
- the death penalty will be carried out on the person
- the person will be subjected to torture
- the person will be subjected to cruel or inhuman treatment or punishment, or
- the person will be subjected to degrading treatment or punishment.

46. As set out above, I have found there is not a real chance that the applicant faces harm now or in the reasonably foreseeable future because of his membership and support of the TNA and/or the SL Federal Party and his Tamil ethnicity arising from his circumstances as already outlined. I have similarly found he does not face a real chance of harm as a Tamil asylum seeker. Based on the same information and for the reasons outlined above, I am also not satisfied that there is a real risk that he would face significant harm for those reasons.

47. I have accepted he will be returning to Sri Lanka having departed illegally. I have found that as a returnee he would be subject to an interviewing process whilst security, criminal and identity checks are undertaken by the authorities. I have found they he might be remanded in custody for a brief period at the airport or at a prison before he is brought before a magistrate, that he is likely to be fined or that a surety or guarantee may be imposed on him. I have found the applicant does not to have any specific profile that would warrant a longer detention, custodial sentence or further interrogation. Whilst prison conditions in Sri Lanka are overcrowded, with poor sanitary conditions and under resourced, this is more as a result of circumstances rather than the intention of the authorities who are working to address these issues. I am also not satisfied the treatment and penalties to which the applicant may be subject, including a fine and a short period in detention, means there is a real risk the applicant will be subject to the death penalty or will be arbitrarily deprived of his life or will face torture. Nor am I satisfied

that there is any intention to inflict severe pain or suffering, pain or suffering or to cause extreme humiliation. I am not satisfied the applicant faces a real risk of cruel or inhuman treatment or punishment or degrading treatment or punishment.

Complementary protection: conclusion

48. 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.