



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA21/08991

Date and time of decision: 4 May 2021 17:23:00
L Hill, Reviewer

Decision

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

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 473EC(2) of the Migration Act 1958 and replaced with generic information which does not allow the identification of 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 citizen of Sri Lanka. He arrived in Australia in November 2012 and applied for a Safe Haven Enterprise Visa (protection visa) on 27 September 2017.
2. A delegate of the Minister for Immigration (the delegate) refused to grant the visa on 31 March 2021 because the applicant did not satisfy s.36(2) of the *Migration Act 1958* (the Act).

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the Act.
4. The IAA received an email from the applicant on 19 April 2021. Enclosed was a 'letter to the IAA' (pdf and word document of the same letter) (IAA submission). The IAA submission contains discussion on why the applicant does not agree with the delegate's decision. To the extent that the discussion reiterates and addresses the claims made by the applicant to the delegate, this is not new information and I have considered it in this review.
5. In the IAA submission, the applicant has also provided further information about why his evidence between his refugee camp interview (entry interview) and protection visa interview is different. In summary, he claimed that as he had arrived with other members of his family, and at the entry interview he gave the common and truthful reason why they as a group had left, that being because they were part of the political party, the Tamil National Alliance (TNA). He was also not asked his personal fears and was told by staff, that after he left the refugee camp, he would have a separate interview with the Department where he could explain his personal safety fears. He further claimed that when he was in the refugee camp, he was sought treatment for his mental health issues. He had been affected by the war in Sri Lanka and suffered from depression. It was during his treatment with the mental health specialists that he fully and truthfully mentioned all his personal safety fears. However, what he had not realised is that the information he had provided during his treatment had not been taken into account when considering the differences in his evidence at his entry interview and his protection visa interview. This is new information. The new information clarifies the factual basis for some aspects of the delegate's decision, and I am satisfied that it was not, and could not have been provided to the Minister before the decision was made. I am also satisfied that it is credible personal information, which was not previously known and, had it been known, may have affected the consideration of the applicant's claims. The new information relating to reasons for the differences in the applicant's evidence and is material to the assessment of his claims for protection, and I am satisfied there are exceptional circumstances to justify considering this new information and that s.473DD(b) of the Act is met.

Applicant's claims for protection

6. The applicant's claims can be summarised as follows:
 - He is a Tamil Hindu male born in [City 1] in the Eastern Province of Sri Lanka.
 - He helped the Tamil National Alliance (TNA) in Sri Lanka. He put up posters, helped with publicity and attended party meetings.

- He wanted to get a government job. His father paid money to the [Official A, named] for him to get a government job. After approximately four to six months, a government job had not been secured for him. He went, along with his brother, to ask for his father's money back. He never gave the money back.
 - In June 2012, when he and his brother were returning from class, they were kidnapped by unidentified men in a white van. They were taken to an unknown place where they were tortured and beaten. The unidentified men rang their parents and told them they would be killed if they asked for the money again or made a report to the police. After three days, he and his brother were released.
 - He feared he would be kidnapped again and went and stayed with his [Relative A] in Colombo. On two occasions, he returned to [City 1] to visit his family. His sister, through someone she knew, organised for them (him, his sister, and her husband) to travel overseas on a ship. In October 2012, he boarded the ship, he did not know where the ship was traveling to, but he had to get out of Sri Lanka as his life was in danger.
7. The applicant has claimed that he fears being harmed on return because of his ethnicity, his past experiences arising from his help to the TNA and because he asked for his father's money back, his return as a failed asylum seeker who departed illegally and his residence in Australia for an extended period.

Refugee assessment

8. Section 5H(1) of the Act provides that a person is a refugee if, in a case where the person has a nationality, he or she is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Well-founded fear of persecution

9. Under s.5J of the Act 'well-founded fear of persecution' involves a number of components which include that:
- the person fears persecution and there is a real chance that the person would be persecuted
 - the real chance of persecution relates to all areas of the receiving country
 - the persecution involves serious harm and systematic and discriminatory conduct
 - the essential and significant reason (or reasons) for the persecution is race, religion, nationality, membership of a particular social group or political opinion
 - the person does not have a well-founded fear of persecution if effective protection measures are available to the person, and
 - the person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour, other than certain types of modification.
10. I accept, on the evidence the applicant has provided that his identity is as claimed. I accept the applicant is a Tamil Hindu male born in [City 1] in the Eastern Province of Sri Lanka, and a Sri Lankan national. Sri Lanka is the receiving country for the purpose of this assessment.

11. The applicant has consistently claimed that he had to leave Sri Lanka as his life was in danger, however on the material before me, the applicant's evidence regarding the past experiences which he claims led to his life being in danger, have differed.
12. On 8 January 2013, two months after his arrival in Australia, the applicant participated in an entry interview with the Department. Like the delegate, I have listened to the recording of this interview. The applicant was asked what had happened to him personally to make him leave Sri Lanka. In summary, he stated that:
 - There were murder threats for him, his brother and sister's husband (brother-in-law).
 - The threats were received in approximately [a date in] June 2012 and 8 September 2012, date of election.
 - The threats were made by men who he had never seen before, unidentified men.
 - In June 2012, the threats were abduction and bashing.
 - In September, it was election day and he was helping one political party, TNA and the opposing party threatened him not to get involved in the campaign. He was threatened that he would be killed and bashed.
 - He received these threats in person. He was verbally told he would be in danger. In addition, his brother-in-law's vehicle was vandalised.
 - He was not a member of the TNA but had volunteered to help with the election campaign. He put up posters, helped with publicity and attended party meetings.
13. On 27 September 2017, approximately three and a half years later, the applicant lodged an application for a protection visa. In summary, the applicant's written claims for protection were:
 - He left Sri Lanka because his life was in danger.
 - He was harmed in Sri Lanka. He was kidnapped and tortured physically and mentally.
 - He tried to seek help by going to his [Relative A's] place. His [Relative A] gave him shelter because his life was in danger.
 - He moved to Colombo to his [Relative A's] place in Colombo however it was not safe for him there. He continuously looked for another country to go too.
 - He fears on return that the same people will physically and mentally harm him and his family.
 - The authorities cannot protect them. Wherever he relocates too they will be tortured.
14. On 24 February 2021, the applicant attended a protection visa interview. I have listened to the recording of this interview. At this interview, the applicant reiterated that he had left because his life was in danger however his evidence regarding the past experiences which had led to his life being in danger differed from that provided at the entry interview. In summary, the applicant claimed that:
 - He was working in a private company and wanted to get a government job. His father paid money to an [Official A] for him to get a government job. After approximately four to six months, a government job had not been secured for him.
 - He went, along with his brother, to ask for his father's money back. He ([Official A]) never gave the money back.

- In June 2012, when he and his brother were returning from class, a white van stopped, and unidentified men got out, blindfolded them and put them in the van. They were then taken to an unknown place and put in a room. They were tortured and beaten with a stick. He realised they were being tortured because they wanted the money back.
 - While held they had to give them their home phone number. They had to ring their parents and ask for money. His parents were told that they would be killed if they asked for the money again or made a report to the police. After three days, they were blindfolded put in a van and dropped somewhere.
 - He feared he would be kidnapped again in [City 1] and went and stayed with his [Relative A] in Colombo. On two occasions, he returned to [City 1] to visit his family. He stayed for one to two days before returning to Colombo.
 - His sister, through someone she knew, organised for them to travel overseas on a ship.
 - On [a day in] October 2012, he boarded the ship, he did not know where the ship was traveling to, but he had to get out of Sri Lanka as his life was in danger, he feared being killed.
15. At the protection visa interview, it was put to the applicant, that the evidence he was now providing about why he had left Sri Lanka were different to the evidence he had provided at his entry interview. The delegate told the applicant he had listened to the recording of his entry interview, and while he was aware that the applicant had been told to keep his answers short and that he would have another chance to provide more details later, the reasons the applicant had given at this interview for leaving Sri Lanka related to his involvement with the TNA. In response, the applicant stated that this interview had taken place eight years ago and he didn't have a chance to tell his story clearly. He claimed that his sister's husband had a van and helped the TNA. He also worked for the TNA. At the entry interview, he had told his family's problems and now he was giving the specific reasons why he had left. At the conclusion of the interview, the applicant reiterated that he had been told not to provide his personal issues at the entry interview. He stated that that he did not believe what he had said now (protection visa interview) was inconsistent with what he had said at the entry interview. At the entry interview he was told that he would have the opportunity to provide his personal issues later.
16. In the IAA statement, the applicant has sought to further clarify the differences in his evidence at his refugee camp interview (entry interview) and protection visa interview. In summary, he claimed that as he had arrived with other members of his family he gave the common and truthful reason why they as a group had left, that being because they were part of the political party, the Tamil National Alliance (TNA). He reiterated that he had not been asked about his personal fears and was been told by staff, that after he left the refugee camp, he would have a separate interview with the Department where he could explain his personal safety fears. He further claimed that when he was in the refugee camp, he was sought treatment for his mental health issues. He had been affected by the war in Sri Lanka and suffered from depression. It was during his treatment with the mental health specialists that he fully and truthfully mentioned all his personal safety fears.
17. I have listened to the entry interview and like the delegate, while I accept that the applicant was told to be brief and that he would have the chance to provide further details later, he was specifically asked the question, "what happened to you personally to make you leave Sri Lanka", and I do not accept that as claimed by the applicant he was not asked nor given the chance or opportunity to provide or explain, his personal reasons or personal safety fears. The applicant was not asked to provide the reasons for why his family had left Australia at this interview, he was asked for his personal reasons for leaving. Furthermore, the applicant's

explanation that as he had arrived with other members of his family he had given the common and truthful reason why they as a group had left, is difficult to reconcile against his other evidence at this same interview, that his sister and brother-in-law were not with him in Darwin at that time of his entry interview, he stated they were in Adelaide. I have also considered the applicant's statements that he had mentioned his personal safety fears to the mental health specialists whom he had seen when he was at the Darwin camp. The applicant has not presented any evidence including any medical documents in support of his assertions and nor is there any evidence in the material before me to substantiate that this had occurred. I do not accept the applicant's explanation that he had mentioned his personal reasons for leaving or personal safety fears to a mental health specialist whom he saw when he was at the Darwin camp.

18. In light of the foregoing, I do not accept any of the applicant's explanations for the differences in his evidence regarding the past experiences which he claims led to his life being in danger between his entry interview and protection visa statement and interview. Even, if I was to accept the applicant's explanations, there are several material differences in the evidence the applicant has provided which I consider raises further doubt about the reliability of his explanations and his past experiences in Sri Lanka.
19. The applicant's evidence regarding his address history between June 2012 and his departure has varied. At the beginning of the protection visa interview, the applicant was asked to detail his address history. In summary, he stated that in 2012, for approximately four months he lived with his [Relative A] in Colombo and worked at [a named location]. In around June 2012, he returned to his family in [City 1]. The delegate asked him if he returned and stayed with his [Relative A] after he left in June 2012. He indicated that prior to his departure, in early October 2012, he returned to his [Relative A's] in Colombo. He then went from there to Negombo where he boarded the boat. However, later in the protection visa interview, when describing what had happened after he was kidnapped, he indicated that several times he went to his [Relative A's] place in Colombo. He was then asked when he first returned to his [Relative A's] in Colombo after he was kidnapped. He indicated that he was kidnapped "on [a day in] June, mid-June or something like that" and started to go to his [Relative A's] at the end of June. He did this because he was scared something would happen to him again. It was put to the applicant that he had stated earlier in the protection visa interview that the last time he had returned to [City 1] from his [Relative A's] in Colombo was in June 2012. He stated that after he returned in June the problem happened and he had to frequently return to his [Relative A's] in Colombo. Between June and October 2012, he returned to [City 1] to see his family probably two times. He would stay for one to two days then return to his [Relative A's] in Colombo. He indicated that he had not understood the earlier question. I have listened to the protection visa interview, and I do not accept the applicant's explanation that he did not understand the earlier question or was confused. He was specifically asked when he last returned from Colombo to [City 1]. He responded around end of June 2012. Furthermore, the applicant's evidence at the protection visa interview that after he was kidnapped, he stayed with his [Relative A], and only returned to [City 1] on two occasions to visit his family, is inherently inconsistent with the evidence he provided at the entry interview that in September 2012, on election day he helped the TNA and had also assisted in the election campaign by putting up posters, helped with publicity and attended party meetings. Finally, I consider the applicant's evidence regarding his return to [City 1] on two occasions to be irreconcilable against his other claims that he had to leave [City 1] because he feared he would be kidnapped again.
20. The applicant's evidence about his engagement in political activities has differed. At the entry interview, he clearly stated that while he was not a member, he had assisted the TNA. During the election campaign he put up posters, helped with publicity and attended party meetings

and on election day, in September 2012 he helped the TNA. However, at the protection visa interview, when specifically asked whether he had any involvement with any political parties, he stated, “no, nothing like that”. It was later put to him that at the entry interview, he had stated that he been threatened because he was involved with the political party, TNA. He responded that he was helping the TNA. He was involved and had been confused and thought that he was able to say now what happened to him and that his personal problems arose because he had asked for his father’s money back. I have considered the applicant’s explanations for these differences however I do not accept any of them and I find it difficult to accept that if he had been involved with the TNA as claimed he would fail to mention this when specifically asked whether he had any involvement with any political parties, he did not.

21. Finally, similar to the delegate, I found the applicant’s evidence at the protection visa interview, to be vague, internally inconsistent and not of a lived experience. Furthermore, his claims that his father paid money to the [Official A] is not supported by the independent information in the review material which indicates that [Official A] did not hold this position and instead held a far higher position as the [Official B],¹ and given [Official A’s] position, I find the applicant’s claims that he and his brother had gone to this person and asked for his father’s money back to be highly improbable.
22. Having regard to all the evidence before me, including my concerns outlined above, I am not satisfied that the applicant’s evidence regarding his past experiences, which he claimed led to him fearing that his life was in danger and his decision to leave Sri Lanka, are true. I do not accept that the applicant’s father paid money to anyone including [Official A] to get the applicant a government job or that he and his brother later went and asked for his father’s money back. I also do not accept that applicant and his brother were kidnapped and that after this event he feared he would be kidnapped or for his life and went and stayed with his [Relative A] in Colombo. Nor do I accept that the applicant had any involvement including helping or assisting any political parties including the TNA in Sri Lanka and that he was of interest or concern to any groups, organisations, or individuals on this basis.
23. Apart from the past experiences discussed above, the applicant has not claimed that he was of interest to any groups, organisations, individuals or the Sri Lankan authorities for any other reason at the time of his departure in October 2012, and I am not satisfied that he was. I am satisfied that the applicant was not of interest to the Sri Lankan authorities or any groups or organisations or individuals for any reason at the time of his departure from Sri Lanka in October 2012.
24. The applicant has claimed he fears being harmed on return because of his ethnicity, return as a failed asylum seeker who departed illegally, his residence in Australia for an extended period and other matters which I have found not to be credible above.
25. The country information in the review material indicates that Tamils are the second largest ethnic group in Sri Lanka (15.3 per cent of the population). According to the most recent census, the Tamil population was 3.1 million in 2012, compared to 2.7 million in 1981. Tamils live throughout Sri Lanka but are concentrated in the Northern and Eastern provinces. Various sources indicate that there has been a significant opening of civic space since 2015, with a corresponding increase in public confidence to criticise or challenge authorities.² However, reports of monitoring, surveillance, intimidation and harassment of Tamils in day-to-day life by

¹ [Source Deleted].

² OHCHR, “Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka”, 18 February 2020, 20200221140652; UK Home Office, “Report of a Home Office fact-finding mission to Sri Lanka”, UK Home Office, 20 January 2020, 20200123162928.

security forces in the north and east of the country persist and have increased since 2019 – particularly since the election of Gotabaya Rajapaksa as president in November.³ Credible sources state that Tamils with certain profiles – such as political activists and journalists– are more likely to attract the attention of authorities.⁴ In 2019, DFAT assessed that that non-Muslim Sri Lankans, including Tamils, face a low risk of official or societal discrimination based on ethnicity or caste, including in their ability to access education, employment or housing.⁵ More recently, the UK Home Office stated that available evidence suggests whilst Tamils may sometimes be subjected to discrimination, they are unlikely to face persecution based on their ethnicity alone.⁶

26. I have accepted the applicant is a Tamil male born in [City 1] in the Eastern Province of Sri Lanka. The contemporary country information before me published by UK Home Office, DFAT and US Department of State⁷ overwhelming suggests that absent any other concerns, a person's age, gender or area of birth, origin or residence in Sri Lanka would not impute them with an adverse profile nor would they be perceived to be pro-LTTE or pro-Tamil or anti-Sri Lankan government and harmed on this basis on return. I am not satisfied that the applicant will be imputed with an adverse profile because he a Tamil male who was born in and/or resided in [City 1] and/or the Eastern Province and harmed on return on this basis.
27. DFAT has continued to report that the LTTE no longer exists as an organised force,⁸ and only a few incidents involving former LTTE members have been recorded since the end of the war.⁹ Nevertheless, the Sri Lanka government is sensitive to the potential re-emergence of the LTTE,¹⁰ and former LTTE members may be monitored.¹¹ In 2020, UK Home Office reported that local sources from the Northern Province allege that there has been an increase in intimidation towards ex-LTTE members by security services since President Rajapaksa's Sri Lanka Podujana Peramuna (SLPP) swept local government elections in February 2018.¹² DFAT has indicated that the extent of monitoring typically depends on an individual's seniority within the LTTE; ongoing involvement with politically-sensitive issues, including protests relating to disappeared persons; and links to the Tamil diaspora, particularly elements considered radical by the government.¹³ For example, in June 2020 a prominent Norway-based activist was reportedly detained at Colombo's airport when seeking to leave Sri Lanka – he was released after questioning.¹⁴

³ UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", UK Home Office, 20 January 2020, 20200123162928; OHCHR, "Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka", 18 February 2020, 20200221140652.

⁴ UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928.

⁵ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244.

⁶ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil Separatism", May 2020, 20200527172009.

⁷ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil Separatism", May 2020, 20200527172009, UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", UK Home Office, 20 January 2020, 20200123162928; DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244; US Department of State, "Country Reports on Human Rights Practices for 2019 – Sri Lanka", 11 March 2020, 20200312151418.

⁸ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244.

⁹ Colombo Page, "Ex-LTTE cadre, wife and sister arrested with firearms, explosives", 13 October 2019, 20191014130858; Asian Tribune, "An Accidental Bomb Blast Identified an Active LTTE Intelligent Agent", 07 July 2020, 20200709151217.

¹⁰ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244.

¹¹ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244; UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928.

¹² UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", UK Home Office, 20 January 2020, 20200123162928.

¹³ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244.

¹⁴ Asian Tribune, "Key LTTE activist in Norway - Nadaraja Sethuparan arrested at BIA", 23 June 2020, 20200624105850.

28. According to DFAT, the authorities distinguish between so-called 'low profile' and 'high profile' former LTTE members when assessing their potential security risk; 'low-profile' former LTTE members include former combatants, those employed in administrative or other roles, and those who may have provided a high level of non-military support to the LTTE during the war.¹⁵ Low-profile LTTE members who come to the attention of the Sri Lankan authorities – particularly if they are suspected of having a combat role during the war – would likely be detained for questioning and may be sent for rehabilitation.¹⁶ Following their release, a low-profile former LTTE member may be monitored but would not generally be prosecuted.¹⁷ The number of high-profile former LTTE members living in Sri Lanka is assessed to be small and the vast majority have already come to the attention of authorities.¹⁸ Any remaining high-profile former LTTE members who came to the attention of the authorities would likely be arrested, detained and prosecuted.¹⁹ Over 12,000 ex-LTTE members have undergone rehabilitation since the program began in 2009 – the last individual was reportedly released in late 2019 but authorities retain the option of using rehabilitation in future.²⁰ Authorities maintain 'stop' and 'watch' electronic databases that contain information about individuals suspected of involvement in terrorism or serious criminal offences.²¹
29. I have not accepted the applicant's claims regarding his past experiences which he claimed led to his decision to leave Sri Lanka and I have found that the applicant was not of interest to the Sri Lankan authorities, or any other groups or organisations or individuals for any reason at the time of his departure. On the information before me, the applicant has not committed any terrorist or criminal acts in Sri Lanka or been involved in any LTTE or Tamil separatist or diaspora activities before or since the civil conflict ended. He did not have, and nor do I accept he would now be perceived to have had, a role in the LTTE or in post-conflict Tamil separatism or a renewal of hostilities on return.
30. The applicant departed Sri Lanka in October 2012, and I am not satisfied that given the passage of time or his or his family's past or present circumstances, the applicant would be perceived as being associated with and/or involved with the LTTE or any pro-Tamil organisations or groups. I am not satisfied the applicant faces a real chance of any harm as a Tamil male who was born in and/or resided in [City 1] and/or the Eastern Province on his return to Sri Lanka now or in the reasonably foreseeable future.
31. I accept the applicant left Sri Lanka illegally and he would return to Sri Lanka on temporary travel document. I accept he has applied for asylum and would be returning to Sri Lanka after his asylum application has failed and residence in Australia for an extended period.
32. Different agencies, including the Department of Immigration and Emigration, the State Intelligence Service, the Criminal Investigation Department and sometimes the Terrorism Investigation Division process returnees upon arrival at Colombo airport.²² These agencies check travel documents and identity information against the immigration databases, intelligence databases and records of outstanding criminal matters.²³ For returnees travelling on temporary travel documents, police undertake an investigative process to confirm identity.

¹⁵ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244.

¹⁶ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244.

¹⁷ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244.

¹⁸ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244.

¹⁹ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244.

²⁰ UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928.

²¹ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244.

²² DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244 and UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928.

²³ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244.

This would identify someone trying to conceal a criminal or terrorist background or trying to avoid court orders or arrest warrants. This often involves interviewing the returning passenger, contacting police in their claimed hometown, contacting claimed neighbours and family, and checking criminal and court records.²⁴

33. I accept, as a person returning on a temporary travel document, the applicant may be detained at the airport with other returnees for processing by the Sri Lankan authorities. I accept that during this process the authorities will very likely become aware of the applicant's past circumstances. However, as discussed above, I am not satisfied that the applicant will be perceived to be a person of concern. There is no credible evidence before me that he has outstanding court orders or arrest warrants or criminal background or that his name is on any lists. There is also no independent information before me to suggest that absent any other concerns, individuals who return to Sri Lanka after an extended period of time living in Australia are imputed with an adverse profile and I do not accept that he will be. I am satisfied that it would be quickly determined that the applicant has no adverse profile or other profile of interest.
34. DFAT advises that returnees are treated according to standard airport procedures, regardless of their ethnicity and religion and that they are not subject to mistreatment during processing at the airport.²⁵ Processing of returnees at the airport can take several hours, due to the administrative processes, interview lengths and staffing constraints. Returnees are processed in groups, and individuals cannot exit the airport until all returnees have been processed, although returnees are free to go to the bathroom and to talk to one another during this time.²⁶
35. The information before me is that the processing of returnees at the airport is not applied in a discriminatory manner or selectively enforced and nor are returnees mistreated. Overall, I am satisfied that any period of detention that would occur while these investigations are ongoing will be brief and would not exceed the several hours that group processing generally takes.
36. Failed asylum seekers who depart Sri Lanka irregularly by boat are generally considered to have committed an offence under the Immigrants and Emigrants Act (I&E Act). Under the Act, Sri Lankan citizens must only leave Sri Lanka from approved ports of departure using a valid Sri Lankan passport.²⁷ DFAT understands the Police Airport Criminal Investigations Unit at Bandaranaike International Airport makes most arrests. In the process, police will take photographs, fingerprints and statements from returnees, and further enquire about activities while abroad if returnees are suspected to be former LTTE members. At the earliest available opportunity returnees are transferred to the closest Magistrates Court. Should a magistrate not be available before this time – for example, because of a weekend or public holiday – those charged may be detained in an airport holding cell for up to two days. DFAT is not aware of mistreatment of returnees during this process.²⁸
37. Penalties for leaving Sri Lanka illegally can include imprisonment of up to five years and a fine.²⁹ However, Sri Lanka's Attorney-General's Department, which is responsible for the conduct of prosecutions, claims that no returnee who was merely a passenger on a people smuggling

²⁴ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244.

²⁵ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244.

²⁶ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244.

²⁷ Immigrants and Emigrants Act (Sri Lanka), No. 20 of 1948 (1 November 1949), CISBE8E6BE638 and DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244.

²⁸ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244.

²⁹ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244; UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", UK Home Office, 20 January 2020, 20200123162928.

venture has been given a custodial sentence for departing Sri Lanka illegally (as distinct from facilitators or organisers). However, fines may be issued to fare-paying passengers act as a deterrent towards joining boat ventures in the future.³⁰

38. The applicant has not claimed, and there is no evidence before me to indicate that the applicant would be perceived or treated as anything other than a passenger on the people smuggling vessel. I am not satisfied that there is a real chance the applicant will be given a custodial sentence.
39. If the passenger returnee pleads guilty to departing illegally, he will be required to pay a fine (which he can be done by instalment) and will subsequently be free to go. Where a passenger returnee pleads not guilty, the magistrate will usually grant bail on the basis of personal surety or guarantee by a family member. Where a guarantor is required, returnees may need to wait for the guarantor to come to court.³¹ Anecdotal evidence suggests that most passengers of people smuggling ventures spend many years on bail, and that most are free to go after paying a fine.³² Passenger returnees who plead not guilty will only need to return to court when their case is being heard, or if summonsed as a witness in a case against the organiser/facilitator of a people smuggling venture. DFAT has continued to report that the fines issued for passengers of people smuggling ventures was often low, but that the cumulative costs associated with regular court appearance over a protracted length of time can be high.³³
40. The applicant has not claimed, and there is no evidence before me to suggest that he would plead not guilty. Nor is there anything to suggest that if he did plead not guilty that he would not be granted bail on the basis of personal surety or guarantee by a family member. Having regard to the particular circumstances of this applicant, I am not satisfied that the conditions of detention for a brief period at the airport, a fine and if he plead not guilty the costs associated with bail and regular court appearances, if required, amounts to serious harm.
41. In addition, the information before me does not indicate that I&E Act is discriminatory on its terms, that it is applied in a discriminatory manner or that it is selectively enforced. Accordingly, I am satisfied that any investigation, prosecution and punishment would not amount to persecution for the purpose of ss.5H(1) and 5J(1) of the Act.
42. DFAT reported that between 2010-11 and 2018-19, 3,716 Sri Lankan nationals returned from the Australian community or were removed from Australian onshore immigration detention centres to their country or origin or a third country. Many others returned from the US, Canada, the UK and other European countries. Most returnees are Tamil. The Sri Lankan Government has consistently stated that refugees are welcome to return and, in August 2016, released a 'National Policy on Durable Solutions for Conflict-Affected Displacement'. During a visit to Australia in February 2017, Prime Minister Wickremesinghe stated publicly that failed asylum seekers from Australia would be welcomed back to Sri Lanka.³⁴
43. Despite positive government sentiment, refugees and failed asylum seekers face practical challenges to successful return to Sri Lanka. Failed asylum seekers receive limited reintegration assistance and many returnees have difficulty finding suitable employment and reliable housing on return. DFAT assesses that reintegration issues are not due to failure to obtain

³⁰ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244.

³¹ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244.

³² DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064.

³³ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064 and DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244.

³⁴ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244.

asylum, but rather due to the employment and accommodation difficulties returnees may face.³⁵ UK Home Office and DFAT have reported that some returnees, including returnees in the north and east with suspected LTTE links, have been the subject of monitoring by the authorities, involving visits to returnees' homes and telephone calls by the CID.³⁶ DFAT understands that most returnees, including failed asylum seekers, are not actively monitored on an ongoing basis. DFAT is unable to verify whether monitoring, where it occurs, is specific to former LTTE cadres. DFAT is not aware of returnees, including failed asylum seekers, being treated in such a way that endangers their safety and security.³⁷ DFAT has also reported that some refugees and failed asylum seekers reported social stigma upon return to their communities, including for being beneficiaries of financial reintegration assistance. Overall, DFAT understands that societal discrimination is not a major concern for returnees, including failed asylum seekers.³⁸

44. In the present case, I accept the applicant would return to the East and may be identifiable as someone who has sought asylum. The applicant's evidence is that his parents and some siblings remain residing in [City 1], and I am not satisfied that he will have any difficulties with accommodation on return. Nonetheless, I accept that on return he may face some reintegration issues that being difficulties finding employment and possibly social stigma and societal discrimination from his community; however I am not satisfied this would be at a level that would threaten his capacity to subsist or otherwise amount to serious harm.
45. I am not satisfied that, as a Tamil asylum seeker with his background who departed illegally, resided in Australia for an extended period, the applicant faces a real chance of persecution on his return to Sri Lanka, now or in the reasonably foreseeable future.
46. I am not satisfied the applicant has a well-founded fear of persecution.

Refugee: conclusion

47. 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) of the Act.

Complementary protection assessment

48. 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

49. Under s.36(2A), a person will suffer 'significant harm' if:
 - the person will be arbitrarily deprived of his or her life

³⁵ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244.

³⁶ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244; UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928 and UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil Separatism", May 2020, 20200527172009.

³⁷ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244.

³⁸ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244.

- 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.
50. The expressions 'torture', 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' are in turn defined in s.5(1) of the Act.
51. I have accepted that the applicant would return to Sri Lanka (whether involuntarily or otherwise) on a temporary travel document. I accept he may be detained at the airport for processing on return and questioned. I also accept he may be arrested and charged with departing Sri Lanka illegally and detained briefly at the airport if a magistrate is unavailable, fined and possibly incur costs associated with bail and regular court appearances. It does not amount to the death penalty, an arbitrary deprivation of life or torture. Further, on the information before me, I am not satisfied it amounts to pain or suffering that may be described as cruel or inhuman in nature, severe pain or suffering or extreme humiliation, whether intentionally inflicted or otherwise. Nor does the country information indicate that there is an intention to inflict pain or suffering that is cruel or inhuman in nature, severe pain or suffering, or an intention to cause extreme humiliation. I am not satisfied there is a real risk of significant harm on this basis.
52. I accept that as a returning failed asylum seeker who would return to the East and may be identifiable as someone who has sought asylum he may face some reintegration issues that being difficulties in finding employment and possibly social stigma and societal discrimination from his community, however I am not satisfied this treatment constitutes significant harm as defined. It does not amount to the death penalty, arbitrary deprivation of life, or torture. It does not constitute pain or suffering that is cruel or inhuman in nature, severe pain or suffering, whether physical or mental, or extreme humiliation, as required in the definitions of cruel or inhuman treatment or punishment or degrading treatment or punishment. I am not satisfied there is a real risk of significant harm on these bases.
53. Furthermore, having regard to the evidence as a whole, I am also not satisfied that the treatment and measures he may face on return collectively amounts to significant harm. It does not amount to the death penalty, arbitrary deprivation of life, or torture. It does not constitute pain or suffering that is cruel or inhuman in nature, severe pain or suffering, whether physical or mental, or extreme humiliation, as required in the definitions of cruel or inhuman treatment or punishment or degrading treatment or punishment.
54. Finally, for the reasons provided above, I have otherwise found the applicant does not face a real chance of harm on any or the bases claimed now or in the reasonably foreseeable future. As 'real risk' involves the same standard as 'real chance', I am also not satisfied that the applicant faces a real risk of significant harm on these bases.

Complementary protection: conclusion

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

Decision

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

Applicable law

Migration Act 1958

5 (1) Interpretation

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.