



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA19/06392

Date and time of decision: 28 March 2019 11:16:00
B Mericourt, Reviewer

Decision

The IAA remits the decision for reconsideration with the direction that:

- the referred applicant is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*.

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 Sri Lankan national. On 6 March 2017 he lodged an application for a Temporary Protection Visa (TPV). In a decision dated 20 February 2019 the delegate of the Minister of Immigration and Border Protection (the delegate) refused to grant the visa.
2. The delegate was satisfied the applicant is a Tamil from the Northern Province who departed Sri Lanka illegally. S/he accepted that he had been displaced during the civil war in Sri Lanka and had lived in an area controlled by the Liberation Tigers of Tamil Eelam (LTTE). The delegate was not satisfied the applicant had been an LTTE cadre or member of the LTTE himself and assessed that he had been of no adverse interest to the authorities prior to his departure for reasons of his imputed, actual or familial connections to the LTTE. The delegate was also satisfied there was no real chance or real risk of serious or significant harm to the applicant from Sri Lankan authorities or any other person for reasons of his ethnicity, imputed or actual political opinion, imputed, perceived or real connection to the LTTE, residence in a former LTTE controlled area, illegal departure, or return as a failed asylum seeker if he were to be returned to Sri Lanka now or in the reasonably foreseeable future.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. I note the applicant has not been interviewed by the Department. The applicant requested a different delegate to consider his case on the grounds of perceived bias. The Department considered and refused the applicant's request for a different delegate to consider his case stating "the characteristics of Home Affairs staff are irrelevant to them performing their duties." The applicant attended an interview without a representative and handed the delegate a letter in English confirming his refusal to be interviewed by the particular case officer assigned to his case. I had regard to the correspondence from the applicant to the Department which was clearly written in English with the assistance of a third party. As the applicant was unrepresented at the primary level and does not speak English, I am not satisfied that he fully understood the consequences of his refusal to be interviewed by the Department.
5. The IAA received two submissions from the applicant's representative on 14 and 22 March 2019. The submission referred to new information about the applicant's claim to be an LTTE cadre, combatant, member of the LTTE intelligence unit and commander of [a number of] combatants in Sri Lanka. It included two statutory declarations made by the applicant on 3 March and 21 March 2019, a handwritten letter in Tamil purportedly written by the applicant and provided to the Department dated 30 June 2013 together with a translation, a letter from [a named person], [suburb], dated [in] March 2019 confirming the applicant sustained multiple injuries [mainly] from shell explosions, and injuries [and] the following photographs;
 - (a) the applicant's LTTE registration card dated [in] July 2008 with translation;
 - (b) a photo of the applicant with his wife;

(c) a photo of the applicant in LTTE uniform standing next to [a] deceased LTTE leader [taken] in 2007;

(d) a photo of the applicant's brother-in-law who was a member of the LTTE killed [in] September 2008;

(e) a photo of the applicant's cousin with a group of LTTE soldiers in uniform (second from right at back);

(f) two photos of the applicant's commander "[Mr A]" , one in front of a group of marching soldiers and the other a pastiche with gravestones; and

(g) a photograph of [an] LTTE soldier who was [considered] a martyr after he died of a [condition] [in] May 2008.

6. The submission also included a statement about the applicant's previous statement of claims which was prepared by a person purporting to be a registered migration agent and lawyer, but who was not either. This person prepared the application for the applicant and also wrote all the correspondence on behalf of the applicant. He did not read the statement of claims back to the applicant in Tamil, nor did he tell the applicant about the correspondence between himself and the Department about his request for a different delegate. The applicant followed his 'representative's' instructions, attended the interview and gave the delegate letter which he himself did not understand stating he did not wish to be interviewed by that particular delegate. Due to both not knowing what was in the correspondence from the Department and an interpreting error at this 'interview' the applicant did not fully understand the implications of refusing the interview. The applicant's new representative argued in the submission that there are therefore exceptional circumstances to justify consideration of the new information provided above.
7. Given my own concerns about the nature of the correspondence between the applicant and the Department, the applicant's inability to speak and understand English and the clear nature of the fraud perpetuated by a person purporting to be both a lawyer and a registered migration agent, I am satisfied there are exceptional circumstances to justify giving consideration to the new information provided to the IAA.
8. Section 473DC of the Act provides that while the IAA may get any information not before the Minister and which it considers relevant, it does not have a duty to get, request, or accept new information. Subject to the requirements of the Act, the IAA must review a decision by considering the review material without interviewing the referred applicant and, other than in exceptional circumstances, must not consider new information: ss.473DB(1)(b) and 473DD. I have decided in the circumstances of this case to invite the applicant to an interview to provide information and respond to concerns raised as I consider there are exceptional circumstances in this matter.
9. I requested new information from the applicant relating to his claims of harm in the past and harm that he feared harm if he returns now or in the reasonably foreseeable future for reasons of his actual, perceived or imputed involvement with the LTTE. I am satisfied that there are exceptional circumstances to justify the consideration of this new information. This new information was provided at an IAA interview on 22 March 2019 (the 2019 IAA interview). I am satisfied that the new information given by the applicant is credible personal information which was not previously known and which, had it been known, may have affected the consideration of the applicant's claims.

10. I also obtained new information relevant to the history of the conflict in Sri Lanka involving the LTTE in order to assess the applicant's claims relating to his activities as a combatant during the civil war in 2001/02 and from 2007 to 2009¹ which were not considered by the delegate.

Applicant's claims for protection

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

- The applicant fears harm for reasons of his actual, imputed or perceived support and involvement with the LTTE as he was an LTTE cadre.
- He has family members who were LTTE cadres who were killed in the war. His sister's husband (his brother-in-law) was [in] the LTTE and accorded a hero's death by the LTTE [in] September 2008;
- He lived in an LTTE controlled area in the Northern Province during the war.
- He was the commander of a squadron of [a number of] combatants under the command of [Mr A] and involved in combat from 2007/08 until the end of the civil war in May 2009. He did not formally surrender at the end of the war, divested himself of his weapons, uniform, cyanide capsule, LTTE metal plates on which his LTTE number was engraved and destroyed his LTTE identity card;
- He was injured during the fighting and has a number of [injuries];
- He was arrested, detained and tortured by the Sri Lankan Army (SLA) for [some time] from May 2009 at [Camp 1]. His wife never knew where he was or if he had been killed during this period;
- The UN took over the camp resettled the applicant with his wife and child. CID and police registered families resettled in his particular area and would frequently interrogate people about their involvement in the war. By 2011 they were taking many people so the applicant became frightened and went into hiding with various relatives leaving his wife and children in the care of his father-in-law. In about June 2012 the police found him and told him to report to the local police station which he did. He was interrogated, asked to sign a paper written in Sinhalese which he refused to do and he was beaten. He decided to run as he thought it would be better to be killed rather than be tortured and he escaped through the jungle despite being shot at by the police. This is when he incurred his [injury] which continues to be treated in Australia. He went to a relative's house [a number of] km away until he was able to depart Sri Lanka (unlawfully by boat);
- He never confessed to being a member of the LTTE and has never been 'rehabilitated';
- He will be unable to seek protection from the Sri Lankan authorities as they are the perpetrators of harm against Tamils suspected of having involvement in the LTTE.

¹ Joanne Richards, "An Institutional History of the Liberation Tigers of Tamil Eelam (LTTE)", CCDP Working Papers, Centre on Conflict, Development and Peacebuilding (CCDP) - Graduate Institute of International and Development Studies, Geneva, 1 November 2014, CISA447F082828

Factual findings

12. The applicant's claims as to his identity and nationality have been consistent since his arrival in Australia. He has submitted a copy of his National Identity card and Sri Lankan Register of Birth together with English translations. He conducted his entry interviews in Tamil. I accept the applicant's nationality and identity are as claimed and find Sri Lanka to be the receiving country for the purpose of the application. There is no evidence before me to suggest that the applicant has a right to enter and reside in any country other than Sri Lanka and I am satisfied he does not: s.36(3).
13. I am satisfied the applicant is of Tamil ethnicity and he departed Sri Lanka unlawfully by boat.

Refugee assessment

14. 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

15. 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.
16. Real chance is a substantial chance as distinct from a remote or far-fetched possibility.²
17. The applicant is a Hindu Tamil who was born and lived all his life in the Northern Province of Sri Lanka. He is married and has two children now aged [age] and [age] years. His widowed mother, widowed sister and sister's son were all members of his household and dependent on him before his departure. His wife and children continue to live in his home [town], Vavuniya District. The applicant worked as [an occupation] in Sri Lanka.
18. I am satisfied the applicant is of Tamil ethnicity and Hindu religion.

² *Chan v MIEA*, (1989) 169 CLR 379 at 389.

19. Tamils are the second largest ethnic group in Sri Lanka, after the Sinhalese. Tamils live throughout Sri Lanka but concentrate in the north and east. They comprise 93% of the population of the Northern Province according to the most recent census. Tamils have a substantial level of political influence and their inclusion in political dialogue has increased since the change of government in 2015.³ The Sri Lankan Constitution provides that ‘no citizen shall be discriminated against on the grounds of race, religion, language, caste, sex political opinion, place of birth or any such grounds’.⁴
20. According to the 2017 UK Home Office report the current government under Sirisena has started to implement reforms to include Tamil as an official language, devolve power to Tamils and to protect democracy.⁵ In 2013 the UK Upper Tribunal Guidance case of *GJ & Others* (upheld by the Court of Appeal on 18 June 2014) found that Tamil ethnicity alone is not a basis for persecution in Sri Lanka. “The Sri Lankan authorities know that many Sri Lankan Tamils travelled abroad as economic migrants and also that everyone in the Northern Province had some level of involvement with the LTTE in the civil war. In post-conflict Sri Lanka, an individual’s past history will be relevant only to the extent that it is perceived by the Sri Lankan authorities as indicating a present risk to the unitary Sri Lankan state of the Sri Lankan Government”.⁶ The Upper Tribunal went on to find that the LTTE in Sri Lanka is a spent force and the government’s present objective is to identify Tamil activists in the diaspora who are working for Tamil separatism and to destabilise the unitary Sri Lankan state.⁷ DFAT assesses that Sri Lankans of all backgrounds face a low risk of official or societal discrimination based on ethnicity including in relation to access to education, housing or employment.⁸
21. Many Tamils, particularly in the north and east, reported being monitored, harassed, arrested or detained by security forces during the conflict, and continue to claim that authorities monitor public gatherings and protests and practise targeted surveillance and questioning of individuals and groups. DFAT assesses that, while monitoring of Tamils in day-to-day life has decreased significantly under the current government, surveillance of Tamils in the north and east continues, particularly of those associated with politically sensitive issues.⁹

Perceived, imputed or actual involvement with the LTTE

22. I had regard to the applicant’s evidence at both his bio-data interview on 13 September 2012 and his arrival interview on 14 January 2013. At both interviews he indicated his father was killed by members of the SLA when he was young in 1987 and the LTTE controlled the area in which he lived. He said he was forced to complete [training] by the LTTE in 2007 but did not participate in any conflict. His reasons for leaving Sri Lanka were that he and his family, including his mother who was [unwell], were displaced during the conflict and he did not have a ‘stable place to live’ and could not provide for his family. I also had regard to the fact that the applicant stated another name he had been known by was ‘[Name]’ (pronounced [a certain way]). At the 2019 IAA interview and on his purported LTTE identity card, the applicant’s LTTE name is [Name].

³ Department of Foreign Affairs and Trade (DFAT), “DFAT Country Information Report Sri Lanka”, 23 May 2018, p.13, CIS7B839411064

⁴ Ibid

⁵ UK Home Office, “Sri Lanka: Tamil Separatism, Version 5.0”, June 2017, p.7, OG6E7028826

⁶ Ibid, citing *GJ & Others* (post –civil war: returnees Sri Lanka CG [2013] UKUT 00319 (IAC) (5 July 2013), para 356(8)

⁷ Ibid

⁸ Department of Foreign Affairs and Trade (DFAT), “DFAT Country Information Report Sri Lanka”, 23 May 2018, CIS7B839411064

⁹ Ibid, citing *GJ & Others* (post –civil war: returnees Sri Lanka CG [2013] UKUT 00319 (IAC) (5 July 2013),

23. In his written statement dated 30 June 2013 that the applicant claimed he gave to the Department after he was told by guards at the detention centre that Tamils would be sent back to Sri Lanka for protection, the applicant stated he was forced to undertake military training by the LTTE in 2007. He did not claim to be an LTTE combatant or cadre. In 2008 the applicant and his family were forced to leave their village in [his hometown] in 2008 due to the war and went to [a town]. [A number of] months later they were forced to move again to [another town] for [a number of] months and then to [a third town] where the applicant's sister's husband was killed during SLA missile attacks and shelling. The applicant and his family moved to different locations several more times during the war until it ended on 17 May 2009. He was arrested by the SLA, interrogated, beaten and tortured. He was later allowed to join his wife and mother at [Camp 1]. At the camp he continued to be interrogated and tortured by the Criminal Investigation Department (CID) who had an office at the camp. This continued for [a number of] months.
24. In 2010 the applicant and his family were resettled in a village in [his hometown]. They were registered and photographed by members of the CID. He was interrogated about who he knew in the LTTE and where they kept their weapons by CID members going from house to house. He said he didn't know and was beaten. In order to secure his safety he took refuge under the Tamil National Alliance (TNA) who provided him with some relief. In 2011 he assisted the [TNA].
25. The SLA tried to appropriate his father's [property] [and] to distribute it to Sinhalese people. When he tried to claim ownership of the land he was beaten and tortured. A senior officer in the SLA threatened him if he went to the police or the courts. After this he did not stay in his house and took turns staying in his relatives' houses. He then sold his land and through his cousin arranged to come to Australia.
26. For the reasons discussed above, I have disregarded the evidence the applicant provided in his written statement of 26 February 2017 as I accept he was unaware of the contents of that statement at the time. At the 2019 IAA interview I asked applicant why he did not indicate that his two interviews after his arrival or in his 2013 statement that he had been an LTTE cadre. He said in both 2012 and 2013 the LTTE was a proscribed terrorist organisation both in Sri Lanka and Australia and he thought if he admitted he had been an LTTE cadre he would be forcibly returned to Sri Lanka and he would be killed.
27. In his written statement provided to the IAA on 14 March 2019 the applicant said that he fears harm from the Sri Lankan authorities as he was a member and cadre of the LTTE. He was a combatant and also attached to the intelligence wing of the LTTE. He was issued with an LTTE identity card dated [in] July 2008 and provided a photocopy to the IAA. At the 2019 IAA interview he said that about three years ago he was able to obtain a copy of the card from a Tamil friend in the UK who had access to a Tamil Tiger website where there is lots of material including copies of LTTE identity cards and other information. He obtained the photographs he has provided to the IAA from the same person. The website has since been deleted by the Sri Lankan government. He was issued with metal plates with an LTTE number assigned to him and which he wore on his waist, wrist and neck. He was issued with a cyanide capsule which he carried with him. He carried and used a T-56 rifle.
28. The applicant provided the IAA with a photograph of himself in LTTE uniform standing next to [a] deceased LTTE leader [with] other fighters which he stated was taken in 2007. The photograph is a little blurred but the applicant is identifiable.

29. At the 2019 IAA interview the applicant described in detail how he became involved in the LTTE, his role and positions, the battles in which he was engaged how he was injured and what happened at the end of the civil war. The following is a summary of his evidence.
30. In 2001 after a large battle between the LTTE and the Sri Lankan Army (SLA) in and around the applicant's village in which a lot of people died including some of his relatives, the applicant and some of his friends joined the LTTE. They underwent training for about [a number of] months and then were assigned to various groups. The applicant wanted to be a combatant due to the deaths in his extended family. He joined a unit which had more than [a certain number of] people and was given an LTTE name of [name]. In 2001 he was involved in his first [battle]. In 2002 there was a ceasefire and the applicant returned to [his previous work]. He was married in 2007 and about three months later the fighting started again. [Mr A] called on him to return to combat and gave him a company of [a number of] LTTE cadres to command. The applicant provided two photographs of his commander to the IAA but said he was not in either of the photos himself. He was assigned an area [to] defend. He also had a role in the intelligence unit from [year] to [year]. He wrote reports for the LTTE headquarters about outcomes of battles, 'martyrs', soldiers who were injured and he informed the higher authorities about what weapons were needed. During this period he incurred [injuries] in which he was treated in LTTE hospitals by LTTE doctors. At the end of the war there was a big fight and many of the 'boys' under his command were martyred. His cousin was killed and the applicant himself was injured very [badly]. Everyone, including civilians, was captured by the SLA [in] May 2009. Prior to his capture the applicant had destroyed his uniform and put on a sarong and shirt in his bunker. He got rid of his watch, weapons and cyanide capsule. He couldn't see anything but just raised his hands. He was taken by the UN and ICRC by bus to [Camp 1] where he was treated at the hospital. He told them he had been injured in the shelling.
31. The applicant was detained at the camp for [a period of time]. There were tens of thousands of people detained in 10 camps along the main road. On many occasions CID officers interrogated and beat him but the applicant never confessed to having been an LTTE cadre. He always told them he was a civilian and had no connection with fighting. Other people did confess and they were taken from the camp. Eventually the UN took over the resettlement program. They collected everyone who belong to his particular area and settled them in [Town 1] in 2010. The CID and police visited everyone to register them and also started their own investigations. He and some friends started clearing jungle in order to farm and in 2011 his daughter was born. No one knew his LTTE name of [Name] but one night two or three Army people came and called out '[Name]'. He did not respond. They came to the house and grabbed him and beat him on the face accusing him of being a member of the LTTE. His mother came out of the house screaming at them and accusing them of killing his father and neighbours came out of their houses and the men ran away. The applicant was scared and didn't sleep at home for the next two or three months. His wife and children were looked after by his father-in-law. The SLA came periodically to monitor them and in 2012 they told his wife they wanted him to go to the army camp but he did not go. Many people had been taken by them in 2011 and he was frightened. In about June 2012 police found him and told him to come to the police station in an hour. He went on his bicycle. They called him by his LTTE name but he did not respond and then they started beating and kicking him. One officer was speaking in Sinhalese. The applicant could understand some of what was said from his time in the LTTE and he heard the officer say he (the applicant) had been in a high position in the LTTE so they would have to take him somewhere else to get the truth from him. Another officer asked him to sign a paper written in Sinhalese. He refused to sign. He was bleeding from his mouth and nose from the beating. They kept him in the kitchen in the office while they waited for a vehicle. The applicant thought that if he was taken to another place he

would be tortured and killed and decided it would be better to run and be killed rather than be tortured before he was killed. He ran from the office and initially they shot over his head warning him to stop. He kept going and escaped into the jungle despite being shot at. However, he injured [himself]. He still has pain and swelling [from] this injury. He provided medical evidence of this injury to the IAA. He went to stay with his relatives in [Town 2] [a number of] km away for [a few months] before he was able to leave Sri Lanka.

32. The applicant's cousin [organised] his departure. This cousin used to bring vegetables to his relatives in [Town 2]. No one knew about the arrangements including his own wife. She only found out after he was allowed to speak with her by phone on his arrival at Christmas Island. Up until then she thought he had disappeared. After his departure police had come to his home on many occasions to enquire about his whereabouts. When his wife found out he had gone to Australia [a few months] after he left their home, she told the police when they next visited. They returned after [a number of] months asking for evidence that he was in Australia. After the applicant was released from detention [the] Australian government gave him a mobile phone. His wife gave the authorities his mobile number to prove that he was in Australia. He received a number of calls from people he did not know - on one occasion asking if this was [Name]. The applicant said no but he was frightened and stopped answering the calls. He and his wife both changed their mobile numbers about three years ago and that was the last time the authorities spoke with her about him. She continues to reside in [Town 1] with her father and supports herself and the children through [working].
33. At the 2019 IAA interview I put my concerns to the applicant about how he managed to evade detection as an LTTE cadre for so long given his age, the fact that he lived in an area controlled by the LTTE and he had visible scarring. In addition, as he was in the same area for some time it would seem likely that someone would have informed on him particularly while he was kept in [Camp 1]. The applicant stated there were tens of thousands of people kept in camps immediately following the end of the war and no one really knew him in the camp in which he was located. Most of the people in his unit had been killed. Nobody really knew who had been killed or disappeared and it was only after the resettlement process got going with the help of other countries and NGOs that people came to know who was alive and who was dead. After he was initially resettled by the UN the only person who knew he had been a member of the LTTE was his wife. However it did become obvious that someone had informed on him because on the two occasions he had described they called him by his LTTE name even though he did not respond. The applicant acknowledged he had been lucky to escape being put in a rehabilitation camp and attributed this to having never confessed when being beaten.
34. I asked the applicant about other claims relating to the appropriation of his father's land. He said that the land had been taken long time ago and there was no point in further protesting about it. It was gone and he did not fear any harm as a result of that particular issue.
35. I asked the applicant about his association with the Tamil National Alliance (TNA) as described in his 2013 written statement. He said that he helped [with a specific task] but they could not provide any real assistance to Tamils in the area so he ceased his association with them. He did not have any claims relating to the TNA.
36. When asked whether he feared harm on his return to Sri Lanka for any other reason other than his LTTE membership, the applicant said no. I put country information to him about changed circumstances in Sri Lanka since the 2015 elections. The applicant stated he believed that even 20 years after the war the government would continue to pursue people who had been involved in the LTTE and he would be imprisoned and possibly killed if he returned.

37. I have had regard to the Court's observations in *MZZJO v MIBP*¹⁰ about the circumstances in which entry interviews are conducted and the caution required by decision-makers in relation to omissions by applicants of matters at their entry interviews. In this matter, I accept the reasons the applicant did not indicate he was an LTTE cadre when he arrived in 2012 or at his entry interview in January 2013 or in his hand written statement in June 2013.
38. Overall, I consider the applicant's evidence to be credible. He provided a great deal of detail about the locations and dates of the fighting in which he was involved, his role in the intelligence unit, names of his fellow LTTE members and details about [Camp 1] all of which is consistent with country information about what was occurring in the northern province of Sri Lanka in 2001 and between 2007 and 2012¹¹. Country information indicates that the refugee camps (or more correctly the Internally Displaced People's (IDP) camps), including [Camp 1] had a significant CID presence and people brought into the camps that were suspected of LTTE involvement were questioned and detained. Former LTTE members were used to identify suspects and torture was used to obtain information¹². When the authorities identified LTTE members they removed them from the camps and sent them to rehabilitation centres.
39. I am satisfied the applicant was a combatant with the LTTE in 2001 and from 2007 to 2009. I accept that he commanded a unit of about [a number of] men for the LTTE and also worked in the LTTE intelligence wing providing reports to headquarters and requisitioning weapons. I accept that he was detained at the end of the civil war from May 2009 in [Camp 1] for [some time] and that during this period he was interrogated and beaten by members of the CID, SLA and police. I accept that he was resettled by the UN with his family in [Town 1] and was registered by the local CID in 2011. I accept that he was periodically sought for questioning by local CID and police and he was detained in about June 2012 by CID at the local office. I accept he escaped and went into hiding for [a few months] prior to departing Sri Lanka. I accept the applicant was of adverse interest to the police and CID in his local area at the time of his departure. I am satisfied he never underwent 'rehabilitation' as an LTTE member.
40. I am satisfied the applicant departed Sri Lanka unlawfully and does not have a valid passport. Given the applicant departed 6½ years ago and will be returning on temporary travel documents I consider it very likely the Sri Lankan authorities will be aware the applicant is a failed asylum seeker and he will be detained on his arrival and questioned.
41. A number of reports have commented on the arrival processes at Colombo airport for failed asylum seekers. The information states that involuntary returnees are processed by several agencies, including the Department of Immigration and Emigration (DIE), the State Intelligence Service (SIS) and the Criminal Investigation Department (CID). These agencies check travel documents and identity information against the immigration databases, intelligence databases and the records of outstanding criminal matters. The process is the same for all persons returning to Sri Lanka and is not affected by ethnicity or religion. They are then interviewed by the police in order to establish whether they were trying to conceal their identity due to a criminal or terrorist background or trying to avoid court orders or arrest warrants. This often involves interviewing the returning passenger, contacting the

¹⁰ [2014] FCAFC 80

¹¹ Joanne Richards, "An Institutional History of the Liberation Tigers of Tamil Eelam (LTTE)", CCDP Working Papers, Centre on Conflict, Development and Peacebuilding (CCDP) - Graduate Institute of International and Development Studies, Geneva, 1 November 2014, CISA447F082828

¹² Office of the High Commissioner for Human Rights (OHCHR), "Report of the OHCHR Investigation on Sri Lanka (OISL) (A/HRC/30/CRP.2)", 16 September 2015, CISEC96CF13358

person's claimed home suburb or town police, contacting the person's claimed neighbours and family and checking criminal and court records.¹³

42. Although the applicant was not very high up in the LTTE hierarchy I accept that as a combatant and member of the intelligence wing of the LTTE there is a real chance he will be identified by the local police and CID office as a former LTTE cadre and a person of adverse interest when he departed Sri Lanka in 2012.
43. DFAT states that the Sri Lankan government estimates that about 5000 undisclosed ex-combatants remain in the community. They are reluctant to identify as such for fear of rehabilitation or prosecution.¹⁴ Whilst DFAT is not aware of rehabilitation being imposed on any former LTTE members who have returned from Australia it also states that modest numbers of former LTTE members continue to be detained and prosecuted within Sri Lanka's justice system and DFAT is not able to independently verify the number of former LTTE members in places of detention other than rehabilitation centres.¹⁵
44. The UK Home Office Report on Tamil Separatism states that the issue of police powers to arrest was addressed in the UN Committee Against Torture (CAT), Concluding Observations on the fifth periodic report of Sri Lanka, 30 November 2016, noting: *'The Committee is concerned that the broad police powers to arrest suspects without a court warrant has led to the practice of detaining persons while conducting the investigations as a means to obtain information under duress. The Committee notes allegations that police investigators often fail to register detainees during the initial hours of deprivation of liberty or to bring them before a magistrate within the time-limit prescribed by law, during which time torture is particularly likely to occur.'*¹⁶ DFAT quotes the same report in which it was claimed that 'torture to be of routine nature ... practiced all over the country, mainly in police detentions' and that police use torture during interrogation and arrest regardless of the nature of the suspected offence.¹⁷
45. There are further recent reports of continuing human rights violations in Sri Lanka, including the use of torture against suspects and the ability of the security forces to act with impunity.¹⁸ The US Department of State reported in 2017 there are significant human rights problems including incidents of arbitrary arrest, lengthy detention, surveillance and harassment of civil society activists, journalists, members of religious minorities and persons viewed as sympathizers of the LTTE.¹⁹ The 2017 International Truth and Justice Project report noted that human rights violations by the security forces continue with impunity and Tamils with tenuous links to the LTTE or low-level cadres continued to be targeted, along with their families.²⁰

¹³ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report Sri Lanka", 23 May 2018, pp.41-42, CIS7B839411064

¹⁴ Ibid, p.20

¹⁵ Ibid, pp.20-22

¹⁶ UK Home Office, "Sri Lanka: Tamil Separatism, Version 5.0", June 2017, OG6E7028826

¹⁷ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report Sri Lanka", 23 May 2018, p.34, CIS7B839411064

¹⁸ US Department of State, "Country Reports on Human Rights Practices 2017 - Sri Lanka", 20 April 2018, OGD95BE927333; Freedom from Torture, "Sri Lanka – Update on torture since 2009", 6 May 2016, CIS38A8012881; Freedom from Torture, "Tainted Peace: Torture in Sri Lanka since May 2009", August 2015, CISEC96CF13070; International Truth and Justice Project (ITJP), "Silenced: survivors of torture and sexual violence in 2015", 7 January 2016, CIS38A801275

¹⁹ US Department of State, "Country Reports on Human Rights Practices 2017 - Sri Lanka", 20 April 2018, OGD95BE927333

²⁰ International Truth and Justice Project (ITJP), "Unstopped: State Torture and Sexual Violence in 2016/17", 14 July 2017, CISED50AD4849

46. Turning to the applicant's specific circumstances, I have found that he was a member of the LTTE who was an active combatant, leader of a unit of [a number of] LTTE cadres and member of the intelligence wing of the LTTE, albeit at a low level. He lived and his family continues to live in a known LTTE controlled area. He has [injuries]. I accept he was of adverse interest to the police and CID in his local area in the months immediately before his departure. He has never been 'rehabilitated'. He will be questioned on his return to Sri Lanka by authorities who will refer back to the police and CID in his home area before he is released. Under these circumstances, and given the above country information, I am satisfied that there is a real chance that the applicant will be detained, interrogated and suffer serious harm, such as deprivation of liberty, significant physical harassment and significant ill-treatment for reasons of his actual or imputed pro-LTTE political opinion together with his Tamil ethnicity if he returns to Sri Lanka now or in the reasonably foreseeable future. As the harm is feared from the state, I find that the real chance of persecution relates to all areas of Sri Lanka and that effective protection measures are not available to him. Based on all the evidence before me, I am satisfied the applicant's fear of persecution is well-founded.

Refugee: conclusion

47. The applicant meets the requirements of the definition of refugee in s.5H(1).

Decision

The IAA remits the decision for reconsideration with the direction that:

- the referred applicant is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*.

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.