



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA19/06410

Date and time of decision: 9 April 2019 14:34:00
G Deal, Reviewer

Decision

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

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

Background to the review

Visa application

1. The applicant (the applicant) claims to be a Tamil from [Village 1], Sri Lanka. [In] September 2012 he arrived by boat in Australia. On 13 March 2017 an application for a Safe Haven Enterprise Visa (SHEV application) was lodged on the applicant's behalf with the Department of Immigration, now part of the Department of Home Affairs.
2. On 21 February 2019 a delegate of the Minister for Immigration (the delegate) refused to grant the visa. The delegate accepted most of the applicant's claims and that he subjectively feared being harmed by the Tamil Makkal Viduthalai Pulika (TMVP) but did not accept he faced a real risk of serious harm from the TMVP or the authorities because he was a Tamil who had supported the Tamil National Alliance (TNA) or because he left Sri Lanka illegally and would be a failed asylum seeker. The delegate found the applicant was not a person in respect of whom Australia had protection obligations.

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. No further information has been obtained or received.

Applicant's claims for protection

5. The applicant's claims can be summarised as follows:
 - He is a Tamil male of Hindu faith, from [Village 1] in the east of Sri Lanka who was born in [year]. His wife, [child], and [rest of the family] continue to reside in the family village in [Village 1]. He and his family were displaced due to fighting and he assisted the Liberation Tigers of Tamil Eelam (LTTE) during the conflict.
 - On his way to school he was beaten by the Sri Lankan Army (SLA) on many occasions. His mother was well-known [professional] in the area. It was common for Tamil boys 15 year or older to be taken to torture camps by the SLA at that time and he feared this would happen to him as it had to some of his friends, so he finished school in [year]. After living in [Village 1] for a short period he moved to Colombo for [a few] years.
 - His [relative] was imprisoned for [number] months in 1986 on suspicion of LTTE involvement.
 - In about 1987 he was arrested by the SLA and detained for [a few] days and severely mistreated on suspicion of LTTE involvement. He was released with the assistance of his mother. After this incident he kept a low profile and did not leave the house. He fled Sri Lanka in fear of his safety and worked in the [Country 1] from 1991 and returned to Sri Lanka in 1999 because there was a ceasefire.
 - He was briefly detained and beaten by authorities on suspicion of LTTE involvement in about 2000 and so he returned to the [Country 1] that same year after getting married and the birth of his [child]. His wife had protection as she worked [in Occupation 2].

- On his return to Sri Lanka in 2002 he worked [in Occupation 3], including [organisation 1], the [organisation 2] and in his own business.
- In 2004 he returned to the [Country 1] and worked, returning to Sri Lanka in 2006. He travelled to [Country 2] on a [temporary] visa in 2009 and worked there until his return to Sri Lanka in 2011.
- On his return to Sri Lanka he worked [in occupation 3]. The SLA harassed him, beat him, took his money and damaged his [goods] because he was Tamil.
- From about 2008 he was an active supporter and relied on campaigner of the TNA. He drove [Mr A], the TNA member in his area, to political meetings and gatherings and helped distribute leaflets at these events and put up posters. He attracted the adverse attention of the TMVP while working for the TNA. In about May 2012 the TMVP called him three times asking him to attend their offices and when he did not go they sent him a letter demanding the same on 10 August 2012. He stayed at friends' houses at night, and hid in [City 1] for about [a few weeks] before eventually fleeing Sri Lanka for Australia by boat [in] August 2012, in fear of his safety.
- The TMVP went to his house looking for him after he left his home and shortly after he left Sri Lanka and told his family if they saw him they would shoot him.
- He would be harmed because he has lived and worked in Australia. He will continue to be an active supporter and campaigner of the TNA on his return and continue to attract adverse attention because of this. He has a [medical condition] and has been told he needs [further medical treatment]. He fears harm because his original key identity documents were lost in the post. Even if released at the airport he is at risk of being detained after returning to his home area. He is a failed asylum seeker. He left Sri Lanka illegally.

Factual findings

6. Based on the applicant's evidence, including his documentary evidence, I accept he is a Sri Lankan national and that Sri Lanka is the 'receiving country' for the purposes of s.5J of the Act. I also accept his wife, child, s and [rest of the family] continue to reside in the home village in [Village 1]. I accept he is of Hindu faith as this has been consistently claimed however he has not mentioned any claims in this regard.

SLA harassment and mistreatment as a teenager

7. The applicant claims he assisted the LTTE during the conflict. The claim he assisted the LTTE (as distinct from the claim he was arrested on suspicion of LTTE involvement) was only first mentioned in the applicant's SHEV interview when he said that as a Tamil he had to support the LTTE, he had to give them food if they wanted it, if he wanted to live in the area he had to help. I consider it may have not been mentioned earlier because it happened some 35 or more years ago when the applicant was a child. He only mentioned this when the delegate asked if he had had any involvement with the LTTE during the conflict. He also said that the LTTE went to his area. When directly questioned by the delegate he also said he never fought, trained or helped or was harassed by the LTTE and none of his family members ever served with the LTTE. In his arrival interval interview the applicant did not indicate the LTTE were in his home village and in his application he indicated that a Sri Lankan army camp was near his home and school when he was about [age]. He also said that he and his [relative] were not asked to fight for the LTTE because of their illnesses; the applicant claims to have a

[medical condition]. The country information before me indicates the armed conflict commenced in about 1983.¹ It also indicates that the LTTE was at its height of influence in 2000 – 2001 and controlled and administered 76% of the northern and eastern provinces of Sri Lanka and that all the people living in these LTTE controlled areas necessarily had some contact with the LTTE and its administration on a day to day basis.² In light of this I am willing to accept the applicant's family may have been forced to assist the LTTE with things like providing food [number of] years ago when the applicant was a child as many other Tamil families would have also been required to do at that time in that area. I do not accept he or any of his family members served with the LTTE during the conflict. While I am willing to accept his [relative] may have been imprisoned on suspicion of LTTE involvement for [a few] months in 1986 given it is plausible in light of the country information before me and the detail provided, there is nothing before me to suggest he continued to be viewed with suspicion after his release.³

8. The applicant claims he was beaten by the SLA on multiple occasions on his way to school and that he was forced to cut his education short and leave school in [year] at the end of [year specified] because of this. The applicant has consistently said he left school in [year]. In his application he mentioned that while walking to school he was beaten by the SLA on many occasions and that a number of his friends were taken by the SLA to torture camps and that this was common for young Tamil boys from the age of around 15. He was scared this would happen to him and because of this he finished school after [year specified]. In the SHEV interview the delegate asked the applicant to tell him about his youth in [Village 1]. The applicant said that after [year specified] he was not happy. He did not have any freedom of movement. He could not go out because the army would catch him. He did not mention or provide any detail about his claimed beatings by the SLA. I do not accept the applicant was repeatedly beaten by the SLA on his way to school or that his friends were taken to torture camps. Nonetheless, the country information before me indicates that the armed conflict commenced just prior to the applicant commencing [year specified] and he has broadly consistently claimed to fear the SLA at that time as a young Tamil male and to have heard of others' harassment by the SLA at that time and I am willing to accept this aspect of his claim and that he left school because of this.⁴

Imprisonment and severe mistreatment by SLA

9. The applicant claims he was detained by the authorities on suspicion of LTTE involvement, beaten and then released in both 1987 and 2000. In his arrival interview when asked if he were ever arrested or detained he said that when he was about [age] years old (making it about 1987) he was detained under suspicion for [a few] days and beaten. When asked if this ever happened again he said it happened twice but they released him and the last incident was in 2000 (when he would have been about [age] years of age). He provided more detail about the first incident in his application but did not mention the second incident. He said it happened when he was travelling from [Village 1] to Colombo and that it happened because he was Tamil. The SLA officer put a gun to his head and told his father they wanted to take him away. He was taken to [a] camp and severely mistreated. His mother could speak Sinhalese and she went to the camp and begged them to release him and he was released.

¹ Danish Immigration Service, "Human Rights and Security Issues concerning Tamils in Sri Lanka", 71, 1 October 2010, CIS19345.

² UN High Commissioner for Refugees, " UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183EA8

³ Jane's Information Group Inc., "Tiger Cubs and childhood fall as casualties in Sri Lanka", 1 July 1998, CIS3187.

⁴ UN High Commissioner for Refugees, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183EA8.

After being released he lived with his mother for a short period in his home village and he did not go outside but his mother sent him to the [Country 1] as she was afraid he would be taken. In his SHEV interview he provided more details about the first incident including that he was arrested on suspicion of LTTE involvement at a checkpoint. He said that at the camp they put his hands inside a barrel and a piece of wood on his hands and he still had scars and problems from his mistreatment although I note he has not provided any further detail or supporting information in relation to these injuries. An officer told them they were not supposed to harass anyone and that was why he was released. When the delegate asked if he were released after his mother came to the camp he said she was a [professional] and she knew some of the officers and that she took a letter to the camp to say the family had no involvement with the LTTE. Noting the broadly consistent nature of the claim and the detail provided, I accept the applicant was detained and severely mistreated by the SLA in about 1987 on suspicion of LTTE involvement and that he was released with the help of his mother. He has consistently said that after this incident he kept a low profile and did not leave the house and fled to the [Country 1] in 1991 which I am willing to accept. However, I note in the four or so years he remained in his home prior to his departure, he did not have any further issues with the authorities and he legally travelled to the [Country 1] on his passport and in these circumstances I do not accept he continued to be wanted by the authorities after his release.

10. In contrast, the second incident was not mentioned by the applicant after its very brief mention in the arrival interview, despite him having an opportunity to provide more detail in his SHEV application, interview and post interview submission. When compared with the first incident the detail in relation to the second incident is seriously lacking. This raises some concerns for me regarding its veracity particularly given it was more recent. I do not accept the applicant was detained on suspicion of LTTE involvement, beaten and released by the SLA in about 2000.

Harassment by the SLA while working

11. The applicant claims that on his return to [Village 1] from [Country 2] in 2011 he was harassed by the SLA. They took money from him, damaged his stock and beat him on [a number of] occasions. In his arrival interview when asked why he left Sri Lanka the applicant initially said people took bribes and harassed him while he was doing his job. At night people would take his money and threaten him and he was marginalised as a Tamil. In his SHEV interview he said that while [working] [in] his [vehicle], the SLA would stop him and ask him for money. If he did not give them money they would beat him. They would also take his [products], put them in the rain and spoil them. When questioned about these claimed incidents in the SHEV interview the applicant said that the SLA would ask them for money at checkpoints and would not let them freely operate their businesses. The delegate noted the applicant had also said in his application that the SLA beat him. The applicant said if he did not give them money they would hit him. The delegate asked him when this happened and the applicant said about four or five times. He was again asked when this happened and he said before 2011. When the delegate asked if it happened before 2009 the applicant said "yes". The delegate asked him for more detail about these beatings and the applicant said that the SLA asked them to give them stuff and if they refused they beat them. He said this was basically because he was Tamil. The country information before me indicates that at that time in the east, there was still a strong army presence, especially in rural areas where poor people felt vulnerable; there were still checkpoints between [Village 1] and Colombo and

random checks were still being performed.⁵ I accept the applicant was on occasion harassed by the SLA at checkpoints and forced to give them money and that they may have destroyed his [products] on one occasion. Based on his description of the events in his interviews, including that it was because he was Tamil, I consider he was not personally targeted and it was not because he was suspected of LTTE links, but rather the result of generalised discrimination against Tamils at that time. He did not mention being beaten by the SLA until his application and did not mention it occurred [on number of] times until his SHEV interview and he appeared to struggle answering the delegate's questions about this aspect of his claim in the SHEV interview. I do not accept the SLA beat him on [a number of] occasions. The claim they came at night and harassed him and took his money was not mentioned after first being briefly stated in the arrival interview. I do not accept this occurred.

12. In the applicant's SHEV interview when asked whether there were any specific incidents that made him travel overseas in 1999, 2000 and 2004 the applicant said that he could not live peacefully and run his own business because the SLA used to give him a hard time, stopped his vehicle and asked him to go here and there. He said they would get him to transport them places which would place him at risk if the LTTE saw him because they would attack his[vehicle]. When asked to describe a specific incident when he was attacked by the LTTE he said he was lucky, it did not happen to him, but it happened to other people and that was why he was scared. It is possible the applicant may not have thought to mention these claimed incidents earlier given he was never attacked by the LTTE. However, given the detail provided I am willing to accept the applicant may have been harassed by the SLA at checkpoints and forced to drive them short distances in his [vehicle] at these times. I note, he has not claimed to have been questioned or detained by them in connection with an adverse security profile at these times and based on the country information before me I consider these incidents were the result of the generalised discrimination and harassment suffered by Tamils at the hands of the security forces during the conflict.⁶
13. The applicant claims he returned to Sri Lanka from overseas on four separate occasions to see his family although he has also broadly claimed to have fled each time as he feared for his safety. I also note that in the arrival interview he said he returned from [Country 2] after just one month on one occasion because he did not like the job. Each time he has travelled legally on a [temporary] visa and has worked overseas and in between leaving school and leaving Sri Lanka he has spent the bulk of his time working overseas. I do not accept he travelled overseas in 1991, 2000, 2004 and 2009 because he genuinely feared for his safety at those times.

TNA involvement and harassment by the TMVP

14. The applicant claims he drove a local TNA member, [Mr A], to political meetings and gatherings. He said he was an active and relied upon supporter of the TNA and that because of this he was pursued by the TMVP. This was why he fled Sri Lanka in fear of his safety in 2012. When asked in the arrival interview why he left Sri Lanka the applicant relevantly said he had some problems with people with weapons. When asked who these people were, he said they were affiliated with the Sri Lankan government and were opposed to them because they were working for Tamils in the area. When asked when he last had a problem with these

⁵ UN High Commissioner for Refugees, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183EA8.

⁶ Danish Immigration Service, "Human Rights and Security Issues concerning Tamils in Sri Lanka", 71, 1 October 2010, CIS19345; United Nations Office High Commissioner for Human Rights, Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism – Mission to Sri Lanka, (23 July 2018) UN Doc. A/HRC/40/XX/Add.3.

people the applicant said it was in about August 2012 when they were searching for him and he had to hide at other peoples' homes. He also mentioned putting up posters for the TNA stating that this was what caused the problems. In his application he said that after his return from [Country 2] in 2011 and when not working in his own business he would transport [Mr A] to political meetings and gatherings. He would work for the TNA a few hours per day. At the meetings he would distribute TNA leaflets. As the driver he was visible and could be easily identified. He came to the attention of the TMVP who were against Tamil people. He knew they were interested in him because in May 2012 they called him on the phone number [three] times asking him to go to their offices. He did not go. On about 10 August 2012 he received a letter in his letterbox from the TMVP asking him to come in for interrogation. He did not go. He stopped staying at his home at night as he was afraid the TMVP would take him away. He stayed at other peoples' houses. He did not drive his vehicle because he was afraid they would recognise him. Shortly after receiving the letter he went to [City 1] where he remained for about two weeks in hiding. He returned to his home for a couple of days to see his family and in [August] 2012 left Sri Lanka for Australia by boat in fear of his life.

15. When asked in the SHEV interview when he first became involved with the TNA the applicant said it was in about 2008. When asked what he did with them he said he was helping to transport them and asked Tamils to vote for them. When asked to describe the other work he did he said it was the same thing and that there was nothing to explain and then later mentioned getting people to vote for them and putting up posters. When asked if he knew what [Mr A] was doing now he indicated he did not, stating he has not had any contact in [some] years. He said the main reason he got in trouble was because he was driving [Mr A]. He said he only picked up the first call from the TMVP and that when he did not go to their offices as requested they sent him a letter. When asked when the calls began he could not remember. He said, for the first time, that after receiving the letter the TMPV went to his house looking for him but he was not there. His wife was home and they told her if they saw him they would shoot him. When asked if he were ever physically harmed by the TMVP he said he was not but that his friends had been and he feared it might happen to him. He provided no further detail in this regard. When asked if this was the sole reason he left Sri Lanka he said it was and that he could not take any more torture as he had a [medical condition] and was not young anymore.
16. In support of this claim the applicant provided a copy of a letter purportedly from the TMVP. The copy of the original has a letterhead that does not look professional; it has different sized and type font and is written in both English and what looks to be Sinhalese. It is dated 10 August 2012 and the content of the letter is hand written. The translation indicates the letter is addressed to the applicant and it states "We have sent invitation...[to the applicant]...of the above address many times in person and by telephone but he has not attended our office. Therefore important note. We are to meet you on a necessary meeting [in]08.2012 at [in] the morning. We wish to inform you that we will be faced to take final measures in case if this is refused or not taken proper notice of". I find it somewhat implausible that the TMVP would threaten the applicant in this manner in writing, particularly given this was some years after they had officially handed over weapons and joined the government.⁷ Despite its mention in the letter, the applicant has not claimed to have been approached by the TMVP in person at his home. In light of the above and the prevalence of document fraud in Sri Lanka I place no weight on the letter.⁸ The country information before me indicates that the TNA was the largest Tamil political party at that time, that its candidates ran in 2011 elections for local

⁷ Danish Immigration Service, "Human Rights and Security Issues concerning Tamils in Sri Lanka", 71, 1 October 2010, CIS19345.

⁸ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064.

government and that these elections were accompanied by inter and intra party violence and violations of electoral law and that the role of some paramilitary groups at that time was to weaken the TNA.⁹ Other country information before me reports that Karuna and Pillayan factions were engaged in “ballot rigging”, intimidation and violence during elections, including in the Batticaloa district, targeting anyone opposed to their party.¹⁰ The applicant’s claim to have put up posters and asked others to vote for the TNA on his return to Sri Lanka in 2011 and to have been generally harassed by an armed group in connection with this, which is also consistent with the country information detailed above indicating the TMVP harassed and intimidated anyone politically opposed to them, have been highly consistent and I accept this aspect of his claim. However I have serious doubts about the other aspects of this claim.

17. The applicant’s claim to have driven [Mr A], which he indicated in his SHEV interview was his main claim, was only first mentioned in his application and in the SHEV interview he indicated he knew little about [Mr A]. Its late mention raises serious concerns for me regarding its veracity given its recency and significance. I do not accept the applicant drove [Mr A]. The applicant mentioned being involved with the TNA from 2008 in his SHEV interview having previously indicated his involvement commenced in 2011 after his return from [Country 2]. He was unable to provide much detail about his claimed involvement when questioned on this in the SHEV interview. In his arrival interview he said he posted notices for them, in his application he said he handed out leaflets at meetings when requested and in his post interview submission his migration agents described him as an active and relied upon supporter of the TNA. Given its late mention and the lack of detail provided I do not accept his involvement stretched back to 2008 or that he did anything other than put up posters and encourage those around him to vote for the TNA. I do not accept he was an active and relied on supporter. The applicant was never personally approached by the TMVP or mistreated in the period from 2011 (when working for the TNA) to August 2012 (when he left Sri Lanka), despite remaining in his home in the three months between being purportedly called by them (May 2012) and receiving the letter (August 2012). I do not accept the TMVP letter is genuine and consider the applicant has fabricated events relating to his harassment by the TMVP leading up to his departure from Sri Lanka in 2012. I do not accept the TMVP called him three times asking him to go to their offices and then sent him a letter requesting the same. Nor do I accept they have looked for him since or that they told the applicant’s family they would shoot him. I do not accept he left Sri Lanka genuinely in fear of his life.

Medical condition

18. The applicant claims he cannot face any more torture, in particular because he has a [medical condition] and he needs [further medical treatment]. In his SHEV application he briefly mentioned he had a [medical condition] when explaining why he was not asked by the LTTE to fight. In his SHEV interview he said he left Sri Lanka because he could not undergo more torture particularly because he has a [medical condition]. At the conclusion of the SHEV interview the delegate asked the applicant if he had anything else to state and the applicant said he had been told he needed three surgeries. Anything may happen to him. The applicant provided no further detail about his claimed condition or the surgery he claims is required. He has not provided any supporting documentation like medical records, a doctor’s letter or diagnosis. I note he has also been represented by the same firm of migration agents since lodging his application and while he claims he was only given limited pro bono assistance and

⁹ UN High Commissioner for Refugees, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183EA8.

¹⁰

advice with his application (he was invited by the Department to apply in November 2015, but only ended up lodging an application in haste in March 2017 after receipt of a second letter from the Department in December 2016 giving him a further 60 days to lodge) an agent from the same firm attended his SHEV interview and they lodged an extensive post interview submission on his behalf making no mention of his physical condition or any surgeries.¹¹ On the evidence before me the belated claim he requires [further medical treatment] is unsupported and I do not accept it. While it appears, and I am willing to accept, he has had a [medical condition] since childhood there is no credible evidence before me to indicate this is serious, debilitating or has required on-going treatment.

19. While it appears the applicant provided an English translation of a character reference (a copy of the original which appears to be written in Tamil is before me) from the [specified] office to the delegate in the SHEV interview this was not included in the referred material. Regardless I have decided not to obtain this given the applicant referred to it in the SHEV interview as merely a character reference and did not indicate the [specified office] had any personal involvement in the events claimed.

Refugee assessment

20. 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

21. 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.
22. I accept the applicant is a Tamil male born in [year] from [Village 1], Sri Lanka and that his family were displaced during the war and he was briefly detained on suspicion of LTTE involvement but was no longer suspected after his release some [years] ago. I also accept he was harassed as a Tamil by the authorities during the conflict and in its aftermath and by a

¹¹ Reference was made to general country information about medical services in Sri Lanka in the context of submissions about the applicant’s inability to relocate within Sri Lanka.

rival political group, the TMVP, because he put up posters and supported the TNA in the lead up to the 2012 local elections but I do not accept the TMVP called him, sent him a letter or threatened to kill him or that he was wanted by them or authorities or the government when he left Sri Lanka in 2012.

23. The country information before me indicates that conditions in Sri Lanka have improved since the applicant left in 2012, particularly after the election of the Sirisena government in 2015, which has since engaged constructively with the United Nations, established the Office of Missing Persons, removed military checkpoints on major roads, returned some confiscated land in the north and east and reviewed cases of those held under the *Prevention of Terrorism Act* (PTA), among other things.¹² Nevertheless, the current government's progress has been slow, and a number of human rights challenges remain, including continued reports of the PTA being used to arrest and detain suspects, torture and other ill-treatment in detention and militarisation and "Sinhalisation" in minority areas.¹³ Political turmoil in 2018 has since settled and the information before me merely speculates on what may happen in the future in this regard.¹⁴
24. The country information before me indicates that a person's history will only be relevant to the extent the person is perceived by the authorities as indicating a present risk to the unitary Sri Lankan state.¹⁵ In line with this, the country information reports that the government holds sophisticated intelligence on those who continue to be of interest, such as those with an extant court order, arrest warrant, order to impound their passport or those suspected of separatist or criminal activities or close relatives of high profile former LTTE members.¹⁶ If an individual is detained in these circumstances they may be severely mistreated.¹⁷
25. While Tamils in some parts of the country still report of monitoring by the authorities, members of the community have reported feeling more empowered to question this. DFAT assesses that the risk of official and societal discrimination on the basis of Tamil ethnicity is low. Consistent with this the UK Home Office has noted that in its opinion being of Tamil ethnicity, in itself, does not warrant international protection.¹⁸
26. The country information before me indicates that there were frequent reports of extrajudicial killings, disappearances and abductions for ransom by various groups including paramilitary until about 2011 but that these incidents have significantly decreased since the end of the conflict.¹⁹ Originally a breakaway group from the LTTE, the TMVP was subsequently disarmed and worked for the government (although there are reports they continued to act criminally at that time) and eventually registered as a political party and formed part of the United

¹² DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826.

¹³ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064; Freedom House, 'Freedom in the World 2018 - Sri Lanka' (5 April 2018); Patrick Wintour, 'Sri Lankan reform has 'ground to a halt' with torture used freely – UN', *The Guardian* (23 July 2018); Amnesty International, 'FLICKERING HOPE: TRUTH, JUSTICE, REPARATION AND GUARANTEES OF NON-RECURRENCE IN SRI LANKA', 25 January 2019, 20190130105934.

¹⁴ *The Diplomat* 'Sri Lanka: After the Crisis, What Next?', 7 January 2019, 20190108151614.

¹⁵ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826.

¹⁶ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064.

¹⁷ United Nations Office High Commissioner for Human Rights, Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism – Mission to Sri Lanka, (23 July 2018) UN Doc. A/HRC/40/XX/Add.3.

¹⁸ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826.

¹⁹ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064.

People's Freedom Alliance, a party coalition led by the Sri Lankan Freedom Party.²⁰ DFAT reports that the influence and inclusion of Tamils in politics has increased in recent years. The TNA represents the majority of Tamils in the north and east of Sri Lanka.²¹ Recent local elections held in 2018 were described as the most peaceful in Sri Lanka's history, which was largely attributed to education and the effective enforcement of election laws.²² DFAT assesses that no laws or official policies discriminate on the basis of political opinion, and that there is no systemic political discrimination against any political group.

27. Overall, the country information before me indicates that while the conditions in Sri Lanka have greatly improved for Tamils in recent years including more inclusion in the political dialogue, issues remain. In particular close relatives of high profile former LTTE members or those who have engaged in separatist or criminal activities are at risk of being detained and mistreated and if detained in these circumstances they may be severely mistreated. However the applicant does not meet this description. Beyond some incidents of opportune harassment on account of ethnicity I have not accepted he was of any ongoing interest to the authorities after his release some [years] ago. I have also not accepted the applicant's claims of serious harassment by the TMVP in the lead up to his departure from Sri Lanka, including the receipt of the letter demanding he attend their offices or the threat to his life, or that he was of genuine interest to them when he left Sri Lanka in 2012. The applicant claims he will resume supporting the TNA on his return. In the SHEV interview he confirmed he had not been involved in any anti Sri Lankan government demonstrations in the seven or so years he had been in Australia and was not part of a Tamil organisation or even a Tamil community group in Australia. He said this was because the Australian government told them not to get involved in these types of activities. I have only accepted he supported the TNA for about a year prior to his departure. I have accepted he put up posters and attempted to persuade those around him to vote for them. I am willing to accept he may do this again on his return. Overall, based on the country information detailed above and the applicant's profile I am not satisfied the applicant faces a real chance of harm by reason of his origin, ethnicity, his or his family's past experiences in Sri Lanka or his political views.
28. I accept the applicant will be a returning asylum-seeker. The applicant also claims to fear harm because he has lived and worked in Australia for [for a number of] years and he does not have his key original Sri Lankan identity documents because they were lost when the Department posted them to him. I accept his original Sri Lankan national identity card and his Sri Lankan and [Country 2's] drivers' licences may have been lost in the post. However in the arrival interview he indicated his original passport and marriage certificate were still in Sri Lanka and he has copies of his lost Sri Lankan identity documents. DFAT states that the biggest problems facing returnees are bureaucratic inefficiencies and social stigma which can affect a returnee's ability to secure employment and housing and that many have to meet the costs of their boat journey. DFAT also notes of anecdotal evidence of returnees to the north being monitored by authorities; however the applicant is from the east and has not indicated he would return to the north. DFAT also reports that free legal advice and support is available in Sri Lanka when obtaining replacement documentation given it is not uncommon to lack identity documentation given the conflict and 2004 tsunami. The applicant also claims he cannot face any more torture because of his [medical condition] however I have not accepted he was wanted by the authorities or those working with them when he left Sri Lanka in 2012 or that his [medical condition] is serious, debilitating or requires on-

²⁰ Austrian Centre for Country of Origin & Asylum Research and Documentation, "Sri Lanka: COI Compilation", 31 December 2016, CIS38A80123251; International Crisis Group, "Sri Lanka Between Elections – Asia Report No 272", 12 August 2015, CISEC96CF13069.

²¹ The Diplomat 'Sri Lanka: After the Crisis, What Next?', 7 January 2019, 20190108151614.

²² Colombo Page, "Most peaceful election in history of Sri Lanka - election monitors", 10 February 2018, CXBB8A1DA22040.

going treatment. The applicant has also consistently indicated he believes his family have paid in full for his journey to Australia. As a Tamil asylum seeker returning to the east the applicant may face some initial reintegration issues and may have to obtain a replacement national identity card and Sri Lankan drivers' licence but I am not satisfied this amounts to serious harm.

29. The applicant left Sri Lanka illegally and as such will be subject to the *Immigrants and Emigrants Act 1949* (I&E Act) and associated procedures at the airport . He fears he will be detained at home even if he manages to pass through the airport. The country information before me²³ indicates that following arrival at the airport, returnees will be processed in a group by a number of government agencies and this process can take several hours. If returning on a temporary travel document, police will undertake further investigations in particular to ensure an individual does not have a criminal or terrorist background or an outstanding court order or arrest warrant. Overall, DFAT understands returnees are not mistreated during processing at the airport. Those who departed illegally by boat may be found to have committed an offence under the *Immigrants and Emigrants Act 1949* (I&E Act). If arrested they will be photographed, fingerprinted, a statement will be taken they will be transported to the closest magistrate's court where the next steps will be determined. If a magistrate is not available, for example on a weekend or public holiday, they may be held for up to two days in an airport holding cell. They must also appear in court when their case is being heard or they are summonsed as a witness in a case. The offence will be heard in the court closest to the occurrence of the offence which involves legal and transportation costs. Cases are only heard when all members of a people smuggling venture have been located, which can result in long delays. Penalties can technically include imprisonment however no mere passenger has been given a custodial sentence and the fines are relatively low (starting at 3,000 rupees) and able to be paid in instalments. A fine will generally be issued and the person will be free to go immediately, if they plead guilty. If not pleading guilty they will likely be granted bail on the basis of personal surety or guarantee by a family member and so will have to wait for a family member to pick them up. DFAT also notes that the cumulative costs for returnees associated with the court process can be high.
30. There is no credible evidence before me that suggests the applicant has a criminal or terrorist background or outstanding court orders or arrest warrants or is otherwise wanted by the authorities. He has not said he was anything other than a passenger on the people smuggling boat. Based on the country information above I accept the applicant may be detained at the airport for processing and may possibly be briefly (up to two days) held in a holding cell if a Magistrate is not available, as part of the usual procedures for those who left illegally. I am not satisfied there is a real chance he would be otherwise detained. If the applicant pleads guilty, he has not indicated he would do otherwise, after being issued with a fine he will be free to leave immediately. Given his ability to work and option to pay the fine in instalments I am not satisfied that he would not be able to pay the fine or that there is a real chance this would threaten his capacity to subsist. If he does not plead guilty he would likely be granted bail on certain condition, such as personal surety or guarantee by a family member and would be released on being collected by a family member and the evidence before more does not indicate his wife or a sibling, who all currently reside in the family village in the east, would be unable or unwilling to do this if required. While he may have to meet costs associated with the court process in his circumstances based on his profile and support I am not satisfied there is a real chance this would threaten his capacity to subsist or would otherwise amount to serious harm.

²³ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OGG6E7028826.

31. I accept the applicant, as a consequence of his illegal departure, may be interviewed, charged, briefly held, fined, and may possibly have to attend court appearances and meet costs associated with this, but I do not accept these experiences amount to 'serious harm' in this case, even taking into account his heart condition. Furthermore, I am not satisfied that the relevant laws and procedures dealing with those who depart Sri Lanka illegally are discriminatory, or intended to apply or are applied or enforced in a discriminatory manner.
32. I am not satisfied the applicant faces a real chance of persecution because of his illegal departure.
33. I am not satisfied the applicant has a well-founded fear of persecution.

Refugee: conclusion

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

Complementary protection assessment

35. 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

36. Under s.36(2A), a person will suffer 'significant harm' if:
 - the person will be arbitrarily deprived of his or her life
 - the death penalty will be carried out on the person
 - the person will be subjected to torture
 - the person will be subjected to cruel or inhuman treatment or punishment, or
 - the person will be subjected to degrading treatment or punishment.
37. For the reasons already discussed, I accept the applicant may be interviewed, charged, briefly held, fined, and may possibly have to attend court appearances and meet costs associated with this. However, I am not satisfied that these circumstances amount to 'significant harm', as defined for the purposes of s.36(2A), even when taking into account [a medical condition]. There is not a real risk the applicant would be arbitrarily deprived of his life or subject to the death penalty on his return or be subject to torture. Furthermore, the evidence before me does not support a conclusion that there is an intention to inflict severe pain or suffering, pain or suffering that could reasonably be regarded as cruel or inhuman in nature or to cause extreme humiliation. I am not satisfied the applicant faces a real risk of significant harm as a consequence of his illegal departure.
38. As detailed above I accept that as a Tamil asylum seeker returning to the east the applicant may face some initial reintegration issues and have to obtain a replacement national identity card and Sri Lanka drivers' licence. However, I am not satisfied that these circumstances,

even when coupled with what he may experience as a consequence of his illegal departure, amount to 'significant harm' within the meaning of s.36(2A) of the Act. This will not involve the applicant being arbitrarily deprived of his life, or being subjected to the death penalty, torture, cruel or inhuman treatment or punishment or degrading treatment or punishment.

39. In considering the applicant's refugee status, I have otherwise concluded that there was no 'real chance' the applicant would suffer harm on his return to Sri Lanka for the other reasons claimed. 'Real chance' and 'real risk' involve the same standard.²⁴ For the same reasons, I am also not satisfied the applicant would face a 'real risk' of significant harm.

Complementary protection: conclusion

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

Decision

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

²⁴ *MIAC v SZQRB* [2013] 210 FCR 505.

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.