



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA18/05303

Date and time of decision: 31 August 2018 17:31:00
M Anderton, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Tamil Hindu from [City 1]. He arrived in Australia on 6 September 2012 and on 18 October 2016 he lodged an application for a safe haven enterprise visa. On 9 July 2018 the delegate refused the visa application on the basis that the applicant could relocate to another area in Sri Lanka to avoid harm. The applicant's case centred around claims that he witnessed his brother in law being shot in 2007 and his fear of harm from CID, Karuna group and unknown persons who threatened and searched for him.

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) (the review material). However, I have not had regard to the refugee status determination interview audios which were provided by the Secretary to the IAA in error.
3. No further information has been obtained or received.

Applicant's claims for protection

4. The applicant's claims can be summarised as follows:
 - In his transferee ('arrival') interview conducted in Nauru on 5 October 2012 the applicant claimed that in 2006, the Karuna group detained him in a dark room and slapped him because he did not go to school or maybe because he did not join in the celebration of Heroes day. He also claimed he was detained by police for one day for being in the wrong area in 2011. He saw his brother in law shot in the head in 2007 at his garage. They also pointed the gun at his head and he ran away. The applicant's [sibling] put in a police report and CID asked him questions. On 19 April 2007, four people came to his home (when he was at his [sibling's] home), pointed a gun at his father's head, searched the house for the applicant. After that the applicant did not go outside and arranged to stay with a church pastor for three years, who told them not to contact the police. In 2010 on the way to temple, four people came with a pistol and asked where he was, so he quickly ran to his brother in law's house. The applicant came to Australia to save his life.
 - According to his original unsigned and undated statement provided to the department in November 2016, he is a young Tamil male from [City 1] who studied to year [grade] and completed his [grade] levels.
 - He is afraid he will be persecuted by the Karuna group or an unknown group who killed his brother in law.
 - The applicant witnessed the murder of his brother in law in 2007 and he believes the same group of people have continuously tried to track him down and harm him. The applicant went into hiding at a pastor's house for three years. The unknown group tracked him down. On one occasion the group visited the family home and pointed a gun to his father's head to reveal the applicant's location and raided the home. Following his departure to Australia, the same group visited his family home and threatened his mother. Once when he was out, the applicant saw the murderers and he

called CID. While he was waiting for CID, the persons received a phone call and they hurried away. The applicant believes that CID warned the murderers that the applicant had identified them.

- The applicant has interacted with the members of the LTTE group and they are able to identify him.
- The applicant's father was in the fisheries business and had links with the LTTE force and was a sympathiser and often supported them through payments and purchasing goods for them. Following the separation of the LTTE, the Karuna group continued to have connections with the applicant's father and brother in law. Although the father had connections he started to withdraw from providing support after the murder of the brother in law. Once the father was attacked by the Karuna group for refusing to provide money.
- Two of the applicant's cousins were high ranking LTTE and have resettled in the UK.
- The applicant believes they want to kill him to prevent him from making further disclosures about their identity to CID and police as he is the only witness to have seen the brother in law's murder and had made prior disclosures to them. He is also able to identify high ranking LTTE persons and his family has a history of association with rebel groups.
- In a later unsigned statement provided in March 2018 the applicant added he was working at the brother in law's garage. Two men approached the brother in law and discussed [vehicles]. The applicant briefly left the main garage area and when he returned saw he had been shot and the two men had left. He made a report to CID, who gave him a number to call if he saw them again.
- The applicant consulted a pastor in the area after two men approached the house looking for him. He was at his [sibling's] place at the time. They threatened his parents. The pastor advised him to move away, so he stayed at [a location] run by the pastor about three kilometres away from his house. He was advised not to make contact with CID or police as there was a real chance they were connected to the brother in law's killers. He stayed there about 2 years, stopped attending classes as he was scared but the pastor organised for him to attend his [exams]. He heard from his parents that the men still looked for him. When the pastor went to Colombo and met with an accident preventing his return, the applicant went to stay with his [sibling].
- In 2010 the applicant began to go outside more as he felt the men had lost interest in him. While at temple one night he received a missed call from his friend. The applicant looked down the road and saw that 2 men approached his friends. The friends had told the men that the applicant was at the church [location]. They went looking for him there. The applicant also heard from his parents that they came there looking for him that same night.
- Fearful, the applicant moved from [one place] to his [relative's] house and helped her with a retail business. He did not register his address. In a roundup of unregistered residents, he was arrested and detained for a night. He was repeatedly asked if he had LTTE connections and physically harmed, including an officer pinched his stomach. A village elder intervened and he was released. In 2011 following this incident the applicant left [the location] and stayed with [another relative] [for] 9- 10 months. Then they moved to [City 2] for 4 months. He was still scared to report his residency to police and decided to leave the country.

- In his protection interview the applicant added that his [sibling] had employed a lawyer to investigate the murder and there were warrants for him during the court case. The applicant provided supporting documents which included the brother in law's death and obituary and business registration documents, police report, pastor letter, mother's affidavit.
- In summary, the applicant feared harm from his brother in law's killers, unknown armed groups, Karuna group, unidentified men, and Sri Lankan authorities.

Factual findings

5. I accept the applicant is a Sri Lankan Tamil Hindu from [City 1] and that Sri Lanka is his "receiving country".

Early claims

6. In his arrival interview, in answer to a question about whether the police and security or intelligence organisations impacted on his day to day life in Sri Lanka, the applicant raised the 2006 detention by Karuna because he did not attend school and a one day police detention in 2011 for being in the wrong area. However, the applicant did not mention this in answer to the question as to why he left his country and did not mention it in his 2 statements or his protection interview, despite being given a number of opportunities to provide more information or claims. I accept that he may have been harassed by Karuna group (for not attending school) during the civil conflict period as harassment of Tamils during the conflict was not uncommon. I note the applicant also indicated in his arrival interview that there was now no Karuna group office operating in the area where he lived. I consider the 2006 event and any harassment during the conflict was remote in time and I do not accept that he faces harm in the future from Karuna or authorities in that regard.
7. Further, given the lack of detail about 2011 detention claim, that he did not mention he departed Sri Lanka for those reasons and did not continue to mention in subsequent statements or interview, I do not accept the applicant was detained in 2011.
8. For the following reasons I consider the applicant has fabricated the remainder of his claims.

2007 brother in law shooting, subsequent threats, in hiding

9. Firstly, the applicant's claims shifted and his account of the shooting and subsequent claimed visits by persons looking for him was vague and lacked details. For instance the applicant's first statement was vague and general, with no dates or even years that the claimed events occurred. Further, his account in his statements changed considerably from, at first fearing the Karuna group and an unknown group, to fearing harm from CID and authorities also due to corruption or links with the group. Further, while he stated he was the only witness to the murder, his later claims indicated he did not see the murder, but was at the same garage. Further, the applicant's claims in the first statement included that his father had LTTE connections and Karuna group or that the applicant had interacted with LTTE and he could identify high ranking LTTE members and they could identify him. However, the applicant did not make those claims in the second statement or at interview, despite being given many opportunities. Further, at the end of the protection interview, the applicant's representative submitted the applicant's case was not about LTTE connections or fear of harm due to LTTE connections. Further, his account of the incident was vague and lacked details. For instance,

he did not remember where in the body the brother in law was shot. I consider the applicant's claims lacked details and limited details have shifted considerably.

10. Secondly, having listened to the protection interview, I consider the applicant was making up his account as he went along and not recounting true events. For instance, towards the end of the interview the applicant added a claim that there was a court case and a warrant for him to appear in relation to the brother in law's death and that his family was blackmailed as well. However, he had not mentioned blackmail, warrant or a court case in his two prior statements. I consider that he added that in response to the delegate's concerns about why the applicant would appear on any database. The agent stated it was not a warrant, that it was a misnomer. The agent stated that the [sibling] hired a lawyer to commence civil action because the police were not investigating. However this was inconsistent with the 2008 police report which referred to further investigation being conducted and that 'magisterial and coronial enquiries were conducted'. Further, the applicant provided no evidence of a court case or warrant. I consider the applicant's and his agent's claims at the protection interview were confused, such that I consider the applicant was making up these claims as he went along.
11. Further, if the applicant's [sibling] had commenced such a case and there were repeated appearances (or warrants), then it is difficult to believe that the applicant would not have mentioned that in his statements or provided documentary evidence of that. Further, I consider that his [sibling] would have commenced a civil court case to investigate the case and agitate for its finalisation is at odds with the applicant claiming to be in fear of his life and in hiding at the same time.
12. In his statements and at the protection interview, the applicant claimed he saw one of the murderers in the street and phoned the CID from a phone booth to tell them. I consider his account lacked credibility. For instance, I consider that the applicant would happen to have the CID phone number with him and be able to find a phone booth nearby so that his friend could follow the murderer lacks credibility.
13. The applicant claimed to be hiding at the pastor's [location] for three years (which was only a few kilometres from his house) and later at the [sibling's] home and other relatives' homes, which were in the same area. The applicant claimed he stopped attending school after 5 days and later sat his [grade] levels with the assistance of the pastor. However, the school document provided indicated the applicant sat his school [grade] Levels examination in December [year], so he could have been found when he sat those exams.
14. Thirdly, I find it difficult to believe the applicant's claims that he was "in hiding" for five years before departing Sri Lanka, or that if armed groups and/or murderers wanted to kill him, that the applicant could not be found. Even more so, I find it difficult to believe that if the authorities were in collusion with the murderers that the applicant could not be found, given resources of authorities and the use of household and school registration. The pastor's house was close by. Further, I find it difficult to believe that even if he was staying at his [sibling's] house later that he could not be found, given [they were] a relative living close by.
15. Further, if the murderers were in collusion with CID I consider it is odd that they would not have approached the applicant immediately and warn him not to identify them. There was no need to wait until the applicant had phoned CID. If they were in collusion, the authorities knew the applicant's details when he was interviewed the day of the murder and next day. If they were in collusion with the murderers they would know who and where the applicant lived and could have found him straightaway or at school.

16. The agent submitted the information was trickled down to the operatives or murderers and they did not have the same resources as officials to find the applicant. However, given the applicant's claims these were murderers who were after him and had CID assistance, I do not accept the applicant could not have been found. Further, it is difficult to believe that the applicant's family would not have been severely harmed to find the applicant. I do not consider it is credible that such persons would continue to look for the applicant, know where his family, school and friends are and not be able to find the applicant, who lived with a priest a few kilometres away or do serious harm to others to find him. Further, it is not credible that CID (if corrupt as claimed) could not have found him and provided that information to the murderers over 5 years.
17. I have considered the 2008 police report provided. However it provides little detail and makes no mention of the applicant being a witness or present at the shooting death. Further, it notes that after investigation no information about the culprits was revealed. However, if the applicant was a witness to it, he could/would have provided a description. The report noted the incident was reported to the court [in April 2007]. However, I find this difficult to believe, as it would have been the day after the death. Further, while the report notes that magisterial and coronial enquiries were conducted, there was no evidence of such court documents or case. Further, I consider the wording of the document was odd. For instance it stated "the dead body was handed over". However, it is not recorded to whom or when the body was handed over, which is particularly odd, given it was a report dated more than a year after the death. Further, there were two different dates on the document ([date] and [date] May 2008). Further, it was odd that it was a report signed by the "headquarter police inspector" but written like a letter to the same "police station." Further, the report was not on any letterhead or on any official type paper. Given its anomalies and the prevalence of fraudulent documents, I place no weight on it.
18. I have considered the other documents provided by the applicant. However, there are a number of anomalies or inconsistencies in them.
19. I accept the business registration document indicated [someone] ran the business. The applicant claimed this was his brother in law and he was murdered. However, some of the other names on the death certificate and obituary documents provided did not match the other family names. The obituary document listed the family, including the deceased's parent's in-law ([names]). However, their names bore no resemblance to the applicant's parents' names. Further, the deceased's wife's name on the obituary document did not match any of the applicant's [siblings]names. Further, the name of the deceased's mother on the death certificate and obituary document were not the same. Further, item 13 on the death certificate, which should refer to the particulars of whom provided the information about the death did not appear at all in the death certificate.
20. The pastor letter is undated. The letter indicates the applicant worked at the [service] centre between 2007 and 2010. However, at the protection interview, the applicant stated he only worked there for 5 days during his school holidays. It states the owner was attacked and killed by an unidentified armed group and the applicant was continuously terrorised at his home at gunpoint by the armed group. However, the applicant did not claim he was continuously terrorised at gun point at home. Rather, he claimed a gun was put to his father's head on one occasion. Further, the applicant did not claim that the group found or saw him at home. Further, the letter does not mention that the owner was the applicant's brother in law. It is also odd that it makes no mention that the applicant resided with the pastor or his [church location] for three years as claimed. The letter states the applicant told the pastor that he went in search of a shelter for his own safety. It makes no mention that the applicant

lived with the pastor (or at his [location]) for 3 years. Given the applicant claimed he acted on the advice of the pastor and did not engage with police any longer and stayed with him for three years in hiding, it is particularly odd that the pastor did not mention these key factors.

21. The applicant's mother's affidavit is general and lacks details. It states the applicant was working at [a] company and there was a shooting incident by unknown people [in] April 2007 and since then the applicant has been threatened and living in hiding. It is odd that it does not mention that anyone was killed or that the person killed was the applicant's brother in law or that the applicant was working for the brother in-law. I find it particularly odd that this was not mentioned given the claimed author of the affidavit would have been the mother in law of the deceased person. Further, the date of the shooting incident is different to that claimed by the applicant ([date] April 2007 or [date] April 2007 in arrival interview). While it mentions that the applicant had been living in hiding in fear of his life, it did not mention that he lived with the pastor. Further, there was no identity documentation provided to confirm that the affidavit was from the applicant's mother.
22. Given the anomalies on the obituary and death certificate, and problems outlined above with the applicant's evidence, I do not accept it corroborates the applicant's brother in law was killed. Further, having considered the anomalies and inconsistencies of the above documents and the prevalence of fraudulent documents and the applicant's vague, inconsistent and poor evidence, I place no weight on the documents and I consider the applicant is not a credible witness.
23. I do not accept the applicant witnessed a shooting death or that his brother in law was killed or that he was in hiding or that he was threatened by unknown men or armed groups, and/or Karuna. I do not accept that the authorities colluded with the murderers, armed group or unknown persons. I do not accept the applicant was of interest to anyone. I do not accept that anyone was looking or continues to look for the applicant or visited his family's home or friends.

LTTE, rebel groups and Karuna association claims

24. In his first statement, the applicant claimed his father was LTTE and continued his association with the Karuna group and that two of his cousins were high ranking LTTE and resettled in [another country]. He also claimed that he was able to identify high ranking LTTE persons and his family had a history of association with rebel groups. However, the applicant provided almost no details about these claims. Further, he was given many opportunities at the protection interview to provide information and any other claims not raised. The applicant continued to say he had raised all his claims. He did not mention claims that his family was connected to the LTTE or Karuna group. Further, his agent submitted at length at interview that the applicant's case was different and he was not making claims of LTTE connections, but only claims in relation to fear of harm from the operatives or murderers of his brother in-law and being found by virtue of CID or police corruption or collusion.
25. Further, there was no evidence that the applicant or his family were rounded up and sent to rehabilitation camps. The country information indicates that the authorities sent thousands of people with any connection or suspected LTTE link to rehabilitation camps. I consider that none of the applicant's family or applicant were so sent is strong evidence that they were not members of the LTTE, rebel groups, high ranking LTTE, provided supplies to the LTTE or connected to the LTTE.

26. I do not accept the applicant's father, cousins or the applicant had LTTE connections, were LTTE sympathisers, provided support or that they can identify LTTE members or could be identified by LTTE. I do not accept the applicant is or was suspected LTTE or with LTTE connections.
27. Further, I consider his claim that his father was connected to the Karuna group is at odds with the applicant's claim that he feared the Karuna group and they were looking for him. Further, the applicant's claims lacked any detail about the claimed connection to Karuna group, rebel groups or LTTE. I consider if he had such connections, the applicant could have provided more information about these, as there was plenty of opportunity to do so at interview, by his agent and in post interview correspondence. I do not accept the applicant's father was threatened at gunpoint, attacked for refusing to pay money, or the family home raided by Karuna, authorities, unknown groups or anyone.
28. I consider the applicant has fabricated his claims in their entirety.

Refugee assessment

29. 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

30. 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.
31. As discussed above, I have not accepted the majority of the applicant's claims. While I accepted that he may have been stopped and held for ID checks and harassed or for being in the wrong area during the civil conflict or not attending school, I do not accept that he faces any harm upon return in that regard as the events were remote in time and in the context of the civil conflict.
32. While the applicant has not specifically claimed fear of harm on the basis of ethnicity, illegal departure or failed asylum seeker, I consider that those claims arise on the material as he has

claimed he left the country by boat and sought asylum and feared danger upon his return. I note the delegate did not deal with these issues, but focussed on relocation. I have therefore considered the applicant as a young Tamil male from [City 1], and an illegal departee who will return as a failed asylum seeker.

33. I accept at least until the end of the civil war in 2009 that Sri Lankan citizens of Tamil ethnicity suffered disproportionately at the hands of the Sri Lankan authorities, particularly in North and East areas. I accept there are continuing detentions and torture against Tamils, who may be suspected LTTE or criminals, even since the end of the war.
34. I am mindful of the information that people with significant links to the LTTE may still face a real chance of harm, if returned to Sri Lanka. I have not accepted the applicant or his family have any LTTE links or suspected of same. I have not accepted that the applicant knows any high ranking LTTE or can identify any of them. I consider the applicant has fabricated these claims. I do not accept the applicant has an LTTE or anti-government profile or an LTTE imputed political opinion.
35. I have not accepted that the applicant witnessed his brother in law's death or anyone's death or that he is wanted by Karuna, armed groups, authorities or anyone. I am satisfied that the applicant does not have any criminal charges, warrants for his arrest, and is not suspected of being anti-government or involved in or interested in Tamil separatism or reviving the conflict or that he had any connection to or association with LTTE.
36. Based on current information I do not accept that the applicant faces a real chance of being detained or coming to authorities' or anyone else's attention as I do not accept he has an LTTE, anti-government profile or links or an imputed political opinion as an LTTE supporter.
37. I do not consider the applicant faces a real chance of any discrimination or other harm. The security and humanitarian situation in Sri Lanka has greatly improved since the end of the war. The DFAT report before me indicates that the overall situation for Tamils in Sri Lanka has improved since the end of the civil conflict in 2009. Country information in the review material indicates there have been significant improvements in the security situation in the North and the East since the end of the conflict.
38. DFAT assesses surveillance of Tamils in the north and east continues, particularly those associated with politically sensitive issues, but the monitoring of Tamils in day to day life has decreased significantly under the Sirisena government. However, I do not consider the applicant is or will be associated with politically sensitive issues. Further, some members of the Tamil community have described a positive shift in the nature of the interactions with authorities, including feeling able to question their motives or object to monitoring.
39. While the government had reportedly decreased systematic surveillance of returnees, I have considered information that DFAT is aware of anecdotal evidence of regular visits and calls by CID to some failed asylum seekers in the north in 2017. However, as discussed above, I have not accepted the applicant has any profile that might be of interest to authorities or that CID, police or anyone has visited his family. Further, the applicant is from the East, not the North. For the reasons below, I do not accept he faces a real chance of harm as a returning asylum seeker.
40. UNHCR eligibility guidelines also confirm due to the improved human rights and security situation there was no longer a need for group based protection mechanisms or for the presumption of eligibility for Sri Lankans of Tamil ethnicity. Based on the country information,

I find the applicant does not face a real chance of suffering harm on account of ethnicity or as a young Tamil male from [City 1].

41. I do not accept the applicant faces a real chance of harm on the bases claimed.

Failed Asylum seeker

42. I accept that if the applicant returns to Sri Lanka, he would do so as a failed asylum seeker. I note the information in the DFAT reports that thousands of Tamils have been returned to Sri Lanka since the end of the Sri Lankan civil war, including from Australia, and claimed asylum. Although there have been reported instances of returnees being harmed, the information before me suggests those were people with substantial links to the LTTE or outstanding warrants and I have not accepted that the applicant or any of his family has such a profile.
43. I note while the government has decreased systematic surveillance of returnees, DFAT is aware of anecdotal evidence of regular visits and calls by CID to failed asylum seekers in the North. UNHCR survey reported 49 percent of returnees in the north received a visit. I note the applicant is from Eastern province, not Northern Province. Further, he has no other profile and I am not satisfied there is a real chance he faces such a visit. In any event, I do not accept that such a visit amounts to harm or serious harm.
44. While not claimed specifically, I have considered country information about social stigma for returnees or asylum seekers as people resent the financial support provided to refugee returnees. I consider the applicant has been educated to [grade] levels, and he confirmed he assisted with work at a relative's retail business. Given his education, previous work and the support of his family in Sri Lanka, I do not accept he faces a real chance of harm as a returnee or asylum seeker. I am not satisfied that he faces a real chance of social stigma as a returnee. Further, and in any event, I do not accept social stigma amounts to serious harm.
45. Having regard to the country information in the review material and in particular in the DFAT reports, I am not satisfied there is a real chance the applicant would be harmed by the Sri Lankan authorities or otherwise because he applied for asylum in Australia.

Illegal departure

46. I accept the applicant departed Sri Lanka without a passport and therefore illegally. For that reason, he has committed an offence under Immigrants and Emigrants Act ("IAEA") and faces questioning at the airport and may be charged and fined. The country information before me indicates that all returnees are treated the same regardless of their ethnicity and religion and the laws are not applied in a way that is discriminatory or selectively enforced against a particular group of those returnees. I do not accept that Tamils are treated differently. Further, the country information is that they are not subjected to mistreatment during processing at the airport.
47. Country information is that bail is usually granted to returnees. While facilitators and organisers of people smuggling venture can be charged under s45C of the IAEA and are not usually released on bail, there is no evidence or claim that the applicant is of that profile. I find the applicant will be released on bail.
48. Country information is that a guilty plea attracts a fine of LKR 3000 (approximately \$25AUD) for a first offence to LKR 200,000 (AUD\$1670). As this is a first offence, I find that it is highly likely the fine will be at the lower end. Country information is that if a guilty plea is made, they are free to go and the fine can be paid by instalments.

49. If they plead not guilty, bail is granted immediately on the basis of personal surety or guarantee by a family member. If a guarantor is required, returnees may need to wait for the guarantor come to court.
50. I consider the chance of the applicant being required to have a family member act as guarantor is remote. In any event, I do not consider the applicant would not have family member able to provide surety as his parents and siblings live in Sri Lanka and he is in contact with them. I do not accept he faces any harm if he is required to travel to attend court appearances in the future.
51. While there are reports of arrests and torture they were known as former LTTE members. As discussed above, I do not accept the applicant or his family have an LTTE or anti-government profile. I do not accept the authorities have any adverse interest in him. I do not accept that the applicant has an LTTE or anti-government profile or is of any interest to authorities now or upon return in the foreseeable future.
52. Based on the country information and the applicant's circumstances I do not accept the applicant faces a real chance of torture, interrogation, mistreatment on arrival in Sri Lanka or during the questioning process to establish identity and bail. Further, I do not accept he faces any harm as a result of authorities checking with his home area about his identity as I have found he is not of adverse interest to CID, police, authorities, armed groups, Karuna or other groups or anyone.
53. I accept that if the applicant arrives over the weekend he may be briefly held in airport holding cell until before a magistrate. However, DFAT has assessed risk of torture or mistreatment to detainees is low and considered with the applicant's profile and circumstances, I do not accept the applicant faces a real chance of torture, interrogation or mistreatment upon arrival, during questioning or brief detention.
54. I have considered the prison conditions and accept on the basis of country information that they are generally poor, overcrowded and unsanitary. However, I do not consider the applicant will be held in prison. The information is that he may be held in an airport holding cell.
55. Further, I have found that he does not have an anti-government or LTTE profile and is not of interest to authorities and do not accept there is a real chance of torture, assault or mistreatment if held on remand, or that any brief detention in these conditions amounts to serious harm for this particular applicant.
56. Furthermore, I find that the IAEA provisions that deal with breach of the departure laws from Sri Lanka are not discriminatory on their face, or disclose discriminatory intent and are not implemented in a discriminatory manner. I find that the Sri Lanka departure laws are laws of general application.
57. I am not satisfied, that questioning, arrest, and the poor conditions in remand and the application of a penalty for illegal departure amount to systematic and discriminatory conduct as required by s.5J.
58. I have had regard to all of the evidence before me and I have considered the applicant's accepted claims individually and cumulatively, as well as considering the personal circumstances of the applicant. I am not satisfied the applicant has a well-founded fear of persecution from CID, Sri Lankan authorities, police, Karuna, unknown armed groups,

murderers or anyone for any reason or combination of reasons in s.5J(1)(a), now or in the reasonably foreseeable future, if he returns to Sri Lanka.

Refugee: conclusion

59. 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

60. 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

61. 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.
62. I have considered the applicant's circumstances whether he faces a real risk of significant harm upon return to Sri Lanka.
63. As to treatment for the illegal departure and any questioning and detention the applicant may experience in relation to this, I find the applicant is likely to be issued a fine and released. If he pleads not guilty, he will be released pending his court date and may have to return to court for future appearances. Upon arrival, if he is held in an airport holding cell over the weekend, while waiting to come before a magistrate, I accept the conditions are poor and overcrowded. However, I am not satisfied he would be subject to the death penalty, arbitrarily deprived of her life or be tortured.
64. Having regard to his circumstances, I am also not satisfied that the treatment, travel to court appearances and penalties the applicant may face as an illegal departee amount to severe pain or suffering, pain or suffering that is cruel or inhuman in nature or extreme humiliation, intentionally inflicted or caused.
65. I am not satisfied that, individually or cumulatively, any processes or penalties the applicant may encounter under the IAEA, would constitute significant harm as defined under ss.36(2A) and 5 of the Act.

66. I have considered the applicant's return and social stigma upon return. However, as discussed above, I have not accepted he faces a real risk of such harm. In any event, I am not satisfied social stigma amounts to significant harm as defined.
67. I have considered the applicant's circumstances cumulatively and the processes, penalties he may encounter under IAEA, and as a returnee. However, I am not satisfied on the evidence those circumstances individually or cumulatively amount to significant harm.
68. In relation to the balance of the claims which I have accepted, I have found that the applicant does not have a real chance of harm on any of the bases claimed. For the same reason and applying the authority in *MIAC v SZQRB* [2013]FCAFC33, I am not satisfied the applicant will face a real risk of harm if removed to Sri Lanka.

Complementary protection: conclusion

69. There are not substantial grounds for believing that, as a necessary and foreseeable consequence of being returned from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm. The applicant does not meet s.36(2)(aa).

Decision

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

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly

...

cruel or inhuman treatment or punishment means an act or omission by which:

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature; but does not include an act or omission:
 - (c) that is not inconsistent with Article 7 of the Covenant; or
 - (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

degrading treatment or punishment means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:

- (a) that is not inconsistent with Article 7 of the Covenant; or
- (b) that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

receiving country, in relation to a non-citizen, means:

- (a) a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or
- (b) if the non-citizen has no country of nationality—a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.

...

torture means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant; but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

5H Meaning of refugee

(1) For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a refugee if the person:

- (a) in a case where the person has a nationality—is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or
- (b) in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Note: For the meaning of ***well-founded fear of persecution***, see section 5J.

...

5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
 - (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
 - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
 - (c) the real chance of persecution relates to all areas of a receiving country.

Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.

Note: For effective protection measures, see section 5LA.
- (3) A person does not have a well-founded fear of persecution if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country, other than a modification that would:
 - (a) conflict with a characteristic that is fundamental to the person's identity or conscience; or
 - (b) conceal an innate or immutable characteristic of the person; or
 - (c) without limiting paragraph (a) or (b), require the person to do any of the following:
 - (i) alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith;
 - (ii) conceal his or her true race, ethnicity, nationality or country of origin;
 - (iii) alter his or her political beliefs or conceal his or her true political beliefs;
 - (iv) conceal a physical, psychological or intellectual disability;
 - (v) enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
 - (vi) alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.
- (4) If a person fears persecution for one or more of the reasons mentioned in paragraph (1)(a):
 - (a) that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and
 - (b) the persecution must involve serious harm to the person; and
 - (c) the persecution must involve systematic and discriminatory conduct.
- (5) Without limiting what is serious harm for the purposes of paragraph (4)(b), the following are instances of **serious harm** for the purposes of that paragraph:
 - (a) a threat to the person's life or liberty;
 - (b) significant physical harassment of the person;
 - (c) significant physical ill-treatment of the person;
 - (d) significant economic hardship that threatens the person's capacity to subsist;
 - (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
 - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.
- (6) In determining whether the person has a **well-founded fear of persecution** for one or more of the reasons mentioned in paragraph (1)(a), any conduct engaged in by the person in Australia is to be disregarded unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.

5K Membership of a particular social group consisting of family

For the purposes of the application of this Act and the regulations to a particular person (the **first person**), in determining whether the first person has a well-founded fear of persecution for the reason of membership of a particular social group that consists of the first person's family:

- (a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in paragraph 5J(1)(a); and
- (b) disregard any fear of persecution, or any persecution, that:
 - (i) the first person has ever experienced; or

- (ii) any other member or former member (whether alive or dead) of the family has ever experienced;

where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.

Note: Section 5G may be relevant for determining family relationships for the purposes of this section.

5L Membership of a particular social group other than family

For the purposes of the application of this Act and the regulations to a particular person, the person is to be treated as a member of a particular social group (other than the person's family) if:

- (a) a characteristic is shared by each member of the group; and
- (b) the person shares, or is perceived as sharing, the characteristic; and
- (c) any of the following apply:
 - (i) the characteristic is an innate or immutable characteristic;
 - (ii) the characteristic is so fundamental to a member's identity or conscience, the member should not be forced to renounce it;
 - (iii) the characteristic distinguishes the group from society; and
- (d) the characteristic is not a fear of persecution.

5LA Effective protection measures

- (1) For the purposes of the application of this Act and the regulations to a particular person, effective protection measures are available to the person in a receiving country if:
 - (a) protection against persecution could be provided to the person by:
 - (i) the relevant State; or
 - (ii) a party or organisation, including an international organisation, that controls the relevant State or a substantial part of the territory of the relevant State; and
 - (b) the relevant State, party or organisation mentioned in paragraph (a) is willing and able to offer such protection.
- (2) A relevant State, party or organisation mentioned in paragraph (1)(a) is taken to be able to offer protection against persecution to a person if:
 - (a) the person can access the protection; and
 - (b) the protection is durable; and
 - (c) in the case of protection provided by the relevant State—the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system.

...

36 Protection visas – criteria provided for by this Act

...

- (2) A criterion for a protection visa is that the applicant for the visa is:
 - (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee; or
 - (aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or
 - (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (a); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant; or
 - (c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (aa); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant.
- (2A) A non-citizen will suffer **significant harm** if:
 - (a) the non-citizen will be arbitrarily deprived of his or her life; or
 - (b) the death penalty will be carried out on the non-citizen; or
 - (c) the non-citizen will be subjected to torture; or
 - (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
 - (e) the non-citizen will be subjected to degrading treatment or punishment.

- (2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:
- (a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or
 - (b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or
 - (c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

...

Protection obligations

- (3) Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.
- (4) However, subsection (3) does not apply in relation to a country in respect of which:
- (a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.
- (5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:
- (a) the country will return the non-citizen to another country; and
 - (b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.
- (5A) Also, subsection (3) does not apply in relation to a country if:
- (a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country.

Determining nationality

- (6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.
- (7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.