



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA17/03326

Date and time of decision: 6 March 2018 14:57:00
Matthew Currie, 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 Sri Lanka citizen of Tamil ethnicity. He arrived in Australia in November 2012. In March 2016 the applicant lodged an application for a safe haven enterprise visa (SHEV). In August 2017 a delegate of the Minister for Immigration and Border Protection refused to grant the visa on the grounds that Australia did not owe protection obligations to the applicant. On 7 August 2017 the matter was referred to the Immigration Assessment Authority (IAA).

Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
3. A migration agent acting as the applicant's representative sent the IAA two emails on 26 August 2017. Each of these emails contained a range of attached documents and the emails themselves contained argument about the delegate's decision.
4. The emails contained a legal submission written by the applicant's representative and a statutory declaration prepared by the applicant. The submission contained argument against the findings of the delegate. I have had regard to the argument in the body of the emails submission in this decision.
5. The statutory declaration made by the applicant presented a range of new claims that had not been previously articulated. These claims principally related to service with and work for the LTTE whilst in Sri Lanka which he had previously denied. The new claims substantially expand the applicant's claims for protection in Australia. They are new information. The new claims about his service with the LTTE can be summarised as follows:
 - that whilst he was a [age] student at high school he commenced working as an intelligence officer for the LTTE providing information about Sri Lankan army movements to the old TTE that he underwent approximately 10 days of training in [Town 1] and that he used that the LTTE name '[name]'.
 - That he would meet his LTTE controller regularly and pass on relevant intelligence information to him at that time, occasionally he would carry items through military checkpoints on behalf of the LTTE.
 - That his arrest in 1998, which he had previously articulated was related to suspicion arising from his Tamil ethnicity and from his presence in the North was in fact related to his LTTE service.
 - That he had a national identity card, a claim he had previously denied, but that he habitually used false documents provided by the LTTE, in order for him to act as an intelligent agent in territory occupied by the Sri Lankan army.
 - That after he was released from prison in March 2000 he re-joined the LTTE and spent the next seven years between 2000 and 2007 working as an intelligence operative for the LTTE and that during this period he received training on how to use firearms and that he was given a cyanide capsule so that he could kill himself rather than be captured by the army.

- That contrary to his earlier claims, in January 2007 he had knowingly participated in attack against a Sri Lankan military checkpoint resulting in the death of one soldier and that after the incident he went into hiding at the house of a friend and then fled to India.
 - Part of his duties was to drive an LTTE internal security agent (an assassin) who was responsible for killing members of the Sri Lankan security forces, and LTTE members who were thought to be disloyal. He had driven the assassin previously to a number of killings, including the attempted assassination of a CID officer and the killing of other members of the Sri Lankan security forces.
 - That he is aware that one of his former LTTE colleagues [Colleague 1], is known to have surrendered to the Sri Lankan authorities at the end of the war and is still missing, the applicant presumes that [Colleague 1] has informed against him, and so it would be unsafe to return to Sri Lanka.
6. These claims are substantially different from earlier claims articulated by the applicant. Previously he had maintained that he had no role with the LTTE though he had known members of the organisation through his work as a [driver]. All of these claims are new information. These new claims relate to events in the applicant's own life which occurred between 1995 and 2007. I observe that this new information is at considerable variance to his earlier claims articulated in his 2013 Arrival interview, his March 2016 SHEV application, his September 2016 protection visa interview or in post interview Statutory Declaration of 2016.
 7. By way of explanation the applicant has claimed that he did not feel able to present this information previously because he was scared of the repercussions of admitting his links to the LTTE. He feared he might be detained as a terrorist by the Australian authorities and sent back to Sri Lanka and that Australian authorities would inform the Sri Lankan authorities about his work for the LTTE, resulting in detention and torture. Though he had assistance in preparing his 2016 SHEV application from another legal advisor (not his current adviser) he claims that advisor did not probe his links to the LTTE in sufficient depth.
 8. In the legal submission the applicant's representative also put forward several arguments for acceptance of the applicant's revised claims, firstly that Australia's *non-refoulement* obligations are invoked by the new information; and secondly that the information was not, and could not have been submitted before the Minister made a decision under s.65 of the Act, as the applicant faced an inordinate fear that if he disclosed the full extent of his LTTE involvement as an intelligence operative he would be deemed a terrorist, face prolonged detention and be deported to Sri Lanka and surrendered to the authorities.
 9. I have considered the applicant's explanations for his changing narrative and he has not satisfied me that he is telling the truth about these events. I note that before his entry interview in 2013 and before his 2016 protection visa interview the applicant was advised by the Australian authorities of his obligations to tell the truth and to put all his chain his claims fully before the delegate. The applicant acknowledged these requirements at the time of the interviews.
 10. Included in his submission to the IAA, the applicant has provided a character reference by the CEO of Friends of Refugees, a Sydney based refugee advocacy group. The reference outlines the volunteer work the applicant has done for the organisation, and very briefly offers support for the applicant's new claims about the LTTE and advocates that the IAA should consider the new information. However, the reference also indicates that the applicant only provided the information about his links to the LTTE to the CEO after the date of the delegate's decision to

refuse to grant the visa. Given that the information about the applicant's LTTE links was provided to the CEO after the decision and it comes from the same source (the applicant) I do not consider that it corroborates the applicant's revised claims or is probative of them. Noting these factors, and the documents principle purpose of offering a character reference for the applicant based upon his activities since arriving in Australia, I do not consider this character reference to be relevant to the applicant's claims.

11. The applicant claims that he trusted his former adviser and as evidence of his trust had informed him about his personal circumstances and about treatment he received at the hands of the Sri Lankan authorities during his period of detention in 1998 (outlined further below). I accept that discussing his mistreatment with his agent may have been distressing and personally difficult for the applicant. However, I am not satisfied that the applicant, given the trust reposed in his former legal advisor, would not have advised him fully about the links to the LTTE if they were true. I conclude the applicant did not inform his former legal advisor about his LTTE links because they did not exist and that the applicant has fabricated this account in order to enhance his claims for protection in Australia and to undermine the factual basis for the delegate's decision not to grant him a Visa. Given this finding I am not satisfied that the new information is credible or that either limb of s.473DD is met. I am unable to consider this new information.
12. The emails also contained two other documents which related to the disappearance of approximately 100 members of LTTE who surrendered to the Sri Lankan authorities on 18 May 2009. The first was a 2015 report by the International Truth and Justice Project, and the second was a list of missing former LTTE members last seen in the custody of the Sri Lankan authorities. Given that the first report relates to a specific group of former LTTE members (of which the applicant was not a member) I am not satisfied that this document has any relevance to the applicant's claims.
13. I note the second document (the list) refers to a LTTE member known as [Colleague 1], who the applicant now asserts was a colleague. I have concluded above that the applicant's new claims about his work for the LTTE, including that relating to [Colleague 1] are fabricated and as such I am not satisfied that the document is relevant to the applicant's claims for protection.

Applicant's claims for protection

14. The applicant's claims can be summarised as follows:
 - The applicant is a Sri Lankan citizen of Tamil ethnicity who was boring on [date] in Kilinochchi, Northern Province Sri Lanka.
 - As a child he lived in Kilinochchi. He moved to [City 1] in order to continue his education. Whilst in [City 1] he lived with family friends.
 - In 1998 the applicant was detained under the auspices of the Prevention of Terrorism Act (PTA) by the Sri Lankan authorities on suspicion of being an LTTE member. He was taken to [a camp] in [City 1] where he was severely tortured. Later he was taken to a gaol in Colombo.
 - He confessed to membership of the LTTE under duress. In early 2000 he was brought before a magistrate who found that his confession had been coerced through torture, and he was released in March 2000. The LTTE paid for his lawyer.

- He returned to [City 1] and worked as a [driver] between 2000 and 2007. In late 2006 he was driving a member of the LTTE as a fare, when they approached a checkpoint manned by two members of the SLA. As they approached the checkpoint the LTTE man [withdrew] a weapon and fired upon the two soldiers at the checkpoint. The other soldier fired back at the vehicle damaging it. The applicant sped away.
- He returned the LTTE member to where he had dropped him off and then took the vehicle to a workshop for repair. After repairs were completed he returned the vehicle to the [owner], and went into hiding at a friend's house.
- Shortly thereafter he fled to India, living there between 2007 and 2012 when he departed for Australia.
- The applicant fears that if returned to Sri Lanka, he would be identified by the Sri Lankan authorities, detained, tortured and killed for his involvement in the incident of late 2006.

Factual findings

15. Since his arrival in Australia the applicant has provided Australian authorities with a number of documents purporting to explain his identity. These documents include a birth certificate (with certified translation) and several documents related to his education. There are several minor discrepancies in the applicant's details in these documents, but I ascribe these to transliteration errors. These documents establish the applicant's identity to my satisfaction. I accept that the applicant was born on [date] in Kilinochchi, Northern Province, Sri Lanka. I also accept his claim to be a Sri Lankan citizen. For the purposes of this assessment I find that his receiving country is Sri Lanka.
16. As a small child the applicant lived in Kilinochchi with his family. Later he moved to [City 1] in order to study, living with friends of his mother. As evidence of his residence and study in [City 1], the applicant has provided copies of several documents from various schools. These documents confirmed that the applicant studied until 1994 in Kilinochchi, and from 1995 he was enrolled in a school in [City 1]. I accept the applicant's claims about his schooling, and that he lived in [City 1] from 1995.
17. The applicant claims that in 1998 he was arrested by the Sri Lankan authorities. He was detained in [a camp] in [City 1] and was accused of being a member of the LTTE. He claims his imputed membership arose from his Tamil ethnicity, his habitual residence in the Northern Province and that he was in [City 1] without his family. Whilst at the camp, the applicant claims that he was severely tortured over several months and has provided detailed accounts of this torture. He was coerced into signing a confession. The confession was in Sinhalese and he did not understand it. Later he was taken to several different gaols, one in near Colombo. In early 2000, the applicant was brought before a magistrate. The magistrate found that the evidence against the applicant was weak, and that his confession had been coerced under duress. He ordered the applicant to be released. The applicant was released in March 2000.
18. As evidence of these claims the applicant has offered a letter from the International Committee of the Red Cross (the Red Cross) dated [April] 2000. The letter indicates that the applicant was visited by the Red Cross on three occasions whilst in detention at several camps between November 1998 and [March] 2000. The document notes that the applicant had been detained [in] November 1998, and was released [in] March 2000. The document indicates that the applicant had spent time in prisons in [City 1], Kalutara District (near Colombo) and [District 1]. The applicant has also provided a copy of a 20 page Sri Lankan Court transcript. This

document is not in English, but the applicant has provided what is described as a three page translation into English of six pages of the court document which was prepared by an accredited translator. The translated document presents a summary of the findings of a Sri Lankan High Court Judge. The judgement indicates that the applicant was detained in 1998 and charged for breaches of the Prevention of Terrorism Act (PTA). He signed a confession [in] December 1998. The judge conducted a preliminary enquiry about the circumstances of the applicant's detention and confession. He found that medical evidence supported the applicant's claims of being subjected to extreme torture during detention and that his confession had been signed under duress. The judgement concludes by rejecting the confession as evidence. Having considered this material, I accept the applicant's claim to have been detained in November 1998, tortured and coerced into confessing involvement with the LTTE. I also accept that after a court hearing the applicant was released.

19. After his release the applicant returned to [City 1]. He commenced work as a [driver], driving [around] [City 1] for a man called [name deleted]. He worked in this role between his release (March 2000) and his departure for India in January 2007. During this period, the applicant would occasionally come into contact with members of the LTTE. Much of this period was covered by the ceasefire between the LTTE and the Government, and the LTTE maintained an office in [City 1]. The applicant would regularly pick up [clients] from the LTTE office, and became friendly with them. As he had been detained and tortured by the authorities for his presumed LTTE sympathies, the applicant was treated sympathetically by members of the LTTE and he became friendly with them.
20. [In] January 2007 the applicant accepted a [client] in [City 1]. The applicant recognised the man as an LTTE member, as he had previously picked him up from the LTTE office in the town. En-route, the applicant came upon a newly emplaced security checkpoint manned by two members of the Sri Lankan army. As he began to slow down for the checkpoint his passenger became agitated. As they got closer the applicant saw him withdraw a previously concealed firearm, and commenced shooting at the soldiers, hitting one of them. Frightened, the applicant turned his vehicle around, and drove away at speed. The remaining soldier fired shots at the applicant's retreating vehicle hitting it several times. The applicant returned the LTTE man to where he had picked him up, and then took the vehicle to a workshop he trusted and had the damage to the vehicle repaired. He returned the vehicle to the owner [and] stopped driving. At the time the applicant lived in a room rented from the [owner].
21. [In] January 2007 while he was in his room, he heard some men talking to the [owner] about the [vehicle] he had been driving. The men were plain clothed, but he formed the view that the men were members of the Sri Lankan Police Criminal Investigation Division (CID). He claims that he overheard the [owner] informing the men that he (the applicant) had been driving the [vehicle]. The applicant decided that he had to escape, and he fled out the back of the house. He claims that during his escape he heard gunshots, and he assumes that the CID men were firing at him. He went to the nearby home of a friend ([Friend 1]) and hid there for three days. [Friend 1] informed him of another family he knew who had made arrangements to flee to India in February. [Friend 1] arranged for the applicant to travel with the family, during the interim period the applicant stayed in hiding in the homes of several other friends. [In] February 2007, the applicant left Sri Lanka for India by boat via the western township of [Town 2] in the company of the other family. He pretended to be the brother of a member of the other family. The applicant lived in India between February 2007 and his travel to Australia in October 2012 and registered their as a refugee. Whilst there the applicant used the fake name [in] order to blend in with the family and to hide his true identity. He worked [in] India.

22. As evidence of these claims the applicant has provided a number of refugee documents from India which he asserts support his claims to have lived in India. This evidence is somewhat problematic. As the applicant claims to have used a fake name whilst in India, none of these documents are in his true name and, since the documents are not translated into English, I cannot identify his pseudonym in the documents. I give little weight to these documents. Nevertheless, having heard all of the applicant's testimony about his time in India and noting the detailed explanation of his account, I am prepared to accept that the applicant lived in India as a refugee between February 2007 and October 2013 when he departed for Australia.
23. None of the documentation provided by the applicant evidences his claims about the incident of [January] 2007. At interview the delegate attempted to explore this incident in some detail but the applicant's account remained rudimentary; though I accept that an event, such as that described by the applicant would be highly stressful. Despite my doubts, I note that when asked specific questions, the applicant was able to provide extra detail and did not appear to introduce inconsistencies into the account when doing so. I am willing to accept that an event, like the one described by the applicant occurred. I am also willing to accept that after such an incident the applicant would have been frightened of the repercussions because of his earlier period of detention and torture and would have taken steps to cover up his involvement in the incident, such as having the vehicle repaired, returning it to its owner and to go into hiding. I conclude that as the driver of a vehicle in an incident like this this, he may have been of interest to the Sri Lankan authorities around this time.
24. Whilst I am willing to accept the applicant's participation in this incident, I note that by his own account the shooting was spontaneous, was instigated because of the positioning of a new checkpoint at short notice which neither the applicant nor his passenger was aware of, and was not premeditated. The applicant's role as the driver during the incident was unwitting. He was not a member of the LTTE.
25. The applicant's account about the events of [January] 2007 is unsupported by the documentation he has provided. However, having found that the shooting incident occurred five days earlier, I am willing to accept that there was follow up action by the CID in the days following the incident. I accept that this would include questioning the owner of the [vehicle]. But I am troubled by the applicant's account of the visit by the CID to the home of his employer (where he rented a room). I find that it is vague, and relies upon detail I consider to be dubious and unpersuasive. Notably I find that the applicant's description of overhearing the CID question his employer, and being able to escape through the back door of the house while the police shot at him to be unconvincing. I am not satisfied that this incident occurred and I conclude that the applicant invented it to add weight to his narrative and enhance his claims of protection in Australia. Nevertheless, I am willing to accept that as the driver of a vehicle involved in a shooting incident, he may have been of some interest to the Sri Lankan police at this time and that he departed Sri Lanka because he feared the consequences of his involvement in the incident.
26. After his arrival in India, the applicant lived with the family in a refugee camp. In October 2012 he came to Australia by boat. The applicant claims to have departed India for Australia because he feared that the Indian authorities, who he knew to work closely with Sri Lankan security forces would return him to Sri Lanka, since he thinks that the former President (Rajapaska) was placing pressure on India to return Tamil refugees. The applicant did not advise his real family of his departure to India, and had no contact with them whilst he was there. After he arrived in Australia, the applicant re-established contact with his real family. At the time, he found out that his real family had been displaced at the end of the war, and had spent time in a displaced persons camp before returning to Kilinochchi and that his mother had

reported him missing to the Red Cross in 2011. After connecting with his family, they told him that the Sri Lankan authorities continued to look for him, and had regularly visited the family home to find him, most recently in November 2015.

27. As evidence of these claims, the applicant has presented a letter from the Red Cross which indicates that he was reported missing [in] January 2011. I accept that this letter is genuine and indicates that his mother reported him to be missing in 2011, but I do not find that the letter is probative of the applicant's claims for protection; rather that he did not have any contact with his family while he lived in India. He has also provided several documents, including some from the UNHCR document dated [November] 2010 indicating that his mother, father and siblings had received assistance from the UNHCR in Kilinochchi at this time. These documents also record that the applicant was absent. I am willing to accept that the applicant's family, who lived in Kilinochchi were displaced after the war as general country information records that thousands of Tamils in war torn northern Sri Lanka underwent similar experiences. However, as I have already accepted that the applicant was in India at this time, I do not accept that his parent's displacement has any bearing on his claims for protection.

Refugee assessment

28. 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

29. 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.

Tamil ethnicity, habitual residence in the north and LTTE

30. The applicant's representative submitted a post interview submission to the department in which it was put forward that UNHCR guidelines published in 2012, and a range of other material in the submission indicated that the applicant would still be at risk because of his unique combination of circumstances and would he would suffer from serious harm if returned

to Sri Lanka. Similar arguments were restated in submissions to the IAA. I have had regards to these arguments in my considerations.

31. Country information before me does indicate that the authorities in Sri Lanka remain sensitive the re-emergence of the LTTE and other post war separatist activities¹. The Department of Foreign Affairs and Trade reports that those persons who may remain of security interest to the Sri Lankan Government are persons who were high profile former LTTE members (i.e. leaders of the organisation or those suspected to have committed terrorist or serious criminal acts during the conflict or to have provided weapons), or low profile former members (i.e. former combatants, administrative staff or other persons who provided non-military support) who have not undergone rehabilitation². I note that the UK home office's March 2017 assessment of Tamil Separatism found that being a person who evidences past membership or connection to the LTTE, would not of itself warrant international protection³.
32. The applicant's claim of ongoing government interest is not supported by any of the documentation he has submitted as evidence of his claim. Noting the recent country information above, I am not persuaded by the claim put forward by his representative. I note that over 10 years have passed since the incident of January 2007 and almost 20 years since he was detained in 1998. During the intervening period the applicant had been out of the country for more than a decade and he has not engaged in any pro-Tamil advocacy or separatist activities. The war in Sri Lanka ended in May 2009 and credible recent reporting indicates that the LTTE is no longer exists as an organised force in Sri Lanka⁴. Former members of the LTTE have generally been rehabilitated back into Sri Lankan society, with only a very small number of persons still under detention⁵. Given the passage of time, I am not satisfied that the applicant, who had limited participation in a single incident in 2007 would still be of interest to authorities in Sri Lanka. I conclude he has fabricated his claims about ongoing interest from the Sri Lankan security force in order to enhance his claims for protection in Australia.
33. Prior to his 2007 departure for India, the applicant lived in the Northern Province of Sri Lanka for his entire life. His claims revolve around his presence in the north of Sri Lanka, and his imputed LTTE links whilst there. The majority of Tamils in Sri Lanka live in the Northern and Eastern Provinces in what were historically Tamil Lands⁶. Throughout the conflict the Northern Province was principally under the control of the LTTE. Around 2006 when the final phase of the war commenced, the Government started to reoccupy land in the Northern Province, including area around where the applicant resided.
34. Areas in the Northern Province which were contested by LTTE faced significant disruption and destruction as they were fought over during the war. However, recent country information has indicated that the security situation in Sri Lanka has greatly improved across the whole country⁷. The situation in the Tamil provinces is reported as having improved dramatically since the end of the war⁸. Whilst there remains a significant security presence in Eastern and Northern Provinces, this has been described as largely idle and recent reports suggest that Tamils have a greater freedom of movement and a reduction of military involvement in their

¹ Department of Foreign Affairs & Trade (DFAT) "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105, 3.29 &

² DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105, 3.38 – 3.42

³ UK Home Office, "Country Policy and Information Note. Sri Lanka: Tamil separatism. Version 4.0", 31 March 2017, OG6E7028822 3.1.2 – 3.1.3

⁴ DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105, 3.31.

⁵ DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105, 3.49.

⁶ DFAT, "DFAT Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105 3.5.

⁷ DFAT, "DFAT Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105, 2.37

⁸ DFAT, "DFAT Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105, 2.39.

lives⁹. As of 2017, DFAT assess that the level of Government intrusion into the lives of the Tamil community has fallen; that military units are generally restricted to Barracks and that significant progress towards reconciliation has been made by the Government including a relaxation of previous restrictions, the return of land controlled by the military, the release of former prisoners and the creation of Government bodies charged with a reconciliation mission¹⁰.

35. Tamils have a substantial level of political influence and their inclusion in political dialogue has increased since the election of President Sirisena in 2015. The Government has taken genuine steps towards a meaningful policy of reconciliation and that there have been significant improvements in the day to day lives of Tamils in Sri Lanka. Whilst members of the Tamil community may still face some practical difficulties in day to day life as a result of the civil war there are avenues available to address these issues including elected Tamil officials at the highest levels of Government¹¹. There are a number of Tamil political parties, with the largest coalition of parties operating under the umbrella of the Tamil National Alliance (TNA). The TNA currently has 16 members of parliament and holds the majority of seats in the Northern Provincial Council. The TNA leader, Rajavarthiam Sampanthan, is leader of the National Opposition¹². Former members of the LTTE are not prevented from engaging in public life and known former LTTE members ran as candidates in the last parliamentary election¹³.
36. In 2017, the most recent report from the UK Home Office has indicated that a person being of Tamil ethnicity would not in itself warrant international protection and that neither in general would a person who evidences past membership or connection to the LTTE unless they have or are perceived to have a significant role in relation to post-conflict Tamil separatism¹⁴. I do not consider that the applicant has had any such role. I am not satisfied that the applicant would face a real chance of harm arising from his Tamil ethnicity, his habitual residence in the north or his previously imputed links to the LTTE, or any combination of these factors, if returned to Sri Lanka.

Failed asylum seeker who departed illegally

37. Evidence before me indicates that 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 mistreatment¹⁵. DFAT has reported that upon arrival in Sri Lanka, returnees will be met by Sri Lankan Government officials in order to undergo immigration processing. This processing is principally aimed at determining the identity of the returned person. These procedures can take several hours, primarily due to the administrative processes, interview lengths, and staffing constraints at the airport. Returnees are processed en masse, and individuals cannot exit the airport until all returnees have been processed¹⁶. DFAT assesses that all returnees, regardless of their ethnicity or religion are treated according to these standard procedures, and that they are not subject to mistreatment during processing at the airport¹⁷.

⁹ DFAT, "DFAT Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105, 2.39.

¹⁰ DFAT, "DFAT Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105, 2.39 – 3.3, 3.8.

¹¹ DFAT, "DFAT Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105, 3.6.

¹² DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105, 3.6.

¹³ DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105, 3.30.

¹⁴ UK Home Office, "Country Policy and Information Note. Sri Lanka: Tamil separatism. Version 4.0", 31 March 2017, G6E7028822, Section 3.

¹⁵ DFAT, "DFAT Country Information Report: Sri Lanka", 24 January 2017, CISED50AD105, 4.22

¹⁶ DFAT, "DFAT Country Information Report: Sri Lanka", 24 January 2017, CISED50AD105, 5.19

¹⁷ DFAT, "DFAT Country Information Report: Sri Lanka", 24 January 2017, CISED50AD105, 5.20.

38. Approximately 6000 persons have returned from Tamil Nadu, India to Sri Lanka since the end of the conflict. DFAT assesses that, while the process of returning from Tamil Nadu to Sri Lanka can involve some administrative and lifestyle difficulties, there is no evidence to suggest that individuals would experience official or societal discrimination upon their return¹⁸. There is no evidence before me suggesting that persons with the applicant's profile would be of interest to the Sri Lankan authorities based upon his claim of asylum in Australia or his former residence in India.
39. The applicant has in his possession copies of his Sri Lankan birth certificate and other documents which confirm his identity. I am not satisfied that the applicant would face undue difficulties establishing his identity if returned to Sri Lanka, and the evidence before me does not indicate that he would face a real chance of harm as a returning Tamil asylum seeker.
40. The movement of persons into, and out of Sri Lanka is governed by the *Immigrants and Emigrants Act*. Returnees, who are suspected of breaches of the Act, such as for departing without going through immigration, may be subjected to penalties and, when identified, will likely be arrested and charged. If charged, most returnees will have their fingerprints taken and be photographed. At the earliest available opportunity after investigations are completed, the individual would be transported by police to the closest Magistrate's Court, after which custody and responsibility for the individual shifts to the courts or prison services. The Magistrate then makes a determination as to the next steps for each individual. Those who have been arrested can remain in police custody at the Criminal Investigation Department's Airport Office for up to 24 hours after arrival. 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 prison¹⁹. Conditions in Sri Lankan prisons are reported to be overcrowded and unsanitary. DFAT considers that these conditions are the result of a lack of resources.
41. The applicant departed Sri Lanka by boat without going through normal immigration checks. He has provided detailed accounts of his trip and his travel arrangements. I accept that he departed Sri Lanka illegally and that if returned to Sri Lanka the applicant would likely face charges arising from breaches of the *Immigrants and Emigrants Act*. According to the Sri Lankan Attorney-General's Department, which is responsible for the conduct of prosecutions, no returnee who was merely a passenger on a people smuggling venture had been given a custodial sentence for departing Sri Lanka illegally. However, fines had been issued to act as a deterrent towards departing illegally in the future. Fine amounts vary on a case-by-case basis and can be paid by instalment. If a person pleads guilty, they will be fined (which they can pay by instalment) and are then free to go. In most cases where a returnee pleads not guilty, returnees are immediately granted bail by the magistrate on the basis of personal surety or they may be required to have a family member act as guarantor. Where a guarantor is required, returnees may sometimes need to wait until a family member comes to court to collect them. There are rarely any conditions in relation to the bail, 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 people smuggling venture. There is no general requirement to report to police or police stations between hearings²⁰.
42. The evidence before me indicates that these processes have a general application to all returnees and are not applied by the Sri Lankan authorities in a discriminatory way. I am also

¹⁸ DFAT, "DFAT Country Information Report: Sri Lanka", 24 January 2017, CISED50AD105, 3.63

¹⁹ DFAT, "DFAT Country Information Report: Sri Lanka", 24 January 2017, CISED50AD105, 5.21

²⁰ DFAT, "DFAT Country Information Report: Sri Lanka", 24 January 2017, CISED50AD105, 5.22

not satisfied that any questioning, brief detention or the imposition of a fine for breaches of Sri Lankan immigration law arising from the application of the Immigrants and Emigrants Act amounts to serious harm. I am not satisfied the applicant face a real chance of persecution as a result.

Refugee: conclusion

43. Having considered all of the evidence before me and the applicant's cumulative profile, I am not satisfied that the applicant has a well-founded fear of persecution arising from his Tamil race; his being from the north; his adverse past with the Sri Lankan authorities; his status as a failed asylum seeker who departed illegally, or any combination of these factors if returned to Sri Lanka.
44. 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

45. 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

46. 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.
47. I have found that the applicant departed Sri Lanka illegally and that if returned will likely be charged for breaches of Sri Lankan immigration law. He will likely have a fine imposed upon him. He may also face several days of incarceration in conditions that are crowded and unsanitary. However, I note that DFAT has assessed that these conditions arise as a consequence of a lack of resources, and are not the result of discriminatory policy by Sri Lankan authorities.
48. On the evidence before me, I am not satisfied that the application of these processes will result in the applicant facing the death penalty, the arbitrary deprivation of his life or torture. I am also not satisfied that there is an intention to inflict pain or suffering, severe pain or suffering or to cause extreme humiliation. I am not satisfied that these processes amount to cruel, or inhuman or degrading treatment or punishment. I do not consider that the imposition of a fine, nor any detention served whilst undergoing judicial processes amount to significant harm.

49. I have otherwise found that the applicant would not face a real chance of any harm arising from his Tamil race; his being from the north; his adverse past with the Sri Lankan authorities; or his status as a failed asylum seeker, or any combination of these factors if returned to Sri Lanka. As 'real chance' and 'real risk' have been found to meet the same standard I am not satisfied that there is a real risk that the applicant would suffer a real risk of significant harm from any of these factors if returned to Sri Lanka.

Complementary protection: conclusion

50. 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.