



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA21/08909

Date and time of decision: 1 April 2021 15:13:00
S Ryan, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a national of Sri Lanka and arrived in Australia [in] May 2013. On 26 July 2017 he lodged an application for a Safe Haven Enterprise visa (SHEV) and participated in an interview held by telephone on 14 January 2021 that was conducted by a delegate of the Minister for Immigration (the delegate). The delegate refused to grant the visa on 9 February 2021 and referred the matter to the Immigration Assessment Authority (IAA) on 26 February 2021.

Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the Migration Act 1958 (the Act). No further information has been obtained or received.

Applicant's claims for protection

3. The applicant's claims can be summarised as follows:
 - He is of Tamil ethnicity and was born in [year] in the [District 1] district in the Central Province of Sri Lanka. His mother temporarily left her home in Kilinochchi to live with family at the time of his birth.
 - His father remained in Kilinochchi [that year], running their shop. He was a member of Liberation Tigers of Tamil Eelam (LTTE) involved in recruitment and intelligence and undertook weapons training. His father would travel to procure goods for the shop and used these trips to obtain information about the Sri Lankan Army.
 - The army came to know of his father's LTTE connections, and they detained and tortured him. He was able to escape from detention in September 1990 and fled with his wife and the applicant to India.
 - A senior army officer was killed shortly after his father's escape and the army believe his father was involved. His father's family fled for India one week later as they were being harassed, interrogated and tortured by the army seeking information on his father's whereabouts.
 - His father continues to remain a person of interest to Sri Lankan authorities. In 2010 a friend of his father returned from India to Kilinochchi and was stopped by the army. They showed him a list of LTTE members that included his father and asked if he knew their whereabouts.
 - He will be detained by the Sri Lankan authorities upon return to Sri Lanka as he will be identified as the son of an LTTE member suspected to be involved in the killing of a senior army officer. They will detain and torture him to obtain information about his father.
 - The Sri Lankan authorities will assume he is an LTTE member and/or has received training from the LTTE in India on account of being a young Tamil male who is the son of an LTTE member living in India.
 - His personal information was published by the Australian immigration department in 2014 and the Sri Lankan authorities have accessed this and will infer that he has sought

protection in Australia. They will be suspicious of his history and of the information he provided to the Australian government.

- He fears harm from Sri Lankan authorities on account of being a young Tamil man whose father was a member of the LTTE and is wanted for criminal offences, who cannot speak Sinhala and speaks Tamil with an Indian dialect, whose personal information was published on the internet, and who has sought asylum in India and Australia.

Factual findings

Background and Identity

4. I accept the applicant is of Tamil ethnicity and that he was born in [year] in [District 1]. He has provided a translated Sri Lankan birth certificate issued at the time of his birth, copies of Sri Lankan Refugee identity cards, and evidence he attended high school in India. These documents confirm his claim to be a Sri Lankan national who arrived as a refugee in India in 1990. I accept the applicant's claim to be a citizen of Sri Lanka only, which is the receiving country for the purpose of this review.
5. I accept the applicant's evidence that his parents are the children of Indian Tamils, who were born in [District 1] and that they have moved (at an unspecified time) to Kilinochchi. They left Sri Lanka by boat in September 1990 and since that time have lived in [a named] refugee camp in Tamil Nadu, India. He has [number] siblings born in India who continue to live in [that camp].
6. The applicant completed [number] years of schooling in [year] and between [year] and 2013 he worked in various [roles]. At the time he left India in March 2013 he was working [for] a company selling [products]. He has never been married and does not have any children. He indicated in the 2017 SHEV application that he had not been employed in Australia. The letter from his social worker provided to the delegate shortly after the SHEV interview indicated that since the COVID crisis he had experienced financial difficulties and lost employment in Australia.
7. I accept the applicant's claim that he does not speak Sinhalese and that he speaks Tamil with an Indian accent. I accept also that these features may identify him to Sri Lankan authorities and to broader society as a member of the Sri Lankan Tamil expatriate community who has spent a considerable amount of time living in India.

Health

8. The applicant has provided a letter prepared by his mental health social worker on 17 January 2021 which indicates he was referred by his GP for assessment and treatment by the author in June 2020 due to his worsening symptoms of anxiety and depression.
9. I accept the clinical assessments contained in this report and while I accept the applicant has been referred to a psychiatrist for review and treatment, although there is no evidence before me indicating the applicant has subsequently been assessed or treated by a psychiatrist. The report indicates the applicant is taking anti-depressant medication and attends fortnightly counselling sessions.
10. I attach limited weight to the information in this letter as evidence corroborating the applicant's claim to have a well-founded fear of persecution in Sri Lanka. The opinions given concerning the applicant's past experiences and the risk of harm he may face if returned to Sri Lanka appear to be assessments based solely on the applicant's own account of his circumstances. In assessing

whether there is a real chance of the applicant being harmed in Sri Lanka I have had regard to a much wider range of information than what appears to have been considered in these reports.

11. The applicant was not represented at the time of his SHEV interview in February 2021. I consider his responses during that interview suggested he was able to meaningfully participate; in that that it was apparent he understood the purpose of the interview and nature of the questions he was being asked. I am satisfied that the applicant was on notice of the key determinative issues in his case and that he has had real and meaningful opportunities to put forward his claims for protection and address the matters in issue.
12. I have regard to the information provided by his mental health social worker in assessing the applicant's claims for protection.

Data breach

13. The applicant's personal information (name, date of birth, nationality, gender, and detention details) was temporarily and inadvertently available for public access on the Department of Immigration's website for a brief period in February 2014. I accept that it is possible this report may have been downloaded for distribution or republication, although there is no evidence indicating that this has occurred. I am willing to accept that on account of the data breach the applicant may be known as a person who has travelled to Australia and was in detention in 2014. Although the report did not reveal specific visa information, I accept that it may be inferred from such matters as the applicant being in immigration detention that he was seeking asylum in Australia.

Father's profile with Sri Lankan authorities

14. The applicant has consistently claimed his family was forced to flee Sri Lanka on account of his father's association with the LTTE becoming known to the Sri Lankan Army. I also consider, however, that the applicant's descriptions of the nature of his father's involvement in the LTTE have been substantially inconsistent.
15. I take into account the applicant is relating matters that occurred more than 30 years ago during a period of significant unrest, and that, given his young age at that time, he could not be expected to provide first-hand recollections of events involving his parents in [year]. During the SHEV interview the applicant indicated his father had told him about his involvement in the LTTE and the circumstances of their departure from Sri Lanka shortly before he left for Australia. The applicant indicated in his SHEV application that he contacts his family in India twice a week.
16. During the 2013 Entry Interview the applicant stated his father had been forcefully asked to start training with the LTTE and the family had fled Sri Lanka after the Army had found out. This is broadly consistent with the evidence he gave in the more detailed written statement provided with his 2017 SHEV application, in which he also claimed his father had been forced to join the LTTE in the period 1988-1990 after the LTTE had threatened to force him out of the village if he didn't. The applicant claimed his father's association with the LTTE involved being forced to undertake weapons training, observing Sri Lankan Army troop movements if they passed his shop in the village and reporting this information to the LTTE.
17. These accounts are substantially different to the evidence he gave during the SHEV interview in which he claimed that his father was an LTTE member who had worked in the intelligence section conducting surveillance of the Sri Lankan army, and that he recruited LTTE members from the customers at his shop. His evidence in the SHEV interview did not suggest his father's involvement

with the LTTE was involuntary. The delegate invited him to provide more information about his father's role in the LTTE, asking him what he knew about his father's position, rank and the timeframes of his involvement. The applicant's responses were limited and superficial, stating that he did not know any more than the information he had provided.

18. Noting that he had introduced new evidence during the SHEV interview which escalated his father's profile as an LTTE member, his limited ability to give any more detailed evidence raises concerns, as does the fact that it is materially different from the six page 2017 written statement that was prepared with the assistance of [an agency].
19. Country information confirms the applicant's assertion that Kilinochchi was and continues to have a large Tamil majority and was an area contested or controlled by the LTTE during the period in question. The Department of Foreign Affairs and Trade (DFAT)'s November 2019 '*Country Information Report Sri Lanka*' reports that all Tamil civilians living in these circumstances were required to interact with the LTTE as a matter of course. Taking into account the applicant's father's age, and relevant country information (particularly DFAT and the UK Home Office) concerning the circumstances for Tamil civilians in LTTE controlled areas of Sri Lanka, I consider the initial claim that his father felt compelled to assist the LTTE by providing them with information after being threatened is plausible and I accept this occurred.
20. The delegate considered information in a 1999 DFAT cable concerning LTTE recruitment and training practices which reports that Tamils between the ages of 15-45 living in the Vanni area were subjected to compulsory training by the LTTE in village camps. This DFAT report post-dates the period in question by nearly ten years. I particularly note DFAT's report suggests the LTTE had begun to implement a compulsory training program and does not suggest such practices had been prevalent in the Vanni in [specified years]. While I note that his claim that his father was required to undertake training with the LTTE was raised prior to the SHEV interview, considering the country information before me and the limited information he has provided, I am not satisfied that he has undertaken such training.
21. I accept the applicant's claim that his father was forced to interact with and provide assistance in the form of information to the LTTE is plausible on the basis that DFAT's observations concerning the experiences of Tamil men living in the Vanni in that period suggests it was likely. However I have serious concerns with the applicant's claim that his father's involvement with the LTTE went further than this. I particularly note the inconsistencies in his evidence and the absence of any persuasive detail concerning his father's role in the LTTE, even allowing for the passage of time and the fact that he was not recounting his own firsthand experiences.
22. The evidence given by the applicant suggests the period in which his father had any contact with the LTTE was brief and he did not suggest that his father had any contact with or involvement with the LTTE whilst living a short distance from Vanni in Tamil Nadu from 1990 onwards. I note the delegate conclusion that the applicant's father's involvement in the LTTE was '*low level*' and that the applicant has not provided any response to this finding to the IAA.
23. On the evidence before me I am not satisfied that the applicant's father was a member of the LTTE, or that he recruited others, or that he was participated in weapons training with them. On the information he has provided I am not satisfied that his father's assistance to the LTTE involved anything more than providing information to them about the movements of the Sri Lankan Army.
24. I consider the applicant has sought to embellish his father's profile as an LTTE member, and it follows that I have concerns with the applicant's claims his father became a person of interest to the Sri Lankan Army on the basis of this profile.

25. Nevertheless I take into account DFAT's observation that many Tamils living in the north reported being monitored, harassed, arrested or detained by security forces during the war, including those imputed by security forces to be LTTE supporters based only on their ethnicity. I accept the applicant's father provided some assistance to the LTTE and I am willing to accept that the applicant's father may have been one of many Tamils detained by the Sri Lankan Army as a person suspected to have given support to the LTTE in or around 1990.
26. Considering the applicant's father's limited association with the LTTE, and that he was neither an LTTE member nor a combatant, I do not accept that his father was a person of any significance to either the Sri Lankan Army or to the LTTE. The applicant's provided a very bare description of his father's purported escape from detention and, and taken with my concerns with the veracity of related aspects of his evidence, I have serious concerns with his claim that the LTTE organised his escape from a Sri Lankan army base in Kilinochchi. I consider it is very likely that he was released by Sri Lanka authorities from their custody in 1990 as he was not a prominent advocate of Tamil separatism, nor a member of the LTTE civilian administration, nor a combatant.
27. A key aspect of the applicant's claim to fear harm from Sri Lankan authorities on return to Sri Lanka is his assertion that his father continues to be a person of significant interest to the Sri Lankan authorities. He has claimed that this interest is due to them suspecting his father was involved in the assassination of a senior Sri Lankan army officer in or around September 1990. I consider this claim is put in the barest terms and is not substantiated by any details (such as names, dates or locations) or any other forms of supporting evidence that might corroborate that this incident has occurred. I further note there is a lack of any form of supporting evidence that might corroborate his claims that his father was a suspected to have killed an army officer, or that he has been charged with or convicted in absentia of a crime of this nature.
28. In terms of his claim that his father remains a person of interest to Sri Lankan authorities more than 30 years later, I consider the applicant's claim that a family friend told his father that he was on a list of LTTE suspects in 2010 is no more than a bare assertion and I do not find his account to be plausible. There is no independently sourced information issued by relevant authorities that would signify their interest in his father, at the time he fled Sri Lanka or at any time afterwards.
29. I have found that the applicant's father's association with the LTTE was very limited, and that he not a person of significance within the LTTE, either at that time or at any time afterwards. I am also not satisfied that the applicant's father escaped from a Sri Lankan Army camp, the event that he claims immediately preceded the assassination of the army officer, and the reason he says the army came to suspect his father's involvement in the crime.
30. For all of these reasons I am not satisfied that the applicant's father was a suspect in the Sri Lankan Army's investigation of the assassination of a senior officer in 1990. I am also not satisfied that members of the applicant's family were ever detained or interrogated or tortured in connection to this event. Given these findings I am also not satisfied that the applicant's father is of any adverse interest to Sri Lankan authorities, or that they have subsequently searched for the applicant's father since he left, or that he was included in a list of LTTE members of interest to the Sri Lankan Army shown to a friend of his father in 2010.

Refugee assessment

31. 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

32. 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.

33. For the reasons given earlier I accept the applicant's father has had a brief association with the LTTE and was briefly detained by Sri Lankan authorities in 1990. I am not however satisfied that the applicant's father was a person of interest to Sri Lankan authorities at the time of his departure from Sri Lanka in 1990 on account of his interactions with the LTTE or for any other reason. There is no credible evidence before me that suggests the applicant's father has since become a person of interest to the Sri Lankan authorities for any reason, and I am not satisfied this is the case.

34. I accept the applicant is a Tamil male born in [year], who lived with his parents in Kilinochchi and then left Sri Lanka in 1990 and lived in India, and who then travelled to Australia where he sought asylum.

35. The applicant fears being targeted and harmed by the Sri Lankan authorities if he returned to Sri Lanka. Noting that there have been many significant changes in Sri Lanka since the applicant left India and travelled to Australia in 2013, I consider that the information before me does not support the applicant's contention that, if he returned to Sri Lanka, he would face a real chance of persecution.

36. DFAT's 2019 report describes how, during the period following the comprehensive military defeat of the LTTE in May 2009, the Sri Lankan government (under Mahinda Rajapaksa) exercised tight military control over the north and east, particularly those areas previously controlled by the LTTE. Many Tamils reported being monitored, harassed, arrested and detained by Sri Lankan security forces. More Tamils were detained under emergency regulations and the Prevention of Terrorism Act (PTA) than any other ethnic group.

37. DFAT and the subsequent UK Home Office May 2020 report '*Sri Lanka: Tamil Separatism*' both indicate that since then, the situation for Tamils has gradually eased, particularly after the election of the Sirisena government in 2015. The UK Home Office January 2020 report '*..Fact-finding mission to Sri Lanka*' (UK Home Office FFM) and DFAT's November 2019 report observed that the north and east parts of the country have been gradually demilitarised and that the harassment and monitoring of Tamils has radically reduced. While there continues to be significant numbers

of military personnel stationed in the north, DFAT reported in their involvement in civilian life steadily decreased.

38. The Easter 2019 terrorist attacks, although they did not take place in the Northern Province or involve Tamil separatists, resulted in a heightened security posture across the country that also saw the military presence in the north increased, including strict curfews and the return of checkpoints. The terrorist attacks were widely accepted as having been committed by Islamist extremists and having no connection to the Tamil community, and the UK Home Office and DFAT cite local sources observing the heightened security restrictions were clearly focussed on the Muslim communities in the north, and that they have subsequently eased.
39. The vast majority of people internally displaced during the war have been resettled, and most returned to their places of origin. I accept that there continues to remain large numbers of Tamil refugees from Sri Lanka living in India. The Sri Lankan Government has invested in substantial post-war reconstruction and long-term economic development programmes, benefiting the population in the Northern and Eastern provinces who were most affected by the protracted conflict. The UK Home Office reports suggest there are no longer travel restrictions operating within the North Province, nor are people restricted from travelling between the north and other provinces of Sri Lanka.
40. However the reporting before me also clearly indicates that the post-war economic development has not occurred on the scale that was promised and anticipated by Tamil communities and that access to government services and the level of infrastructure and economic development in the north and east areas continue to remain a significant issues and lags behind other parts of the country.
41. It is apparent from the country information that LTTE membership or support was sometimes imputed by Sri Lankan authorities purely on the basis of Tamil ethnicity or in combination with a Tamil's age, gender and connections with former LTTE members. This was most prevalent during the war and in the period immediately following the end of the conflict in 2009. It is clear from the more recent country information, particularly DFAT and the UK Home Office reports, that this is no longer the case.
42. DFAT's report describes how, after 2009, Tamils have gained greater representation in the political and cultural mainstream, as well as a substantial level of political influence. The Sri Lankan government has remained watchful for signs of a potential re-emergence of the LTTE (including under the current government) and continues to be sensitive to possible Tamil separatist activity and certain other types of political activism. Nevertheless it remains clear from the reporting before me that the situation for Tamils in Sri Lanka has substantially improved from where it was when the applicant arrived in Australia in 2013.
43. DFAT assessed in November 2019 that Tamils faced a low risk of official or societal discrimination based on their ethnicity. The more recent country information before me; including the two recent UK Home Office Reports, INFORM, US Department of State, Office of the United Nations High Commissioner for Human Rights on Sri Lanka; indicates there have been some substantial political changes in Sri Lanka since the DFAT report was published.
44. The appointment of Mahinda Rajapaksa as Prime Minister shortly after the election of his brother Gotabaya Rajapaksa as president at the end of 2019, and the decisive victories by the 'Sri Lanka Podujana Peramuna' (SLPP) party in Sri Lankan parliamentary elections have returned and consolidated political power with the Rajapaksa family and their coterie. The UK Home Office reports that members of the Rajapaksa family and senior members of their government have been

implicated in alleged war crimes and human rights abuses during their time in power during the final stages of the civil war and in its aftermath.

45. The sources noted above observe that since returning to power the Rajapaksa government has reversed or announced its intention to abandon many key legislative achievements and policy commitments of the Sirisena government, including promises on post-war reconciliation and cultural inclusiveness. The same sources suggest that the regime has curtailed anti-corruption and war crimes investigations and stepped up surveillance and harassment of media and human rights activists. These sources observe serious concerns amongst international and domestic civil rights groups that the current regime is weakening the independence of key institutions and expanding its executive power and facilitating increased encroachment of military leaders into the civil space.
46. I appreciate that the applicant and other Sri Lankan Tamils may feel apprehensive about the impact on their lives of the return of the Rajapaksa family to power. While I take into account the concerns expressed above, it nevertheless remains that the security and socio-economic situation in Sri Lanka is vastly different from what it was under the previous Rajapaksa regime, particularly taking into account the sustained and significant diminishment of the threat posed by militant Tamil separatism. More than ten years have now passed since Sri Lanka emerged from civil war, there have been no attacks by the LTTE since 2009, and the evidence does not suggest any likelihood of a resurgence of militant Tamil separatism in the foreseeable future.
47. DFAT's November 2019 report indicates that the prevalence of monitoring of Tamils in day-to-day life has decreased significantly, with only those associated with certain politically sensitive issues attracting monitoring in recent times and such monitoring is now done with a more subtle approach, and commonly without violence. INFORM's more recent May 2020 report '*Repression of Dissent in Sri Lanka*' describes a number of incidents in which authorities sought to prevent or curtail people holding events in relation to Mullivaikkal and National war heroes' day" (Tamil war remembrance events) in Tamil areas in the North and East, although I note this was in the midst of country-wide, severe government restrictions imposed to manage the COVID-19 pandemic.
48. DFAT's report suggests the focus of the Sri Lankan security and law enforcement agencies has shifted in recent years to identifying those active in post-conflict separatism, Islamic extremism, those with extant court orders, arrest warrants or passport impound orders, and those suspected of involvement in terrorist or serious criminal offences) and those who may otherwise be considered a threat to the Sri Lankan state. I do not consider the more recent UK Home Office reports contradict this view. The UK Home Office cites highly credible sources; particularly the International Organisation for Migration and the United Nations High Commissioner for Human Rights (UNHCR); indicating that the level of security screening at the airport has decreased since 2015. These sources suggest that even high profile LTTE cadres returning to Sri Lanka may face more intensive questioning, but would not necessarily be detained, and would only be of interest if there were outstanding criminal cases against them. I consider the country information before me does not indicate that the government's attention would be adversely focused on someone with the applicant's profile.
49. The two recent UK Home Office reports indicate there are a range of views from NGOs, human rights activists and international observers concerning the extent to which Tamils in Sri Lanka currently face discrimination as well as the reasons some Tamils may who face targeted harassment and intimidation by authorities. The observations made by organisations like the UNHCR concerning the discrimination faced by Tamils is expressed in very general terms and do not particularise the forms of harm that Tamils face as a result of the discrimination they may experience. I nevertheless accept the UNHCR's observations that Tamils have faced historic discrimination, which does not disappear overnight and still persists. The UNHCR observe there

could still be individuals (Tamils) who would be subjected to surveillance and discrimination, although I note this observation is made in the context of an assessment of the treatment likely to be encountered by individuals with a direct link to the LTTE, such as former cadres.

50. Overall, I have particular regard to DFAT's broader and more detailed assessment made in November 2019 that the risk of official or societal discrimination against Tamils in Sri Lanka is low. I note that the timing of the opinions and observations from sources cited in the UK Home Office reports appears to coincide with the information taken into consideration by DFAT when preparing its November 2019 report. DFAT's assessment acknowledges the continued under-representation of Tamils in areas such as government employment but argues this is largely the result of language constraints and the comparatively significant disruptions to the education of Tamils as an impact of the protracted civil war.
51. The country information indicates that the current SLPP regime is more authoritarian in nature than the previous Sri Lankan government and openly fosters Sinhalese ethno-nationalist interests. However I am not persuaded that the situation for Tamils has reverted to the situation when the Rajapaksa family was last in power or that there is a real chance of this occurring in the foreseeable future. The present government is clearly unsympathetic to continuing post-war reconciliation processes, or to heeding Tamil calls for greater cultural recognition and political representation. Notwithstanding these issues I consider the evidence before me concerning the impact of the Rajapaksa government over the past twelve months, indicates that the situation for Tamils in Sri Lanka has not materially deteriorated, or that it will change in the reasonably foreseeable future, to the degree that Tamils could be said to face a real chance of harm on the basis of their ethnicity.
52. The applicant departed Sri Lanka with his family in September 1990. I accept he was not the holder of a passport and did not exit via an approved port of departure. He has never been issued with a Sri Lankan passport, has not lived in Sri Lanka for more than 30 years, and would likely be returning on a temporary travel document issued to him in Australia. It is clear from the UK Home Office and DFAT reports that the applicant is likely to be questioned at the airport by immigration officials and/or Sri Lankan police as part of their investigative processes to confirm his identity, establishing whether an illegal departure from Sri Lanka has occurred, as well as criminal record checks to establish if he has a criminal or terrorist background, or has outstanding court orders or arrest warrants. These are standard procedures that apply to all returnees, regardless of ethnicity.
53. The applicant has a Sri Lankan birth certificate and other formal identity documents issued to him in India. His birth in Sri Lanka was formally registered and there is nothing before me that would suggest this certificate was improperly issued or that any investigation seeking to verify his identity would result in him becoming a person of concern to Sri Lanka authorities. The applicant was no more than [age] at the time left Sri Lanka illegally and DFAT's report confirms Sri Lankan authorities do not impose charges against people who were younger than 12 at the time of an alleged offence of this nature.
54. I accept that the applicant would be recognisable to Sri Lankan authorities as a Tamil male born in [District 1] in [year], whose parents previously lived in Kilinochchi, and who has lived in and sought asylum in India and in Australia. I consider these circumstances are matters likely to be deduced or inferred by Sri Lankan authorities from the circumstances of his return to Sri Lanka and from his identity documents. I do not consider the disclosure of limited personal information as part of the Department's data breach materially alters these facts, or that it elevates his risk of harm. Both the DFAT and UK Home Office reports observe that returning after having lived abroad for an extended period of time, or even claiming asylum whilst abroad, are not unlawful acts in Sri Lanka and are not matters that would lead to questioning by Sri Lankan authorities.

55. The applicant has expressed concern that he would face increased scrutiny from Sri Lankan authorities as an imputed LTTE supporter on account of his family having fled to India in 1990. DFAT advise that its sources were not aware of any returnees from Tamil Nadu being subjected to monitoring or harassment by the authorities, nor being subjected to rehabilitation for real or perceived links to the LTTE, and cites a UNHCR survey indicating that over 90 per cent of returnees from Tamil Nadu felt either generally or completely safe upon return to Sri Lanka. Indian and Sri Lankan authorities have arrangements in place to facilitate the use of documents issued in India for issuing civil documents to Tamil refugees resettling in Sri Lanka. The information before me does not suggest that the applicant's period of residence in Tamil Nadu will attract adverse interest or prompt a more detailed investigation of his identity or links to Tamil activism.
56. Even taking into account the fact that any investigation into the applicant's identity would reveal his familial link to his father and his age and Northern Province origins, I am not satisfied that his circumstances will result in him facing a higher degree of scrutiny from Sri Lankan authorities on return to Sri Lanka. I am also not satisfied the applicant would be at a real risk of being imputed to be an LTTE supporter or face harm from Sri Lankan authorities.
57. The UK Home Office cites the International Organisation for Migration stating that they did not believe there was a distinction between Tamil and Sinhalese returnees and, notwithstanding the possibility of isolated cases, there was no systematic policy of discrimination against Tamils with respect to the processing of returnees at Sri Lankan airports. Given his profile, the evidence indicates the applicant would be briefly held at the airport while he is questioned to confirm his identity. I am not satisfied that this treatment, whilst being administratively processed on return to Sri Lanka, amounts to serious harm or that it is systematic and discriminatory in nature. I do not consider any likely questioning of the applicant by the authorities at the airport on arrival or any brief period held by the authorities to conduct such investigations would amount to serious harm for the applicant for the purposes of s.5J of the Act.
58. Beyond providing a letter from his Mental Health Social Worker a week after his SHEV interview, the applicant did not indicate that he feared harm in Sri Lanka as a result of his mental health. This information was considered by the delegate to be an indirect claim for protection. The social worker's letter the applicant provided to the delegate indicates he takes medication for depression and participates in fortnightly counselling sessions. I accept this is the case and that the applicant may need to continue taking medication and access similar services to manage his mental health on return to Sri Lanka.
59. Considering the information concerning Sri Lanka's public health system I accept that it may be below the standard of care that the applicant experiences in Australia, particularly in the Tamil speaking areas in the north and east, where health services and outcomes are worse than in other areas. DFAT assess that the regional disparities in health service delivery that exist in Sri Lanka are due to the delays in rebuilding destroyed infrastructure and diminution of human capital as a result of the war. I consider that reporting before me does not suggest that Tamils in Sri Lanka are denied medical treatment for reason of their race, or any other reason specified in s5.J.
60. DFAT assess that, while there has been real improvement in the availability and quality of mental health and psychosocial support services in Sri Lanka, these services remain inadequate overall, particularly in the war-affected areas in the North and East of the country, where demand is greatest. However none of the evidence before me suggests the applicant would be denied access to medication or services for reason of his health issues, or because of his ethnicity, origins and history, or for any other reason than the challenges faced by a poorer country like Sri Lanka in funding its health facilities.

61. Noting the applicant's mental health condition, his lack of familiarity with Sri Lanka and the lack of family support in that country, I accept that the applicant may face challenges in resettling in Sri Lanka; including finding accommodation and employment. I accept the applicant may not receive formal reintegration assistance upon return to Sri Lanka. DFAT's report indicates that many Tamil returnees choose to return to the Tamil majority areas in the north, either because it is their place of origin and they have existing family links, or because of the relatively lower cost of living compared to the south. The applicant's family lived in Kilinochchi in the north and he states he does not speak any Sinhalese. He claimed to speak and read 'a little' English in 2017.
62. DFAT's report notes some returnees having reported social stigma upon return to their communities and indicates one reason being that some are beneficiaries of financial reintegration assistance. DFAT also reports some social stigma attached to returnees from Tamil Nadu but does not particularise the nature of social stigma experienced in either circumstance or indicate whether or what types of harm may result. I note DFAT's overall assessment in the same report indicates that societal discrimination is not a major concern for returnees and that they face a low risk of discrimination for this reason. It is telling that neither of the more recent, detailed reports from the UK Home Office mention Tamil returnees having experienced social stigma for these reasons.
63. Notwithstanding the above findings, DFAT's report indicates many returnees, particularly those living in Sri Lanka's Tamil majority Northern Province, have difficulty finding suitable employment and reliable housing on return to Sri Lanka. I note that DFAT's assessment indicates any reintegration issues the applicant may face are not due to a failure to obtain asylum and also that DFAT's report describes some Tamils who had failed to secure asylum in Australia and since returned to the Northern Province having told DFAT they were able to reintegrate into their communities and find employment.
64. I have considered the applicant's mental health condition in the context of his prospects for reintegration. I accept that, as per the evidence provided by the applicant, his mental health condition is a factor adversely affecting his ability to secure gainful employment in Australia. The report indicates that the applicant's mental health, along with the COVID-19 situation, has also been adversely affected by his uncertain immigration status and social isolation in Australia and the processing of his protection visa application. The report does not state that his mental health is such that it precludes him from performing any form of work. Nor does the report comment on the extent to which any other factors might be impacting on his employability in Australia; such as his limited English language skills, his uncertain immigration status or the COVID pandemic. In this context I also take into account that the applicant would be returning to Sri Lanka as a literate and fluent Tamil-speaking Sri Lankan citizen, one who has some English language ability, as well as skills and work experience in various roles [in] India.
65. I am not satisfied on the evidence before me that any consequences the applicant may experience as a result of a lack of or limited health services in Sri Lanka or his health conditions or as result of any difficulty finding employment is systematic and discriminatory treatment or that the essential and significant reason for this is one of the grounds specified in s5(J)(1).

Refugee: conclusion

66. I am not satisfied that the applicant faces a real chance of persecution in Sri Lanka. 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

67. 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

68. 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.

69. The expressions 'torture', 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' are in turn defined in s.5(1) of the Act.

70. I accept the applicant suffers from a mental health condition and that he may not have access to the same level of services he currently receives. I accept he may face challenges in resettling in Sri Lanka, including finding accommodation and maintaining gainful employment. I also accept that, upon arrival in Sri Lanka, he may be subject to an investigative process undertaken by authorities at the airport to confirm his identity.

71. With regard to any forms of harm he may experience as a result of these circumstances I am not satisfied there is an intention to inflict pain or suffering that could reasonably be regarded as cruel or inhuman in nature, severe pain or suffering or that there is an intention to cause extreme humiliation. I am not satisfied there is a real risk the applicant would suffer torture, cruel or inhuman treatment or punishment, or degrading treatment or punishment. Nor would it amount to his being arbitrarily deprived of his life, or to the death penalty. I am not satisfied he would otherwise face harm that would constitute significant harm as defined in the Act.

72. I have otherwise found the applicant would not face a real chance of any harm on return. For the same reasons, I am not satisfied he faces a real risk of harm, including significant harm from anyone in connection with those claims.

Complementary protection: conclusion

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

Decision

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

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

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

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

...

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

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature;

but does not include an act or omission:

- (c) that is not inconsistent with Article 7 of the Covenant; or
- (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

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

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

...

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

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

...

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

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

...

5H Meaning of refugee

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

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

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

...

5J Meaning of well-founded fear of persecution

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

5K Membership of a particular social group consisting of family

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

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

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

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

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

5L Membership of a particular social group other than family

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

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

5LA Effective protection measures

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

...

36 Protection visas – criteria provided for by this Act

...

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

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

...

Protection obligations

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

Determining nationality

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