



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA22/10222

Date and time of decision: 9 March 2022 17:43:00
S MacKenzie, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Tamil from Sri Lanka. He arrived in Australia [in] November 2012 as an unauthorised maritime arrival. On 19 August 2016 the applicant lodged a valid application for a Class XE Subclass 790 Safe Haven Enterprise visa (SHEV) claiming to fear harm in Sri Lanka.
2. A delegate of the Minister for Immigration (the delegate) refused to grant the visa on 4 August 2017, on the basis that the applicant did not face a real chance of serious harm or a real risk of significant harm upon return to Sri Lanka.
3. On 13 October 2017, the IAA affirmed the decision not to grant the referred applicant a protection visa. On 27 January 2022, by consent, the Federal Circuit and Family Court of Australia (FCFCA) remitted the matter to the IAA for reconsideration.

Information before the IAA

4. I have had regard to the review material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).

Submissions and new information

5. On 4 September 2017, the IAA received a written submission from the applicant (2017 submission). The submission in part reiterates claims and evidence already before the Minister, and provides argument as to why he disagrees with aspects of the delegate's decision.
6. In his 2017 submission, the applicant also refers to claims and evidence not before the Minister. It is new information. In summary, the applicant has identified himself as an 'independent Tamil [Occupation 1]' and said he has a 'history of criticising the government [of Sri Lanka]'. He stated that he will 'continue to be politically active' if returned to Sri Lanka and that he feared harm on this basis. He also referred to numerous country information reports not before the Minister that were published prior to the delegate making the decision. The applicant provided no explanation as to why this information was not and could not have been provided to the Minister, or why it may be considered credible personal information.
7. On 11 February 2022, the applicant's representative provided a further written submission on the applicant's behalf (2022 submission). The submission primarily refers to country information not before the Minister that both pre-dates and post-dates the delegate's decision. Copies of the country information are provided. It is also new information.
8. The new information in the 2017 submission that the applicant is [an Occupation 1], a critic of the Sri Lankan government, and politically active, all purport to relate to events that pre-date the delegate's decision. I am not satisfied this information could not have been provided to the Minister before the delegate made her decision. Nor am I satisfied this information is capable of being believed. The applicant's evidence in his written SHEV application was that prior to coming to Australia he worked as [an Occupation 2], [an Occupation 3], and [an Occupation 4]. His evidence was that since being in Australia he has been unemployed or working as [an Occupation 5]. I have also listened to the applicant's protection visa interview with the delegate on 9 February 2017 (SHEV interview). In that interview, he specifically advised the delegate that he had never been involved in politics or expressed views critical of the Sri

Lankan government. When I consider the applicant's evidence in its entirety, the new information bears no resemblance to his earlier claims and evidence in respect of his profile and I am not satisfied it is credible. Neither the applicant nor his representative have pointed to any exceptional circumstances that may justify considering this new information, and none are evident to me. I also note this new information raised in 2017 is not mentioned in the 2022 submission. I further note the applicant's representative indicates the applicant no longer relies on pages 2 - 4 of the 2017 submission (where the new information is mentioned). In all the circumstances, I am not satisfied that there are exceptional circumstances to justify considering this new information.

9. In terms of the country information referred to in the 2017 submission not before the Minister, I am not satisfied it could not have been provided to the Minister before the delegate made her decision. Nor am I satisfied the information, which is general country information broadly about human rights issues in Sri Lanka, is personal information in the relevant sense. Neither the applicant nor his representative have pointed to any exceptional circumstances that may justify considering this new information, and none are evident to me. The country information is now several years old, and I consider it is of little probative value. I am also mindful I have more recent reporting before me from credible and authoritative sources about the issues for determination. Taking all these matters into account, I am not satisfied exceptional circumstances exist to justify considering the new country information referred to in the 2017 submission.
10. In terms of the new country information referred to in the 2022 submission that pre-dates the delegate's decision, I am not satisfied it could not have been provided to the Minister before the delegate made her decision. Nor am I satisfied the information from the United Nations Human Rights Council published in December 2016, which is general country information about human rights issues in Sri Lanka, is personal information in the relevant sense. The applicant's representative appears to rely on this report as evidence of serious and significant harm the applicant will be exposed to if returned to Sri Lanka. However, this report relates to the situation in Sri Lanka over five years ago, and I am mindful I have before me more recent reporting relevant to the issues for consideration. I am not satisfied exceptional circumstances exist to justify considering the December 2016 United Nations Human Rights Council report.
11. In terms of the country information¹ referred to in the 2022 submission and provided to the IAA that post-date the delegate's decision, I am satisfied it could not have been provided to the Minister. I note the reports are primarily about the treatment of Tamils, including those with Liberation Tigers of Tamil Eelam (LTTE) links, the prevalence of torture, and the treatment of returnees/failed asylum seekers, including those who departed illegally, in Sri Lanka. Taking these matters into account, and that the new information is material to the issues for determination, I am satisfied that exceptional circumstances exist to justify its consideration.
12. The 2022 submission also includes a short extract from the September 2021 International Truth and Justice Project (ITJP) report. There is also a short extract from the 2019 DFAT report for Sri Lanka. Neither of these reports were before the Minister and it is new information.

¹ Al Jazeera, "Sri Lanka scraps Tamil national anthem at Independence Day", 4 February 2020; Al Jazeera, "Sri Lanka pardons soldier who killed Tamil civilians", 27 March 2020; International Truth and Justice Project (ITJP), "Unsilenced. Male survivors of conflict-related sexual violence in Sri Lanka speak", September 2018; International Truth and Justice Project (ITJP), "Press Release: Sri Lankan security agencies assaulting families of asylum seekers in UK", 24 October 2019; United Nations Human Rights Council, "Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism", 14 December 2018; Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report - Sri Lanka", 23 December 2021; Tamil Guardian, "Tamil deportees to be handed to CID after 'quarantine process'", 1 April 2021

Neither the ITJP or 2019 DFAT report is provided and therefore the new information is not compliant with the *Practice Direction for Applicants, Representatives and Authorised Recipients* (IAA Practice Direction).² I have decided to not accept this information. However, as the representative indicates the ITJP report evidences Tamils being targeted in Sri Lanka with tenuous (or no) links to the LTTE, I have located the report online and have decided to obtain it.³ This information is material to the issues for determination and I am satisfied that exceptional circumstances exist to justify its consideration. I have decided not to obtain the 2019 DFAT report, as I note the 2021 DFAT report before me replaces it.

13. Both the 2017 and 2022 submissions refer to decisions of the IAA and the Administrative Appeals Tribunal (AAT) not before the Minister. It is new information. The IAA decision (referred to in both submissions) is unpublished and according to the 2022 submission it was decided in January 2017. The applicant seeks to rely on a finding by the IAA, referring to a report by the UN Committee Against Torture (which is before me), that there is a real chance that persons, particularly Tamils suspected of LTTE connections, detained for anything more than a brief period, would be subjected to treatment amounting to serious harm in Sri Lanka. Similarly, the representative seeks to rely on the AAT decisions (not provided to the IAA) decided in 2018 and 2019 as evidence of treatment faced by Tamils or Tamil returnees who departed illegally, including those arrested or detained under the Prevention of Terrorism Act, in Sri Lanka. I am not satisfied the IAA decision could not have been provided to the Minister before the delegate made her decision. While I accept the AAT decisions that post-date the delegate's decision could not have been provided to the Minister, I am not satisfied those decisions (or the IAA decision) are personal information in the relevant sense. There is no indication in the submissions that these decisions pertain to the applicant and, on the evidence, I am not satisfied these unrelated cases to have any bearing on this decision. I also note that decisions of the AAT and IAA are not binding on me and that each case will turn on its particular circumstances. For all these reasons, I do not consider that the IAA and AAT decisions are of material assistance in the determination of this review, and I am not satisfied there are exceptional circumstances to justify considering them.
14. The applicant's representative also provides to the IAA a written submission dated 16 February 2017. It was not before the delegate and is new information. As noted in the consent orders of the FCFA, the applicant's representative purported to, but did not, attach a post-SHEV interview submission to an email to the delegate on 17 February 2017. The submission dated 16 February 2017 now before me purports to be that submission. However, I have some concerns that it is the same submission. In his 2017 submission, the applicant referred to the post-SHEV interview submission in footnotes 5 and 18. He indicated that paragraphs [37]-[50] of the submission evidenced 'the strong likelihood of Tamils, with even tenuous links to the LTTE, to be detained for questioning upon arrival'. However, paragraphs [37]-[50] of the submission dated 16 February 2017 provided to the IAA primarily discuss the prevalence of torture, white van abductions, detention conditions, and Sri Lanka's response to justice and reconciliation. There is no mention in these paragraphs about Tamils being detained or questioned on arrival in Sri Lanka. Similarly, the 2017 submission indicates that paragraphs [51]-[54] refer to country information about the control, monitoring, and violence against those who work in the media. However, paragraphs [51]-[54] of the submission dated 16 February 2017 make no mention of these issues.

² The IAA Practice Direction issued under s.473FB states that if an applicant provides new information, such as country information reports or media articles, they must explain why it is relevant to the review, attach a copy of the document, and identify which parts they rely on

³ ITJP, "Sri Lanka: Torture & Sexual Violence by Security Forces 2020-21", September 2021

15. The above indicates that the submission purportedly written on 16 February 2017 was not the submission that the representative failed to attach to the email of 17 February 2017. Alternatively, it indicates a significant portion of the applicant's 2017 submission (which bears the hallmarks of having been prepared with legal assistance) did not relate to the applicant but another person's case. Having given the matter careful consideration, I am of the view it is the later. As noted above, the new information in the 2017 submission that the applicant was [an Occupation 1], a critic of the Sri Lankan government, and politically active did not resemble his earlier claims and evidence. The applicant's representative doesn't address these matters in the 2022 submission, but instructs the applicant only seeks to rely on page one of the 2017 submission (which discusses matters that do appear to relate to his case). Although the representative indicates that this is only to ensure compliance with the IAA Practice Direction, presumedly in relation to length, I suspect the applicant does not rely on the remainder of the 2017 submission because it is not about him. Having considered all of the above, I am satisfied the written submission dated 16 February 2017 is the same submission the applicant's representative intended to, but did not, attach to the email to the delegate on 17 February 2017. The submission in part summarises the applicant's protection claims, and addresses concerns raised by the delegate in the SHEV interview. I am satisfied the submission represents personal information that, on its face, is capable of being believed. I am also satisfied that, had the representative provided this information to the Minister, it may have affected the consideration of the applicant's claims. I am satisfied s.473DD(b) is met. I am also satisfied there are exceptional circumstances to justify considering this information.

Other information

16. Included in the review material is some information⁴ in the Secretary's control that was not provided to the IAA when the applicant's case was first referred in 2017. It is not clear whether this material was before the delegate and there is no explanation provided as to the relevance of the information. Having reviewed this information, it is difficult to see how it assists in assessing whether the applicant faces a real chance of serious harm or a real risk of significant harm in Sri Lanka. In all the circumstances, I am not satisfied this information is relevant to the review and I have not considered it.

Applicant's claims for protection

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

- He is a Tamil male from the north of Sri Lanka;
- Following the December 2004 Tsunami, he volunteered as [an Occupation 2] assisting refugees until mid-2005;
- After three of his colleagues were kidnapped, he decided it was no longer safe to remain in Sri Lanka. He went to [Country] on a working visa in 2006 or 2007 and returned to Sri Lanka in 2010;
- On return to Sri Lanka, he was questioned about where he had been and whether he had any links he had to the LTTE;

⁴ Consular Access - UNM014 -16275262773; Detention Notice - UNM014 – 16275262773; Scanned copy of visa conditions (Group O) - Boat ID UNM014- SELVARAJAH Thushakar (02 06 1980) - ICSE CID 16275262773; UNM014 Thushakar - BVE Document.pdf; UNM014-Visa extension.pdf

- In the years that followed, he was abducted due to a suspicion he had been involved with the LTTE. He came to the adverse attention of paramilitary groups and/or the CID (Criminal Investigation Department);
- Prior to leaving Sri Lanka, he was asked by the CID to attend [a] camp which was known as a place where Tamils were tortured. He had been tortured when he had been abducted and taken there the previous week. Because he wasn't required to attend the camp until the following day, he used that opportunity to escape;
- He left Sri Lanka by illegal boat in November 2012;
- After he left Sri Lanka, his wife was questioned about his whereabouts;
- If returned to Sri Lanka, he fears harm on account of:
 - his perceived links to the LTTE arising out of his previous employment in 2004-05
 - his Tamil ethnicity
 - his illegal departure from Sri Lanka
 - his failed asylum application abroad.

Refugee assessment

18. 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

19. 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.

Identity

20. The applicant claims to be a Tamil from the Northern Province. He has provided some evidence of his identity, including a copy of his Sri Lankan national identity card. On the basis of his evidence, I accept that the applicant is a Tamil male from this part of Sri Lanka. I find that Sri Lanka is the receiving country.

Events in Sri Lanka

21. The applicant's written claims and evidence about events in Sri Lanka were initially set out in his written SHEV application and accompanying written statement, dated 15 August 2016 (SHEV statement). It can be summarised as follows:

- From December 2004 until April 2005, he volunteered for the [Organisation 1]. His role was to [do a job task] to assist people affected by the Tsunami;
- The SLA (Sri Lankan Army) and CID had suspicions that persons working for the [Organisation 1] might be LTTE members and supporters;
- In around 2006, three [Organisation 1] volunteers were kidnapped by the CID. One was found deceased and the other two remain missing;
- The applicant decided it was not safe to remain Sri Lanka so he went to [Country]. He worked in [Country] from approximately 2007 to 2010;
- When he returned to Sri Lanka in 2010, he was questioned at the airport about where he had been. He advised he was previously a volunteer for the [Organisation 1] and that he had nothing to do with the LTTE. He was permitted to leave;
- The applicant returned home and between 2010 and 2011 (approximately) he worked as [an Occupation 4] at [Workplace];
- In around 2011, he was abducted from [City 1] by armed CID officers. He was taken to a jungle area. The officers tried to blindfold him but he resisted. He was taken to an abandoned house and questioned. The CID suspected he was a LTTE member or supporter. He was specifically asked about his involvement with the [Organisation 1] in 2005. Even though he denied LTTE involvement, he was questioned, physically assaulted, and threatened that he would be killed if he did not tell the truth. He was released after a few hours and told he was being watched;
- The applicant married on [Date], thinking that this would cause the trouble to stop. However, he could tell he was being followed by the same CID officers who had taken him to the jungle. The officers would threaten him by walking by his place of work and smiling at him;
- In around November 2011, the applicant moved to [City 2]. He was again abducted by the CID and taken from his home to the [camp]. He was interrogated and tortured like he experienced in [City 1]. He was detained for a few hours and questioned about his time with the [Organisation 1] and suspicions that he was a LTTE member or supporter. He was told on release he would be monitored;
- About a week later, the CID officers again came to the applicant's home. They asked him to come to the [camp] the next day. He agreed and used that opportunity to escape with his wife from [one part of City 2] to another part of [City 2] which they did the same day. He eventually left Sri Lanka in November 2012;
- After he came to Australia, the CID went to his wife's home in [Village] and questioned her about the applicant's whereabouts. She told the CID that she no longer has a

connection with the applicant. The CID took copies of her identity documents and information.

22. The applicant's claims and evidence about events in Sri Lanka, as set out in his written SHEV application, was broadly consistent with information he had earlier provided to the then Department of Immigration and Citizenship soon after he arrived in Australia. In his entry interview on 19 January 2013, he advised the interviewing officer that he worked for the [Organisation 1] at the time of the Tsunami, that his colleagues were kidnapped, that he went to [Country] in 2007 because of fear, that he was questioned at the airport when he returned to Sri Lanka, that he was asked about any LTTE links at the airport, that he was kidnapped in [City 1], tortured, and asked about LTTE links, that he was taken again a second time one and half months later, that he was kidnapped again two months before he came to Australia, that he learned that the people who kidnapped him were the CID, and that he was released on the condition he had to return to report.
23. In the SHEV interview, the applicant was questioned in some detail about past events in Sri Lanka. While aspects of his oral evidence were consistent with his written claims, there were other aspects that were difficult to reconcile with his earlier evidence. For example, he claimed that in 2011, while in [City 1], he was kidnapped by a paramilitary group. This differed from his evidence in his SHEV statement that he was taken by the CID. He also advised the delegate that during this incident he was blindfolded, however, I note he specifically mentioned in his SHEV statement that he resisted attempts to blindfold him. The applicant later advised in the interview that he was suffering from memory loss.
24. In the post-SHEV interview submission, the applicant's representative submitted that the [Organisation 1] is known to have provided financial support to the LTTE by acting as a conduit through which the international Sri Lankan diaspora could fund the group. It was submitted that the applicant's connection to the [Organisation 1] would impute him with a LTTE connection in Sri Lanka. The representative referred to a 2009 report from the US Department of the Treasury referring to the [Organisation 2] in the United States being named as a 'Specially Designated Global Terrorist' in 2007. I note the applicant earlier claimed that he had previously worked for the [Organisation 1], not the [Organisation 2].
25. In his 2017 submission, the applicant again refers to his involvement with the [Organisation 1]. I also note he states he was taken by the CID in 2011 (not a paramilitary group as claimed in the SHEV interview). In the 2022 submission, the applicant's representative again suggests the applicant worked for the [Organisation 2] and states he was kidnapped in 2011 by 'suspected members' of the CID.
26. The country information before me from DFAT,⁵ the UK Home Office,⁶ the United States Department of State,⁷ Amnesty International,⁸ and the [Sri Lanka] Presidential Commission to Investigate into Complaints Regarding Missing Persons⁹ confirms that:

⁵ DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105; DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818

⁶ UK Home Office, "Country Information and Guidance. Sri Lanka: Tamil separatism. Version 2.0", 19 May 2016, OGD7C848D17

⁷ US Department of State, "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320

⁸ Internal Displacement Monitoring Centre, "SRI LANKA: Civilians displaced by conflict facing severe humanitarian crisis: A profile of the internal displacement situation", Internal Displacement Monitoring Centre, 1 May 2009, CIS17345

- the LTTE launched an armed insurgency against the Sinhalese dominated Sri Lankan government in 1983, surrendering in 2009;
- the [Organisation 2] was a humanitarian organisation involved in relief, rehabilitation and reconstruction efforts in the northeast of Sri Lanka. Money raised by the organisation for humanitarian purposes had reportedly been used by the LTTE for military purposes;
- LTTE support was at times imputed on the basis of ethnicity;
- many Tamils, particularly in the north and east, reported being monitored, harassed, arrested and/or detained by security forces during the conflict and in its aftermath;
- there are credible reports of human rights abuses during the conflict and in its aftermath, including torture;
- following the conflict, military intelligence and other security personnel, sometimes allegedly working with paramilitary groups, were responsible for the documented and undocumented detention of civilians accused of LTTE connections;
- since the end of the conflict, the Sri Lankan authorities have taken steps to guard against the LTTE's re-emergence.

27. I am prepared to accept the applicant's consistent evidence since his arrival in Australia that he volunteered as [an Occupation 2] assisting those affected by the December 2004 Tsunami. He provided varying dates in his written SHEV application and also in the SHEV interview as to when he started this work, but not much turns on this. His evidence indicates he did this work for a period of four to five months until around mid-2005. However, I have doubt that the applicant worked for the [Organisation 2] as suggested in the post-SHEV interview and 2022 submissions. As noted above, the applicant's evidence in his entry interview, his written SHEV application, and 2017 submission was that he worked for the [Organisation 1]. Even if I were to accept he worked for the [Organisation 2] for four to five months as claimed, for reasons set out below, I am not satisfied he faces a real chance of harm on this basis.

28. The applicant's evidence indicated that he remained in Sri Lanka for over one year following his [Occupation 2] work. He ceased working in the volunteer role by May 2005 and I note he obtained his national identity card in Sri Lanka one year later. While the applicant claimed that three of his [Occupation 2] colleagues were kidnapped in 2006, there was no indication that he faced any threat or other difficulties from the Sri Lankan authorities in the period following the cessation of his employment and his travel to [Country] in 2006 or 2007. Nor did he indicate he came to the adverse attention of the Sri Lankan authorities for any reason when he departed Sri Lanka for [Country], using his own passport.

29. The country information documents instances of kidnapping and other human rights abuses against the Tamil population during the conflict in Sri Lanka. It also indicates Tamil support was imputed on the basis of ethnicity. I am prepared to accept the applicant's co-workers were abducted by the CID in 2006 and that one was later found deceased. However, on the evidence, I am not satisfied the co-workers came to the adverse attention of the Sri Lankan authorities solely in connection with their work with Tsunami victims or the [Organisation 1]. Further, I am not satisfied the applicant had an adverse profile with any arm of the Sri Lankan government when he departed Sri Lanka for [Country].

⁹ [Sri Lanka] Presidential Commission to Investigate into Complaints Regarding Missing Persons, "Report On the Second Mandate Of the Presidential Commission of Inquiry Into Complaints of Abductions and Disappearances", 14 August 2015, CISEC96CF14537

30. The applicant's claim that he was questioned on return to Sri Lanka in 2010 is supported by country information. Reporting from the UK Home Office in 2016 indicated that those returning to Sri Lanka from abroad had their details checked against an alert list containing information relating to court orders, warrants of arrest, jumping bail, escaping from detention, as well as information from Interpol and the State Intelligence Service (SIS) computer system. The UK Home Office reported that passengers may be detained for further questioning by the Department of Immigration and Emigration and/or the CID and/or the SIS and/or the Terrorist Investigation Department (TID). Although the applicant claimed in the SHEV interview he was interviewed by a "paramilitary group" at the airport, there is no indication in the reporting before me that paramilitary groups operating in Sri Lanka at the relevant time were involved in incoming passenger processing at the airport.
31. I accept the Sri Lankan authorities asked the applicant about any LTTE connections when he returned to the country in 2010. I also accept his evidence in the SHEV interview that he was asked about other people too. As noted above, the country information indicates that since the end of the conflict the Sri Lankan government have been sensitive to the LTTE's re-emergence. I accept he was permitted to leave the airport after he advised he was previously a volunteer for the [Organisation 1] and that he had nothing to do with the LTTE.
32. Although I have concerns with the applicant's apparent changing evidence about his kidnapping in 2011, I am prepared to accept he came to the adverse attention of the CID or a paramilitary group following his return from [Country]. As noted above, country information indicates that Tamils were imputed with LTTE support on the basis of ethnicity and the authorities have remained sensitive to the LTTE's re-emergence since the end of the conflict. The country information also indicates that military intelligence and other security personnel, sometimes allegedly working with paramilitary groups, were responsible for the documented and undocumented detention of civilians accused of LTTE connections. I accept the applicant was mistreated during his brief detention, questioned about any LTTE links, and released by the CID or paramilitary group on both occasions. The applicant's claim that he was told he would be subjected to monitoring is consistent with the country information and I accept this was the case.
33. I have significant concerns with the applicant's claim that the CID came to his home and asked him to attend the [camp] the following day. In the SHEV interview, he indicated this occurred just prior to leaving Sri Lanka. He claimed that this presented him with the opportunity to escape to another part of [City 2] with his wife. However, I find it difficult to accept the CID would have asked him to attend the camp on his own volition in circumstances where he had claimed that he had been tortured by the CID at the same camp the week prior. I note his evidence in his SHEV statement that the camp was known as the 'Butcher's camp' because people rarely returned from there. I consider if the CID had wanted the applicant to go to the camp that he would have been taken there immediately like he claimed he was previously, particularly if he was genuinely suspected of LTTE links. Overall, I found this aspect of the applicant's evidence unconvincing, and I am not satisfied it occurred.
34. The applicant also claimed in the SHEV interview that about one year earlier (approximately February 2017) his father had been questioned by the CID. I note there was not mention of this in his SHEV statement, nor in subsequent submissions, including to the IAA.
35. Although I have concerns, I am prepared to accept the applicant's wife was approached by the CID after the applicant left Sri Lanka as claimed. I have accepted that applicant's evidence that he was told he would be monitored after he was released from the [camp]. However, I found

his evidence that his father was questioned by the CID in early 2016 unpersuasive and I am not satisfied it occurred.

36. In coming to the above conclusions, I have had regard to the applicant's evidence in the SHEV interview that he has suffered from memory loss. He also indicated he had been attending counselling and was taking medication. While I accept the applicant may have experienced some psychological health issues since being in Australia, there is no credible evidence to indicate this has substantially impacted his ability to give evidence. As already noted, I found the applicant's evidence about past events in Sri Lanka as largely consistent and credible.

Return to Sri Lanka

37. I have accepted the applicant faced some monitoring, mistreatment, and general suspicion from the Sri Lankan authorities following the conflict because he is a Tamil. However, the information also indicates that the overall situation for Tamils in Sri Lanka has improved considerably since that time.
38. I note the UK Home Office's opinion in May 2016 that international protection was not generally warranted in cases where a person evidenced past membership or connection with the LTTE.¹⁰ More recently, DFAT assess that 'high-profile' individuals with links to the LTTE would continue to be of interest to the Sri Lankan authorities, and have indicated that aside from the LTTE leadership, former members who have committed terrorist or serious criminal acts during the conflict, or who provided weapons or explosives to the LTTE, may be considered high-profile. DFAT also assess that even former 'low-profile' LTTE members who have since come to the attention of the Sri Lankan authorities would likely be detained and may be sent for rehabilitation. DFAT describe low profile former LTTE members to include former combatants, those employed in administrative or other roles, and those who may have provided a high level of non-military support to the LTTE during the war. DFAT reports that some Tamils with actual or imputed LTTE links (including those who fought for the LTTE or were part of its civilian administration) continue to report police monitoring and harassment, and that sources in the north said that former LTTE members, including those considered low-profile, are monitored to guard against the LTTE's re-emergence. Overall, DFAT assess that, while they may be monitored, Tamils with former links to the LTTE, and who are not politically active, are generally able to lead their lives without concern for their security as a result of their past association with the LTTE.¹¹
39. The information before me indicates that in 2014 the [Organisation 2] (also referred to as the [Organisation 2 – variation of name]), along with other groups including the LTTE, was classified as a 'terrorist' organisation under a new government proclamation.¹² A Sri Lankan Defence Ministry spokesman stated in 2014 that these organisations were considered terrorist organisations, that it was illegal to have contact with them, and that individuals belonging to these organisations would face arrest under anti-terrorism laws when travelling to Sri Lanka. The organisation remained banned following a review and was listed as a designated entity in a gazette notice dated 20 November 2015.¹³

¹⁰ UK Home Office, "Country Information and Guidance. Sri Lanka: Tamil separatism. Version 2.0", 19 May 2016, OGD7C848D17

¹¹ DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818

¹² Country of Origin Information Services Section (COISS), "Sri Lanka Issues Paper: Treatment of Failed Asylum Seekers and Returnees", 9 November 2016, CR943F68567; The Hindu, "Sri Lanka bans LTTE, 15 other Tamil diaspora groups", 1 April 2014, CX323852

¹³ Country of Origin Information Services Section (COISS), "Sri Lanka Issues Paper: Treatment of Failed Asylum Seekers and Returnees", 9 November 2016, CR943F68567

40. I accept the applicant's evidence in the SHEV interview that he was not involved with the LTTE in any way. The information indicates that at the end of the conflict LTTE members were sent for rehabilitation.¹⁴ Even if the Sri Lankan authorities previously imputed the applicant with a LTTE association in connection with his [Occupation 2] work or as a volunteer for the [Organisation 1], or if they believed he worked as [an Occupation 2] for the [Organisation 2], over a five-month period until mid-2005, I am not satisfied he would be perceived as a former high or low level LTTE member or the member of a banned terrorist organisation.
41. In the post-SHEV interview submission, the applicant's representative drew attention to Tamils with suspected links to the LTTE being arrested and detained under the Prevention of Terrorism Act (PTA). In the 2022 submission, the representative draws attention to reports of Tamils being arrested under the PTA in 2021 for commemorating the war.
42. The PTA was enacted as a temporary measure in 1979 to counter separatist insurgencies. It was made permanent in 1982 and remains legally in force. The PTA allows arrests for unspecified "unlawful activities", permits detention for up to 18 months without charge, and provides that confessions are legally admissible. The PTA was used mainly to target those suspected of involvement with the LTTE and during the war, and authorities detained more Tamils under the PTA than any other ethnic group.¹⁵ As noted by the representative, the information indicates the PTA has been used against Tamils in 2021 for commemorating the war.¹⁶ According to DFAT, several Tamils were arrested under the PTA for alleged LTTE-supportive behaviour, while a Jaffna mayor was arrested under accusations of attempting to resurrect the LTTE.¹⁷ The applicant has not indicated that he supports the LTTE or that he would seek to publicly commemorate the war in Sri Lanka.
43. As above, I am not satisfied the applicant is, or would be perceived as, a former high or low level LTTE member. While I have accepted he faced some monitoring, mistreatment, and general suspicion from the Sri Lankan authorities in the post-conflict era due to his ethnicity, the evidence does not suggest he undertook activities that amount to being part of the LTTE leadership, committing terrorist or serious criminal acts during the conflict, or providing weapons or explosives to the LTTE. Nor does the evidence suggest he is perceived by the Sri Lankan authorities to have done so. I am not satisfied the applicant is perceived by the Sri Lankan authorities as a LTTE member who was a former combatant, employed in any role, or that he provided high level non-military support to the LTTE during the war. Even when considered cumulatively, the country information before me does not support a finding that persons with a profile like his are of adverse interest to the Sri Lankan government authorities on the basis of LTTE links, including if I were to accept he volunteered as [an Occupation 2] for the [Organisation 2] for a short period until mid-2005. Like the delegate, I am not satisfied the applicant has a profile of interest to the Sri Lankan authorities for these reasons and consider the chance he would face a real chance of harm due to any imputed LTTE links remote. I also consider the chance he would be arrested or detained under the PTA remote.
44. DFAT assess that all non-Muslim Sri Lankans, including Tamils, face a low risk of official or societal discrimination based on ethnicity, including in relation to access to education, employment, and housing. DFAT defines 'low risk' as meaning it is aware of incidents but has

¹⁴ DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818; UK Home Office, "Country Information and Guidance. Sri Lanka: Tamil separatism. Version 2.0", 19 May 2016, OGD7C848D17; United Nations Human Rights Council, "Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism", 14 December 2018

¹⁵ DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818

¹⁶ ITJP, "Sri Lanka: Torture & Sexual Violence by Security Forces 2020-21", September 2021

¹⁷ DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818

insufficient evidence to conclude they form a pattern. DFAT states that some Tamils report discrimination in employment, particularly in relation to government jobs, but note other sources suggest this is because many Tamils don't speak Sinhala or English. DFAT also assess there is no official discrimination on the basis of ethnicity in public sector employment, rather the limited Tamil appointments are a consequence of factors such as disrupted education due to conflict and language constraints. DFAT assess that surveillance of Tamils in the north and east continues, particularly towards those associated with politically sensitive issues. Such issues may include those related to the war, such as missing persons, land release and memorialisation events. DFAT assess that physical violence against those being monitored is not common and that ordinary Tamils living in the north and east of Sri Lanka face a low risk of official harassment.¹⁸

45. DFAT reports that the government no longer restricts travel to the north and east of the country, removing security checkpoints on major roads in 2015, and that military involvement in civilian life has decreased since the end of the war. DFAT indicate that in the Northern Province the military remain involved in some aspects of civilian life, particularly the economy.¹⁹ Reporting does not indicate that Tamils are at risk of harm based on their prior place of residence.
46. Tamil political parties are active in Sri Lanka, with the largest coalition of parties operating under the umbrella of the Tamil National Alliance (TNA).²⁰ Country information reports that in November 2019, Gotabaya Rajapaksa, who served as defence secretary during the final phase of Sri Lanka's civil war, won Sri Lanka's presidential election. Later, his brother and former President, Mahinda, was appointed Prime Minister.²¹ According to DFAT, the 2020 parliamentary elections saw the TNA win 10 seats (of a total 225) during the landslide victory of President Rajapaksa's Sri Lanka People's Freedom Alliance (SLPFA). DFAT report there are two Tamil parties in the Government's ruling SLPFA coalition: the Tamil Makkal Viduthalai Pulikal (TMVP) (formerly known as the Karuna group), and the Eelam People's Democratic Party (EPDP), which have a combined total of three seats in the Sri Lankan Parliament. As of November 2021, there is one Tamil cabinet Minister.²²
47. The applicant made various assertions in the SHEV interview about the (former) Sri Lankan government, including that they were secretly poisoning and killing Tamils. For example, the government, with the help of paramilitary groups and Buddhists, are making it look like Tamils are being killed in gang violence or in an accident. He said these issues are being hidden by the media because there is no freedom of press. There was no further mention of these claims in the post-SHEV interview submission. DFAT reports that the Sri Lankan Constitution guarantees freedom of speech and expression and that, although self-censorship is common, journalists and editors continue to openly criticise the government and security forces, including in the north and east.²³ There is no indication from DFAT or the other sources of information before me that the Sri Lankan government (or its proxies) are secretly killing Tamils, or are harming Tamils with profiles like the applicant.

¹⁸ DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818

¹⁹ DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818

²⁰ DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818

²¹ DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818; Al Jazeera, "Sri Lanka scraps Tamil national anthem at Independence Day", 4 February 2020; Al Jazeera, "Sri Lanka pardons soldier who killed Tamil civilians", 27 March 2020

²² DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818

²³ DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818

48. In the 2022 submission, the applicant's representative draws attention to country information in February 2020 reporting that the new Rajapaksa government did not sing the Tamil national anthem at Independence Day and noted it was a departure from previous governments. The representative submits this is an indication of ongoing and renewed ethnic tensions, instability, and that it will have an adverse effect on the applicant. According to the article, President Rajapaksa said in his speech that he is the president of all communities and that he represented the entire Sri Lankan nation irrespective of ethnicity.²⁴
49. The representative also draws attention to a March 2020 report about President Rajapaksa's pardoning of army officer Sunil Ratnayake previously sentenced for killing eight Tamil civilians in 2000.²⁵ The representative argues this is relevant to the applicant because he was kidnapped in or around 2011 by suspected members of the CID during Mahinda Rajapaksa's presidency.
50. The 2021 ITJP report referred to in 2022 submission and that I have obtained details the accounts of 14 Sri Lankan Tamils now living in the United Kingdom who have alleged to independent international investigators (mainly barristers and human rights investigators) that they had been detained (and mistreated) in Sri Lanka between 2019 and 2021. Only three said they were former LTTE cadres. Aside from previous LTTE involvement, other possible triggers for detention were identified as participation in protests or demonstrations related to Tamil causes, electioneering, or receiving money from abroad on behalf of persons being monitored by the Sri Lankan authorities.²⁶ In the 2002 submission, the applicant's representative also refers to an extract of an October 2019 ITJP press release about allegations that the Sri Lankan security agencies are assaulting families of asylum seekers in UK²⁷ that quoted a Tamil asylum seeker as follows: *'They said they have information that I fled abroad and working against the Government of Sri Lanka. They threatened to destroy the whole family'*. Having reviewed the press release, it appears to relate to threats purportedly received by the family of a Tamil asylum seeker living in the United Kingdom who was involved in a protest at a war commemoration event in May 2019. ITJP report that two Tamil asylum seekers said their families were shown photographs from outside the Sri Lankan High Commission in London and threatened. The applicant has not claimed to have been previously involved in politics or Tamil causes in Sri Lanka. Nor has he claimed to have been involved in such activities in Australia where the threat of political violence is generally very low, or expressed an intention to do so if returned to Sri Lanka. Further, he has not claimed that his family in Sri Lanka have been assaulted in connection with his activities in Sri Lanka or abroad.
51. Reporting from DFAT and other sources consistently indicates significant reforms and improvements for Tamils in recent years and I acknowledge there have been concerns about the Rajapaksas' return to power, in particular, concerns there will be or has been a reversal of reforms in respect of reconciliation, accountability and human rights.²⁸ However, I consider the situation in Sri Lanka is significantly different from when the Rajapaksas were previously in power. The country information from DFAT and other sources indicates that Sri Lanka is no longer in the midst or aftermath of a civil war, the LTTE has been eradicated, and while the authorities remain sensitive to its potential re-emergence there is no indication of such a resurgence or the emergence of a similar group. The reporting before me indicates that

²⁴ Al Jazeera, "Sri Lanka scraps Tamil national anthem at Independence Day", 4 February 2020

²⁵ Al Jazeera, "Sri Lanka pardons soldier who killed Tamil civilians", 27 March 2020

²⁶ ITJP, "Sri Lanka: Torture & Sexual Violence by Security Forces 2020-21", September 2021

²⁷ International Truth and Justice Project (ITJP), "Press Release: Sri Lankan security agencies assaulting families of asylum seekers in UK", 24 October 2019

²⁸ DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818; Al Jazeera, "Sri Lanka scraps Tamil national anthem at Independence Day", 4 February 2020; Al Jazeera, "Sri Lanka pardons soldier who killed Tamil civilians", 27 March 2020; Al Jazeera, "Sri Lanka pardons soldier who killed Tamil civilians", 27 March 2020

journalists and political activists in Sri Lanka, particularly when probing historical abuses or other politically sensitive issues, may be at risk of monitoring or harassment from the current government.²⁹

52. Overall, the weight of the country information before me does not support that being Tamil or being Tamil from a certain part of Sri Lanka in itself gives rise to a real chance of persecution, or that persons with a profile like the applicant face any real chance of adverse attention from the state on this basis. Nor am I satisfied that the political developments in Sri Lanka in recent years, including the release of an army officer previously sentenced for the killing of Tamils, indicate that Tamils like the applicant will face a real chance of harm on return to Sri Lanka now, or in the reasonably foreseeable future. While I acknowledge there have been reports of mistreatment of Tamils, particularly in the north of Sri Lanka and against those suspected of links to the LTTE and other politically sensitive issues³⁰, the weight of the country information before me, including from DFAT, indicates that Tamils are not being systematically targeted and subjected to serious harm because of their race. I am not satisfied the applicant faces a real chance of harm in Sri Lanka due to his ethnicity as a Tamil and/or his prior place of residence now, or in the reasonably foreseeable future. Nor am I satisfied the applicant's chance of facing harm is elevated due to past events in Sri Lanka or that he faces a real chance of being imputed with LTTE links or an anti-government opinion arising from his ethnicity, his [Occupation 2] work, or other relevant profile now, or in the reasonably foreseeable future. Considering the information as a whole, while I accept that the applicant as a Tamil may experience a level of official or societal discrimination, I am not satisfied that any such treatment he may face would constitute serious harm.
53. In his SHEV statement, the applicant also claimed to fear harm in Sri Lanka due to having departed the country unlawfully and because he sought asylum in a western country. He said he had read online and been told by others about the dangers of Tamils being returned to Sri Lanka. In the SHEV interview, he advised the delegate that many returnees from western countries have been kidnapped and are now missing. In the 2022 submission, the applicant's representative states the early 2020 pardoning of army officer Sunil Ratnayake³¹ 'signals a return to state sanctioned human rights abuses' and is likely to impact the applicant as a failed asylum seeker if he is forced to return to Sri Lanka.
54. I accept that if the applicant returned to Sri Lanka he would do so as a failed asylum seeker returned from Australia, a western country. I also accept that as he departed Sri Lanka in an irregular manner he would be identified by the Sri Lankan authorities as someone who departed the country illegally.
55. Having regard to the country information before me, I am not satisfied there is a real chance the applicant would be harmed by the Sri Lankan authorities by virtue of him being a Tamil returnee or returnee asylum seeker.
56. DFAT indicate that returnees will arrive in Colombo where they will be interviewed by the Chief Immigration Officer. They may also be interviewed by other agencies including the CID, Sri

²⁹ DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818; ITJP, "Sri Lanka: Torture & Sexual Violence by Security Forces 2020-21", September 2021

³⁰ DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818; International Truth and Justice Project (ITJP), "Unsilenced. Male survivors of conflict-related sexual violence in Sri Lanka speak", September 2018; ITJP, "Sri Lanka: Torture & Sexual Violence by Security Forces 2020-21", September 2021; United Nations Human Rights Council, "Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism", 14 December 2018

³¹ Al Jazeera, "Sri Lanka pardons soldier who killed Tamil civilians", 27 March 2020

Lankan State Intelligence Service (SIS), and Sri Lankan Navy Intelligence (SLNI), depending on the circumstances of their departure from Sri Lanka and their personal history. These agencies check travel documents and identity information of returnees against the immigration and intelligence databases, as well as determining whether they have any outstanding criminal matters. DFAT note that all returnees travelling on a temporary travel document are subject to a police investigative process to confirm their identity, which often includes interviewing the returnee, contacting the police in their home area, contacting family and neighbours, and checking criminal and court records. DFAT is not aware of detainees being subjected to mistreatment during processing at the airport.³²

57. I accept the applicant is likely to return to Sri Lanka on a temporary travel document. I am satisfied on the information before me that he has no identification concerns, and I am not satisfied that he is a person with a criminal or security record that would raise the concern of the Sri Lankan authorities. Further, I am not satisfied that any investigative processes to which the applicant may be subjected would constitute serious harm.
58. DFAT states the International Organisation for Migration meets Australian-assisted voluntary returnees after immigration clearance at the airport and provides some cash and onward transportation assistance. DFAT also states that the Australian Government provides removed returnees with cash to assist with their return to Sri Lanka.³³
59. Local sources told DFAT that some returnees, including those in the north and east suspected of LTTE links, have been subjected to monitoring by the authorities, involving visits to returnees' homes and telephone calls by the CID. DFAT understands that most returnees, including failed asylum seekers, are not actively monitored on an ongoing or long-term basis. DFAT is unable to verify whether monitoring, where it occurs, is specific to former LTTE cadres. Tamils who had failed to secure asylum in Australia and since returned to the Northern Province told DFAT they had no protection concerns and had not experienced harassment by the authorities, nor received monitoring visits, but DFAT cannot determine if this is the case for all such returnees. DFAT assess that surveillance of returnees, where it occurs, contributes to a sense of mistrust of returnees within their community. DFAT also report that some returnees reported being pressured from within their communities on return, and that in some communities people resent the financial support returnees are provided. Others experienced resentment upon return because they spent family funds on what proved to be a futile attempt at irregular migration. DFAT also notes that limited job availability in the north and east further contributes to reintegration issues for returnees securing employment and housing. Overall, DFAT understands that societal discrimination is not a major concern for returnees, including failed asylum seekers, and assess that returnees face a low risk of societal discrimination upon return to their communities.³⁴
60. While I accept that on return the applicant may face some societal discrimination within his local community due to his profile as a returnee asylum seeker, and some reintegration issues, I am not satisfied that he would face anything that would constitute serious harm. I accept there is indication from DFAT that authorities visit or telephone some returnees. However, even accepting that this may occur, on the information before me, I am not satisfied it would constitute harm, or that this, in combination with any societal discrimination would constitute serious harm.

³² DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818

³³ DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818

³⁴ DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818

61. The information indicates that thousands of Sri Lankan nationals, mostly Tamil, have returned to Sri Lanka from Australia (and other countries) since the end of the war.³⁵ I accept on the information before me that returnees with significant actual or perceived links to the LTTE may still be at risk of harm when processed at the airport or on their return home. However, I am not satisfied the applicant holds such a profile.
62. While I acknowledge the applicant may face some challenges returning having spent a significant time abroad, when I consider his individual circumstances, I am not satisfied he faces a real chance of harm due to his asylum application in Australia, his time spent in Australia, or due to being a failed or returning Tamil asylum seeker from Australia/the west now, or in the reasonably foreseeable future, if he returns to Sri Lanka. Nor am I satisfied the applicant's chance of facing harm as a failed asylum seeker is elevated due to the pardoning of Sunil Ratnayake in early 2020 or that the pardoning indicates the applicant will face state sanctioned human rights abuses.
63. As noted in the delegate's decision, there are penalties under the Immigrants and Emigrants Act (IAEA) for departing Sri Lanka illegally.
64. DFAT report as part of this process, illegal departees will be referred to CID at the airport and charged with having committed an offence under the IAEA. Once charged they are taken to the courts at Negombo where they are bailed and released. DFAT indicates that the Sri Lankan Legal Aid Commission provides legal assistance for those charged with illegal departure.³⁶
65. I accept that as the applicant departed Sri Lanka irregularly by boat, he will be considered to have committed an offence under the IAEA. DFAT reports that while persons convicted of the offence of illegal departure theoretically face a custodial sentence of up to five years, in practice, local sources suggest, a fine is always imposed and typically varies from LKR 50,000 (approximately AUD350) and up to LKR 200,000 (approximately AUD1,400), and can be paid instalments. While facilitators or organisers of people smuggling ventures, including captains and their crew, are charged with more serious offences and typically refused bail, DFAT is unaware of a prison sentence being given for illegal departure by itself.³⁷
66. DFAT reports that persons charged are required to appear in court in the location where the matter was first heard, reportedly near the airport at Negombo Courts, which involves legal and transport costs. While the frequency of court appearances depends on the magistrate, DFAT understands that most individuals charged under the IAEA appear in court every three to six months and that, in addition to their own court hearings, they may be summonsed as witnesses in cases against the facilitators or organisers of people smuggling ventures. DFAT report that illegal departure cases may take years to resolve, although the reason for this is unclear. One source suggested that cases are taken forward in court only when all members of a people smuggling venture have been located; while another local source suggested it was simply due to the workings of the Sri Lankan justice system. Some returnees told DFAT that it was difficult and stressful having to return periodically to Colombo for a further hearing in a case where they were uncertain of the outcome. DFAT notes that, while the fines issued for passengers of people smuggling ventures are often low, the cumulative costs associated with regular court appearances over protracted lengths of time can be high.³⁸

³⁵ DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818

³⁶ DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818

³⁷ DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818

³⁸ DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818

67. I find that, on return to Sri Lanka, the applicant would be charged and fined under the IAEA. There is no suggestion he was anything other than an ordinary illegal departee from Sri Lanka. In that context, I find that he would not face a real chance of imprisonment, but it is highly likely that he will be fined. On the evidence before me, I find the imposition of any fine (which can be paid in instalments) would not of itself constitute serious harm. While the applicant may face what DFAT refers to as the 'slow processes' of the Sri Lankan legal system, I am not satisfied that any lifestyle disruption or costs associated with court appearance/s, because of his illegal departure, would constitute serious harm.
68. Additionally, I am satisfied that the application of the provisions of and penalties under the IAEA do not amount to discriminatory conduct. The law is not discriminatory on its terms, nor does the country information before me indicate that the law is applied in a discriminatory manner or that it is selectively enforced. Accordingly, I am satisfied that any process the applicant may face on return to Sri Lanka, and any penalty he may face because of his illegal departure, would not constitute persecution for the purpose of the Act. In light of this I find that the applicant does not face a real chance of persecution from the Sri Lankan authorities due to his illegal departure or travel to Australia.
69. In the 2022 submission, the applicant's representative also refers to reporting from the Tamil Guardian in April 2021 about failed asylum seekers from Germany and Switzerland being transferred to state run quarantine and then to the CID.³⁹ While no information is provided regarding the profile of these returnees, the country information about returnees being processed by the CID is consistent with reporting from DFAT (discussed above) and I am not satisfied that any time spent in quarantine, or other related COVID-19 protocol the applicant may be subjected to by the Sri Lankan government to protect the health of the Sri Lankan community, amounts to serious harm.
70. I have accepted that if returned to Sri Lanka the applicant, due to his ethnicity, may experience a level of official or societal discrimination. I have also found he may face a level of societal discrimination or monitoring as a returnee asylum seeker and that he will be subjected to a number of administrative and legal procedures as a result of his illegal departure. Having regard to all the evidence before me, including the country information, even when his circumstances are considered cumulatively, I am not satisfied he faces a real chance of treatment that would constitute serious harm now, or in the reasonably foreseeable future. I am not satisfied that he faces a real chance of harm in Sri Lanka due to past events in Sri Lanka, due to an actual or imputed LTTE or anti-government profile or political opinion, due to his ethnicity, due to his prior place of residence, as a returnee or failed asylum seeker, due to his time spent/residence in Australia, due to his illegal departure from Sri Lanka, or a combination of these factors.

Refugee: conclusion

71. 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

72. 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

³⁹ Tamil Guardian, "Tamil deportees to be handed to CID after 'quarantine process'", 1 April 2021

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

73. 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.

74. 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.

75. I have accepted the applicant may face some level of societal discrimination or monitoring as a returnee asylum seeker. I also accept there will be a period of adjustment as he reintegrates into the community and life in Sri Lanka. He may also face some level of official or societal discrimination due to his ethnicity. The country information confirms that the trend of monitoring Tamil civilians in day-to-day life has eased since the end of the conflict. Having considered the applicant's own circumstances, and evidence discussed above, I am not satisfied that any monitoring, discrimination, or reintegration issues he may face amounts to significant harm as defined in the Act. I am not otherwise satisfied he faces a real risk of harm as a Tamil or a Tamil male from the north.

76. I have also accepted that the applicant will be identified on arrival at the airport in Sri Lanka as having departed illegally and that he will be subjected to a number of administrative and legal procedures. While I accept he may be subjected to questioning and may be required to pay a fine on return to Sri Lanka, I am not satisfied that the questioning, imposition of a fine and/or having to attend court over a protracted period, or any other process the applicant may be subjected to in connection with his illegal departure, individually or cumulatively, amounts to significant harm as defined by the Act. In particular, I am not satisfied that there is the intention to inflict pain or suffering, or to cause extreme humiliation, necessary to constitute cruel or inhuman or degrading treatment or punishment.

77. The applicant may also be subject to a number of protocols due to the COVID-19 pandemic before being released into the community. However, I am not satisfied that this would amount to or would lead to significant harm as defined.

78. I have otherwise found that the applicant does not face a real chance of any harm in Sri Lanka for the reasons claimed. Based on the same information, and for the reasons set out above, I find he does not face a real risk of suffering significant harm in Sri Lanka.

79. After having regard to the applicant's circumstances, I find that he does not face a real risk of suffering significant harm.

Complementary protection: conclusion

80. 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.