



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA22/10419

Date and time of decision: 5 April 2023 10:20:00
P Tyson, Reviewer

Decision

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

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be an ethnic Tamil from Sri Lanka. On 19 February 2016 he lodged an application for a Safe Haven Enterprise visa, a type of protection visa. In that application, he claimed to fear harm from Sri Lankan authorities because they believed him to have been a member of the Liberation Tigers of Tamil Ealam (LTTE), which he denied. A delegate of the Minister for Immigration refused the visa in a decision dated 13 December 2016. While the delegate found the applicant generally credible, including his claim to have been detained by authorities for over two years in a rehabilitation centre, she concluded there was not a real chance or risk of him suffering serious or significant harm in Sri Lanka.
2. On 14 September 2017 the IAA affirmed the decision of the delegate. However, by order of the Federal Circuit and Family Court [in] November 2022, the IAA's decision was quashed and the matter remitted for reconsideration.

Information before the IAA

3. I have had regard to the review material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. Following the remittal, the Secretary provided further additional information to the IAA. It is not apparent that this material was before the delegate and it appears to be new information. Some of these documents are departmental forms relating to an FOI request, biographic details, consular assistance and detention forms. These do not relevantly add to the material before me. Also included are a number of documents dating from November and December 2012 which present early records of the applicant's claims after his arrival in Australia. Two of these are case notes which seem to record information given at his arrival interview. There is already an audio recording of the arrival interview before me and the new written records and notes do not relevantly add to that information. I am not satisfied there are exceptional circumstances to justify considering this new information.
5. There is also a protection file note from November 2012 setting out the applicant's claims at that time and recording a decision to 'screen in' because his claims potentially engaged Australia's *non refoulement* obligations. This appears to be the earliest record of the applicant's claims after his arrival in Australia and I am satisfied there are exceptional circumstances to justify considering it.
6. In January 2017 the applicant provided new information to the IAA which consisted of a statutory declaration, letter from the applicant's GP, a psychological assessment report and photographs. In his statutory declaration, and the supporting material, the applicant claimed to have been a member of the LTTE and to have risen to the rank of Major. He provided details about his training, involvement in intelligence activities, and battles he had undertaken, in addition to making claims about events occurring after his departure from Sri Lanka. On 3 March 2023, the IAA conducted an interview with the applicant in which he provided further detail about these claims. The applicant's representative made further written submissions on the issues arising at the interview on 14 March 2023.

7. The applicant has provided an explanation for not disclosing his role with the LTTE to the delegate. He has referred to not trusting that Australian officials would not share his information including because of an earlier alleged breach of his privacy, detailed further below. He has also said that he was afraid he would be imprisoned in Australia or returned to Sri Lanka if he disclosed the information, and had been told of this happening to other asylum seekers. His representative has also put forward submissions relating to his mental health (supported by the psychologist report), distrust and fear of authorities, and past traumatic experiences.
8. The medical letter and psychologist report both post-date the delegate's decision and could not have been given to the delegate prior to that decision being made. I find that the applicant evidently had the opportunity to present the new claims (and the photographs) earlier. While I accept he was genuinely fearful, and understand his reasons for not disclosing his LTTE involvement, I am not satisfied that this information could not have been given to the delegate prior to the decision being made. However, in his statutory declaration and at interview, the applicant provided detailed and plausible evidence about his role with the LTTE that is consistent with available country information. Notwithstanding the late disclosure of these claims they, and the medical evidence and photographs submitted in support, are capable of being believed. I am satisfied the new material is credible personal information that was not previously known and, had it been known, may have affected consideration of the claims. Taking this into account, along with what I accept were genuine fears of disclosing this information, and also noting that these new claims, if true, significantly alter the applicant's profile, I am satisfied there are exceptional circumstances to justify considering the new information given by the applicant in January 2017 and March 2023.
9. On 10 January 2023 the applicant's representative made submissions to the IAA about the situation to which the applicant will return in Sri Lanka, based on recent country information. The country information sources, which I find to be new information, were attached.¹ This information is not credible personal information about an individual in the relevant sense. However, it post-dates the delegate's decision and could not have been provided prior to the decision being made. Considering this as well as the passage of time since the delegate's decision, and the political and economic changes in Sri Lanka as outlined in the new information, I am satisfied there are exceptional circumstances to justify considering this new country information.
10. The applicant's representative provided further submissions to the IAA on 14 March 2023. The submissions consist mainly of legal argument but also refer to and attach supporting media/country information that is new information. The first is a news article The Week in February 2023² which refers to a named Tamil Nationalist leader having made claims that former LTTE chief Prabhakaran is still alive, and reactions to these claims, including that of the Sri Lankan Army. This goes to claims made by the applicant at the IAA interview that there are ongoing reports that Prabhakaran is alive. The other sources are an extract relating to Sri Lanka from a Human Rights Watch report³ and a March 2022 article from The Observer relating to Tamils fearing prison and torture in Sri Lanka⁴. While The Week article contains

¹ Department of Foreign Affairs and Trade (DFAT), 'Country Information Report Sri Lanka', 23 December 2021; UK Home Office, 'Country Policy and Information Note Sri Lanka: Tamil Separatism', August 2022; United Nations High Commissioner for Human Rights (UNHCHR), 'Situation of Human Rights in Sri Lanka', A/HRC/51/5, 4 October 2022; UNHCHR, 'Promoting reconciliation, accountability and human rights in Sri Lanka', A/HRC/49/9, 18 March 2022; Human Rights Watch, 'Sri Lanka: UN Report Describes Alarming Human Rights Situation', 3 March 2022.

² The Week, 'Is LTTE leader Prabhakaran alive? What's behind Pazha Nedumaran's claims?', 13 February 2023.

³ Human Rights Watch, 'World Report 2023'.

⁴ The Observer, 'Tamils fear prison and torture in Sri Lanka, 13 years after civil war ended', 27 March 2022.

personal information about various individuals, that information is not of itself information that may have affected consideration of the claims. To the extent the information about Prabhakaran being alive is of itself personal information, it is not credible. This and the other new information is more in the nature of general country information than credible personal information. While I accept The Weeks article is recent and could not have been given to the delegate prior to the decision being made, it is clear from the article that the Sri Lankan authorities are not taking the claims about Prabhakaran seriously and this information adds little to what is already before me. I am not satisfied there are exceptional circumstances to justify considering it. The other new sources similarly post-date the delegate's decision and could not have been given to the delegate, and are relevant to the current situation in Sri Lanka and treatment of Tamils suspected of LTTE activity. I am satisfied there are exceptional circumstances to justify their consideration.

11. I have obtained new country information relevant to the treatment of former LTTE members, specifically a detailed country guidance decision of a UK Tribunal based on expert evidence, and a report from the US Department of State (USDOS).⁵ This information contains a relatively recent evaluation of the circumstances in Sri Lanka. The UK Tribunal decision includes a critique of the current approach of the Sri Lankan authorities to Tamil separatism. Although the assessments of that tribunal are not binding, I consider it a useful opinion. I have also obtained from a number of sources country information relating to the history and structure of the LTTE.⁶ These are relevant to assessing the credibility of the applicant's claims to have been an LTTE member, which were raised for the first time before the IAA. The delegate's decision was made some years ago now, and did not include consideration of the new issues now raised before the IAA. I am satisfied there are exceptional circumstances to justify considering the new information I have obtained.
12. The previous IAA reviewer obtained a 2017 DFAT report as new information⁷. That report has now been overtaken by the more recent 2021 report that is before me. I am not satisfied there are exceptional circumstances to justify considering the 2017 report.

Applicant's claims for protection

13. The applicant's initial claims can be summarised as follows:
 - He is of Tamil ethnicity and Hindu religion. He is from [Village 1] in [City 1] area, [District 1], in Sri Lanka's Northern Province. His parents continue to reside in that area.
 - From 2002-2004 he worked for NGO [Organisation 1] on a [specified] project. The work was in the LTTE controlled Vanni area but required travel to government controlled Vavuniya and liaison with both the government Irrigation Department and LTTE members and administrative staff.

⁵ KK and RS (Sur place activities: risk) Sri Lanka CG [2021] UKUT 130 (IAC); US Department of State, 'Country Reports on Human Rights Practices 2022 - Sri Lanka', 20 March 2023, 20230321155722.

⁶ Joanne Richards 'An Institutional History of the Liberation Tigers of Tamil Eelam', Centre on Conflict, Development and Peacebuilding, Graduate Institute of International and Development Studies, Geneva, 1 November 2014, CISA447F082828; UNHCHR, 'Report of the OHCHR Investigation on Sri Lanka (A/HRC/30/CRP.2)', 16 September 2015, CISEC96CF13358; South Asia Terrorism Portal, 'Incidents involving Liberation Tigers of Tamil Eelam (LTTE) ', 1 January 2009, CIS956B8881635; The Nation, 'Road to Victory - A Battle Remembered' 22 May 2011, CISD9559B12258; A Mehta, 'Sri Lanka's Ethnic Conflict – How Eelam War IV was Won', 2010; South Asian Terrorism Portal, 'Liberation Tigers of Tamil Eelam, Incidents and Statements involving LTTE: 2004-2017' satp.org/satporgt/countries/srilanka/terroristoutfits/lte.htm.

⁷ DFAT, 'Country Information Report – Sri Lanka', 24 January 2017, CISED50AD105.

- From 2004-2009 he worked as a [Occupation 1] for German-funded NGO [Organisation 2]. It operated in the LTTE area and its activities were closely supervised and controlled by the LTTE. In his role, the applicant worked closely with the LTTE. He initially provided tsunami relief but as the war intensified his role changed to providing assistance to those impacted by the war, identifying locations of bodies and informing the LTTE-aligned Tamil Rehabilitation Organisation (TRO), and transporting the injured. He suffered shrapnel injuries in the final phase of the war.
- In March 2009 the applicant was working in [Location 1] when the area was surrounded by the Sri Lankan Army. He was taken to the [named] checkpoint. He was suspected to be an LTTE cadre and transferred to a camp where he was interrogated and tortured. From there he was transferred to [an] army camp and then to various rehabilitation centres. He was released in July 2011 on conditions including that he report weekly to the local army camp and not disclose things that may have happened during war or detention to a third party.
- During his period in detention, the applicant had been forced to sign a document written in Sinhala that he believes was a confession. He had also been befriended by a CID officer who, while intoxicated, had shown the applicant a video of the army committing human rights abuses against LTTE. The applicant had recognised a senior LTTE cadre, V.
- In around September 2012 the applicant encountered V's brother and told him, based on what he had seen in the video, that he did not believe V was alive.
- On 20 October 2012 the applicant was called to report to the army camp in [Location 2]. There, he was questioned by the army commander about how he knew senior LTTE cadres were tortured, arrested or killed. The applicant told the commander about the video and was questioned about the CID officer who had shown it to him. He was warned not to disclose such incidents and told to attend the [named] army camp by 30 October.
- The applicant left Sri Lanka [in] October 2012. CID officers later came in search of him. His family has told them he is in Australia but they continue to check if he has returned. Prior to presidential elections in 2015, CID officers came to his home and took away his voting card.
- In Australia, the applicant was contacted by another asylum seeker who claimed that a CD sent to him by the Department evidently in error contained a copy of the applicant's entry interview record. In around January 2016 a different asylum seeker told the applicant he had heard other asylum seekers discussing the applicant's case.

14. The applicant's new claims to the IAA can be summarised as follows:

- In around 2003 while working for [Organisation 1] he was recruited by an LTTE intelligence wing colonel, N, to perform tasks for the LTTE. This included providing them with scaled maps of Vavuniya identifying the precise locations of army camps, which were available to him through his work. The maps were used for N's role in strategising before attacks.
- In early 2004 the applicant voluntarily joined the LTTE. He undertook 6 months of basic training and was then attached to the Intelligence team in the [specified] Regiment, where he reported to N.
- N placed him at [Organisation 2] and he worked there as a [Occupation 1] while covertly working for the LTTE. He provided information to N weekly, including observations of

the movements of army officials. Through reports to his [Organisation 2] supervisor, he routed funding and assistance to the LTTE areas, for LTTE causes and to LTTE families.

- In 2007 he was selected by Brigadier V, head of [specified] Regiment, for leadership training. He spent three months at a training camp and was then given the rank of Captain and allocated 30 cadres, who he led in three major battles in [District 2] and [District 3].
- Around the end of 2007 he was again selected for a further three months training, at a different officers' training school, after which he was ranked Major and allocated around 100 cadres. He led them in battles in [District 2], [District 4] and [District 1] and sustained injuries in combat.
- The applicant surrendered to the army in March 2009 when surrounded during battle. He was in a group with both civilians and LTTE members and discarded his uniform and weapons prior to surrendering, claiming to be a civilian.
- N was arrested in around 2015 on information given by informants and has been given a 20 year custodial sentence for his involvement in the [specified] attack. Another senior cadre was rehabilitated and then recently rearrested at the airport attempting to leave Sri Lanka, believed to be due to information provided by N after his arrest.
- Despite undergoing rehabilitation the applicant has not disclosed to officials that he was a senior LTTE member or the tasks he did for [Organisation 2]. He was told when he was released from rehabilitation that if it was confirmed he was an LTTE member he would be sent to rehabilitation for a longer period and prosecuted. Prior to his departure he was frequently called for questioning. He believes that authorities had received information about his role and were planning to abduct him.
- Around three years after he left Sri Lanka, CID officers informed his parents that it had been confirmed that the applicant is a member of the LTTE, and threatened he would be returned with the assistance of the Australian government and punished.
- Army intelligence have continued to approach his family. They come every few weeks, sometimes asking questions and sometimes just observing and monitoring.

Refugee assessment

15. 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

16. 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.
17. The applicant has provided evidence of his identity and nationality, including a Sri Lankan birth certificate and national identity card. I accept his claimed identity and that he is a national of Sri Lanka. There is no evidence before me to suggest he has a right to enter and reside in any other country.
18. Aside from the new information about his membership of the LTTE, the applicant's claims have been presented with general consistency since his arrival in Australia. The new evidence fits broadly within the same narrative and is only inconsistent with his earlier claims to the extent he claimed not to have been in the LTTE and to have been working for an NGO in the period in which he now says he was training and fighting with the LTTE.
19. The applicant's evidence at the IAA interview about his LTTE role and activities was detailed and persuasive. To the extent I was able to obtain country information⁸ about LTTE training and command structure, the role of the [specified] Regiment and identities of its leaders, and the locations of fighting in 2008 and 2009, his evidence was either consistent with, or not inconsistent with, this information. For example, the applicant described the [specified] Regiment as a large fighting regiment with different sections, including a group who safeguards the LTTE leader which is consistent with country information that the Imran Pandian Regiment was an infantry unit in the military wing which had been initially established as a bodyguard brigade for the LTTE leader. In the course of giving his evidence he spontaneously referred to other parts of the LTTE structure which are confirmed by the country information, such as the Charles Anthony Brigade, anti-tank regiment and Poonamman mining unit. He also spontaneously referred to the order of command, as confirmed by country information, in response to a question about who he would receive orders from during battles. He stated that his training included physical exercise, weapons and defensive exercises, political and LTTE studies, various drills, tactics and planning, using equipment such as radio and reading and drawing maps, all of which is consistent with the country information about basic and advanced training.
20. Although I was unable to locate or identify some of the precise villages or locations the applicant referred to, the general pattern of his movements in 2007-2009, fighting in [District 2], [District 3], [District 4] and finally around [District 1], and his final fight around [Town 1], [Location 3] and [Village 2], seems consistent with country information about this phase of the war including that the [specified] Brigade under Brigadier V was fighting in [District 4] in late 2008/early January 2009, and that the LTTE was then pushed into the [area] around

⁸ UNHCHR, 'Report of the OHCHR Investigation on Sri Lanka (A/HRC/30/CRP.2)', 16 September 2015, CISEC96CF13358; Joanne Richards 'An Institutional History of the Liberation Tigers of Tamil Eelam', Centre on Conflict, Development and Peacebuilding, Graduate Institute of International and Development Studies, Geneva, 1 November 2014, CISA447F082828; South Asian Terrorism Portal, 'Liberation Tigers of Tamil Eelam, Incidents and Statements involving LTTE: 2004-2017' satp.org/satporgt/countries/srilanka/terroristoutfits/ltte.htm.

[Town 1] and [Location 3] in early 2009 with the frontlines moving east.⁹ The applicant gave an account of the aerial bombing by the Sri Lankan air force, resulting in heavy civilian and LTTE casualties, consistent with country information. The applicant's reference to shortages of ammunition, weapons and even food towards the end of the war is consistent with information that the LTTE was severely diminished as a fighting force by that time, lacking ammunition and supplies.¹⁰ The applicant's description of the presence of civilians with the LTTE at the time of his surrender/capture is consistent with information that the LTTE kept Tamil civilians with them in the conflict zone.¹¹

21. The applicant gave detailed evidence about his role with the NGO [Organisation 2] to the delegate. While some of the evidence about his activities towards the end of the war is inconsistent with his new claims to have been fighting with the LTTE from about 2006, I accept that he did at some point work with that NGO. The applicant's claim that he was planted in [Organisation 2] to gather intelligence and influence funding to LTTE causes is not implausible. Country information states that the activities of NGOs in LTTE controlled areas were directed and coordinated by the LTTE¹², and information cited in the delegate's decision from the [Organisation 2] website (this particular information seems no longer accessible) refers to the organisation receiving criticism during the conflict about its activities in the north, and to its staff members maintaining independence and honesty 'with the exception of a few individuals', implicitly accepting there may have been legitimate suspicions over some [Organisation 2] staff members.
22. There were a small number of inconsistencies in the applicant's evidence, mainly around the timing of various events, and confusing which of the two periods of officer training was undertaken at which location, but I do not consider these significant given the passage of time. In his statement he referred to Brigadier V as head of the regiment who selected him for officer training in around 2006/2007. Information I obtained referred to Brigadier V becoming head of [specified] Regiment in March 2009 after the death of its existing leader, and that he was [District 4] military chief immediately prior to that.¹³ At the interview in response to a question about who initially selected him, the applicant referred to Brigadier V, spontaneously adding that he was the first Brigadier he had worked with and was commander in chief of the [District 2] commanding station at that time. While I could not find any further information about Brigadier V's earlier roles to confirm that he held that position in [District 2] at that time, it is plausible that he could have. In my view the applicant's natural reference to the Brigadier's earlier role, rather than the higher profile role he held later in the war, is consistent with contemporaneous knowledge of the Brigadier at the times the applicant claims and I do not consider it necessarily inconsistent with the country information.

⁹ The Nation, 'Road to Victory - A Battle Remembered' 22 May 2011, CISD9559B12258; A Mehta, 'Sri Lanka's Ethnic Conflict – How Eelam War IV was Won', 2010; Joanne Richards 'An Institutional History of the Liberation Tigers of Tamil Eelam', Centre on Conflict, Development and Peacebuilding, Graduate Institute of International and Development Studies, Geneva, 1 November 2014, CISA447F082828.

¹⁰ UNHCHR, 'Report of the OHCHR Investigation on Sri Lanka (A/HRC/30/CRP.2)', 16 September 2015, CISEC96CF13358; Joanne Richards 'An Institutional History of the Liberation Tigers of Tamil Eelam', Centre on Conflict, Development and Peacebuilding, Graduate Institute of International and Development Studies, Geneva, 1 November 2014, CISA447F082828

¹¹ Joanne Richards 'An Institutional History of the Liberation Tigers of Tamil Eelam', Centre on Conflict, Development and Peacebuilding, Graduate Institute of International and Development Studies, Geneva, 1 November 2014, CISA447F082828.

¹² Joanne Richards 'An Institutional History of the Liberation Tigers of Tamil Eelam', Centre on Conflict, Development and Peacebuilding, Graduate Institute of International and Development Studies, Geneva, 1 November 2014, CISA447F082828;

¹³ Joanne Richards 'An Institutional History of the Liberation Tigers of Tamil Eelam', Centre on Conflict, Development and Peacebuilding, Graduate Institute of International and Development Studies, Geneva, 1 November 2014, CISA447F082828; South Asia Terrorism Portal, 'Incidents involving Liberation Tigers of Tamil Eelam', 1 January 2009, CIS956B8881635

23. The applicant submitted photographs of what he claims is himself working with [Organisation 1] NGO and marching with LTTE cadres. I accept that the person identified in these photographs as the applicant could bear some resemblance to him, although the photo quality is too poor to make any definitive assessment of this. He has also submitted reports from a doctor and psychologist which contain information about his experiences in Sri Lanka consistent with what he has claimed to the IAA.
24. The applicant was able to give detailed accounts of what was involved in the various periods of training he undertook, and differentiate between these. He was also able to offer spontaneous and detailed evidence about his roles as captain and then major. He gave a vivid account of some of the periods of combat in which he was engaged in the final phase of the war in early 2009. There were occasions when his evidence was generalised or not focused on his own activities, but he was able to easily expand in response to further questioning and I am mindful that he was describing events that took place some time ago, and were of a nature where days or weeks may be repetitive and blur together. Overall, I am satisfied that the applicant's evidence was reflective of genuine lived experience of performing the particular roles he claimed, and not simply as an NGO worker or even low-level cadre with familiarity with the LTTE.
25. I note that the applicant's claims to have been detained in March 2009, undergone rehabilitation and released in July 2011 were accepted by the delegate and the previous IAA reviewer. They have been made consistently since his initial screening interview and he was able to expand on and describe various aspects of these experiences at the SHEV interview with the delegate. The claims are supported by documentary evidence: an International Committee of the Red Cross (ICRC) ID card, an International Organisation for Migration (IOM) 'Information Counselling and Referral Service' (ICRS) photo ID card issued in the applicant's name [in] June 2011, a Certificate of Reintegration certifying that the applicant was reintegrated from the [named] Rehabilitation centre [in] July 2011 and Tamil, Sinhala and English version of a document on the letterhead of the Bureau of the Commissioner General of Rehabilitation, Ministry of Rehabilitation and Prison Reforms. The latter contains an anomaly of one digit in the applicant's national identity card number ([specified]), but I accept this could be a data entry error. I draw no adverse inference from the fact that the letter indicates the applicant undertook educational training whereas his evidence at the SHEV interview was that he did not. There are any number of reasons that a general letter issued to a detainee on release from rehabilitation might state that he underwent educational training regardless of whether or not he in fact did. I accept that the applicant was detained, underwent detention and rehabilitation in the various locations he claims, and was released on conditions in July 2011.
26. The applicant also submitted a number of letters to the Department which are broadly supportive of his claims to have been injured, surrendered, and detained. I accept these matters based on other information before me and otherwise find these letters of little assistance given the applicant's own evidence to the IAA that people in his community were not aware of his LTTE involvement.
27. It is the applicant's claim that despite undergoing rehabilitation, the Sri Lankan authorities were unaware at that time of his actual role with the LTTE. There has been some confusion in his evidence as to what, exactly, they did know. In his January 2017 statutory declaration he is clearly claiming that although he had undergone rehabilitation he had not disclosed to Sri Lankan authorities that he was a senior LTTE member or the tasks that he did while working for [Organisation 2]. The statutory declaration implies that authorities did not have confirmed information he was an LTTE member prior to his departure, but that CID officers had later

told his parents that they had confirmed that the applicant was an LTTE member. The psychological report submitted to the IAA at that time similarly reports the applicant as indicating that he maintained to authorities that he was not a member of the LTTE. At the IAA interview he appeared to be initially saying that he had told the army he 'was just a normal member of LTTE' (I note that at this point the interpreter hesitated before 'member', seeming to search for the correct term) and that it was after his release that military intelligence had come to know, through former LTTE members turned informants, that he had been a major. In response to a different question, he again referred to telling the army he was a 'normal LTTE member'. However, later in the interview when I put to him that his statutory declaration suggested he had not confessed to being an LTTE member, but his evidence at the interview suggested that he had, he said that was not correct and that he had told the army he was an NGO worker helping the LTTE and a normal LTTE 'helper' but did not disclose that he had used weapons. The post-interview submissions to the IAA confirm that the suggestion in the statutory declaration that authorities did not find out that the applicant was an LTTE member until after his arrival in Australia is incorrect. The submissions state that as the applicant explained at the interview, he had conceded to the authorities that he was a normal member or helper of the LTTE. They make the distinction that authorities were not aware that he had a combatant or senior role.

28. In considering the claims about the authorities' knowledge of the applicant's role I also take into account the circumstances of his capture. The applicant's evidence was that in around March 2009 he was injured but still engaged in combat in the [Location 1] area in [District 1], in an area with around 20-30 LTTE cadres and lots of civilians, when they were boxed in by the army at around 3 in the morning. His father was among the civilians in the group. The applicant and the others he was with surrendered to the army and he was detained, screened and eventually sent to rehabilitation. When he initially described this event at the IAA interview, he referred to having no clothes or food at this point in time. I asked if he was still in uniform and he said he was. Later in the interview I raised the tension between this and his claim to have maintained to the army that he was not an LTTE member. At that point he expanded, saying that when he realised they were surrounded he, and others, discarded their weapons and removed their uniforms, surrendering without clothes in order to present as civilians. Even accepting that the applicant took these steps to disguise his role at the immediate time of his surrender and attempted to claim he was an NGO worker, he was an injured young man of fighting age captured in a conflict zone. It seems likely that whatever he may have claimed, he was sent to rehabilitation on the basis that he was believed to be an LTTE combatant.
29. In the IAA interview I questioned the applicant about his claim the army did not know of his more senior role, considering country information¹⁴ about the large numbers of LTTE members taken into rehabilitation, the use of torture to extract confessions and information, and the use of informants to identify LTTE members within rehabilitation centres. The applicant said (consistent with his earlier evidence about LTTE structure) that the organisation was separated such that people in one regiment would not necessarily be able to identify those in another. Within the camp where he was held, there was only one person from his regiment and neither of them identified the other. He said that most LTTE members were also committed to not disclosing information about others to the army.

¹⁴ See eg DFAT, 'Thematic Report People with Links to the Liberation Tigers of Tamil Eelam', 3 October 2014, CIS2F827D91260.

30. Country information from DFAT¹⁵ suggests rehabilitation programs were used to screen high and low profile LTTE members and determine who should be prosecuted for terrorism or other offences. High-profile LTTE members were said to include the LTTE's leadership and other members suspected of terrorist or serious criminal acts during the conflict, or to have provided weapons or explosives. It is not apparent to me that the applicant's activities – if known - would necessarily be viewed as falling within these categories, although I note a UK Home Office report in 2012¹⁶ referred to Sri Lankan Deputy Solicitor General as saying that what would lead to a criminal case would depend on the individual case and that gathering information for the LTTE may lead to murder and thus be a 'serious case'. Considering this information, the applicant's release without prosecution does not necessarily either confirm or undermine his claim that authorities were not aware of his position as a major or his previous intelligence role. Similarly, the applicant's relatively frequent reporting requirement after release is not indicative of whether authorities were or were not aware of his role at that time, as the information indicates that this depended on the particular area a person returned to and ranged from weekly to monthly to not at all.¹⁷
31. On balance, considering I have found him an otherwise credible witness about his experiences with the LTTE and in rehabilitation, I accept the applicant's evidence that authorities were not aware of the full extent of his role.
32. I do, however, have some concerns over the applicant's claims about the events that occurred after his release from rehabilitation. It was the applicant's claim to the IAA that authorities learnt of his true role prior to his departure from Sri Lanka and began harassing him because of this. When asked about what made him leave Sri Lanka, he claimed that after he was released from rehabilitation the army had come to know he was in a major position with the LTTE and began coming to his home, making inquiries and 'torturing' him. He was scared he would be re-arrested or kidnapped and disappeared. I asked why they would not have simply re-arrested him once they had that information and he said that they tried to. After further questions attempting to elicit more detailed information I put to him that I did not have a clear idea of what was happening and asked him to tell me in detail about the last interaction he had with the army. At that point he said that two to three times they had called him to their camp and questioned him. He said once he took a person with him who knew Sinhalese and they spoke rudely to the applicant in Sinhalese, accusing him of being in the LTTE and lying to them. Even taking into account the passage of time, I found his evidence about his interactions with the army in the period prior to leaving Sri Lanka particularly vague, especially in comparison to the level of detail in which he was able to describe other aspects of his claims.
33. In contrast, the applicant had made specific claims in his SHEV application about the events that led to him leaving Sri Lanka, relating to his disclosure of a video clip shown to him by a CID officer which then led to him being interrogated at [Location 2] army camp, on 20 October 2012 and told to attend [named] army camp in Vavuniya prior to 30 October. The applicant spontaneously raised this issue at the SHEV interview, although was cut short by the delegate. However, he did not mention it at the IAA interview in response to my questions about his last interaction with the army, or the events leading to his departure. It was only when I put to him that in his original claims he had said he was asked to attend

¹⁵ DFAT, 'Thematic Report People with Links to the Liberation Tigers of Tamil Eelam', 3 October 2014, CIS2F827D91260.

¹⁶ UK Home Office, 'Sri Lanka March 2012', 7 March 2012, 3523.

¹⁷ DFAT, 'Thematic Report People with Links to the Liberation Tigers of Tamil Eelam', DFAT, 3 October 2014, CIS2F827D91260; UNHCHR, 'Report of the OHCHR Investigation on Sri Lanka (A/HRC/30/CRP.2)', 16 September 2015, CISEC96CF13358

[named] Camp just before he left, that he said that he was asked to attend the [Location 2] camp for inquiries and lastly called to attend [named] camp. I then referred to his earlier claims about the video clip, and asked whether he was maintaining this had occurred. He confirmed these claims were correct and gave an account of the video clip and his disclosure of it consistent with that in the SHEV statement.

34. The applicant has consistently said since his arrival that he was required to report on a weekly basis up until the time he left Sri Lanka, and has referred to being questioned and harassed by authorities in that period. So much is consistent with the country information¹⁸ before me regarding the treatment of persons released from rehabilitation and I accept that did occur. I accept that at times he may have been questioned or interrogated while reporting, consistent with country information.¹⁹ I accept that he did not disclose the extent of his LTTE role to authorities during his rehabilitation, and that authorities may have had some lingering suspicion over him. However, the vagueness of the applicant's responses about interactions with the authorities in the period prior to his departure, together with his failure to mention the specific video clip event and the requirement for him to attend [named] camp in response to those questions, leads me to the view that the applicant may have exaggerated some elements of these claims. Even accepting that the applicant may have been shown a video clip of human rights abuses committed by the army while in rehabilitation and may have given information to the brother of V, I am not satisfied that the applicant was called for interrogation about this, or that he was under any sort of specific deadline to attend [named] army camp at the time of his departure. Nor am I satisfied that he was called for questioning in response to any specific new information that had come to light about his role in the period prior to his departure.
35. The applicant made various claims to both the delegate and IAA about continued visits or monitoring of his family by authorities, even up to a few weeks prior to the IAA interview. The psychological report refers to the guilt and shame he feels at his family being disadvantaged due to his actions and experiencing continued harassment since his departure. The DFAT information from 2014 confirms that family members or close relatives of LTTE members wanted by authorities are likely to be subject to monitoring. Given that the applicant was subject to ongoing weekly reporting requirements at the time of his departure from Sri Lanka and continued to be subjected to questioning, harassment and monitoring, I accept that his family may have faced questioning and monitoring after his departure. DFAT's most recent 2021 report²⁰ refers to multiple sources reporting that former LTTE members are monitored, states that family members of high-profile former LTTE members wanted by authorities may be subject to monitoring, and refers to reports of family members of former cadres being subject to harassment. In this context it is not implausible that the family may have faced ongoing scrutiny and I accept these claims.
36. The applicant has claimed in his statement to the IAA that after his departure N and T, two senior members that he worked with when he first joined the LTTE, and to whom he passed information while working for [Organisation 1] and [Organisation 2], were arrested. He says N was arrested first and T later arrested, he believes on the basis of information given by N, despite T already having undergone rehabilitation. While he did not submit any evidence to corroborate these arrests, his claim that N was prosecuted for involvement in a particular attack is consistent with the 2014 DFAT information about former LTTE members being re-arrested and prosecuted at that time for specific acts during the war. At the IAA interview

¹⁸ DFAT, 'Thematic Report People with Links to the Liberation Tigers of Tamil Eelam', 3 October 2014, CIS2F827D91260.

¹⁹ UNHCHR, 'Report of the OHCHR Investigation on Sri Lanka (A/HRC/30/CRP.2)', 16 September 2015, CISEC96CF13358.

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

and in his statement, he referred to the information he had given them being used to plan attacks, although it was not apparent that this was the same attack over which N had been prosecuted. There is no independent evidence before me about the arrests of N and T. I have found the applicant generally credible, although am of the view that some of his claims about what occurred in the period prior to his departure have been embellished. The information he gave about N and T was specific and relatively detailed and is plausible in the context of the country information. I cannot confidently reject these claims and will proceed on the basis that these arrests occurred as the applicant claims.

37. The post-interview IAA submissions argue that the arrest of N was proximate to the time the applicant claims the CID went to his family home and it is possible that information about the applicant's actual role with the LTTE was extracted from N. The applicant has also claimed that some former LTTE cadres are now working with military intelligence and may have informed on him. In this regard, I note DFAT information that the lack of economic options experienced by former LTTE members meant that some had become paid informers for the authorities.²¹ While I accept these things are possible, there is no clear evidence to verify that they have in fact occurred.
38. The applicant's evidence was that he has not engaged in any political activities in Australia and does not have contact with other former LTTE members other than occasionally chatting if he sees them. It is claimed in submissions that he has not engaged in any activities in Australia because of his fear of being returned to Sri Lanka and the threat of harm he faces there. The applicant spoke passionately at the interview about his continued belief in the actions of the LTTE and that the LTTE should still be there fighting for Tamil rights. I accept he still holds pro-LTTE, separatist views and that fear of harm is a factor in his lack of political activity in Sri Lanka after his release, and in Australia.
39. It is now a considerable time since the end of the civil conflict and there have been significant political developments in Sri Lanka since the applicant's departure. At that time, Mahinda Rajapaksa, who had presided over the country at the end of the conflict, remained in power. In 2015 there was a change of government with new President Sirisena elected on a platform that included reconciliation with the Tamil minority. In November 2018, however, he was replaced by Gotabaya Rajapaksa who then chose his brother Mahinda, former President, as Prime Minister. Sri Lanka fell into economic crisis, facing severe shortages of fuel, electricity, food, medicines and other essential items. Following months of mass protests (which were violently suppressed at times), Mahinda Rajapaksa resigned as Prime Minister in May 2022 and Ranil Wickremesinghe, a former Prime Minister, was appointed Prime Minister. Countrywide demonstrations continued and in July protesters stormed and occupied the offices and residence of President Gotabaya Rajapaksa. President Rajapaksa resigned, and Wickremesinghe was elected by Parliament as the new President in July 2022.
40. Prior to the resignation of the Rajapaksas, there was divisive and polarising rhetoric from state officials and the dismantling of steps made towards reconciliation and greater protection of human rights under the Sirisena government. The government sought to retain popularity by highlighting their role in the defeat of the LTTE.²² There are some early signs that the new Wickremesinghe government may adopt a more moderate approach, with Wickremesinghe appealing for ethnic unity in his first speech to parliament and flagging constitutional amendment to strengthen the separation of powers and devolution of political

²¹ DFAT, 'Country Information Report Sri Lanka', 23 December 2021, 20211223094818.

²² DFAT, 'Country Information Report Sri Lanka', 23 December 2021, 20211223094818; UNHRC, 'Situation of Human Rights in Sri Lanka: Comprehensive Report of the United Nations High Commissioner for Human Rights A/HRC/51/5', 4 October 2022.

authority which had been undermined by amendments under the Rajapaksa government. Nonetheless, many of the same officials from the Rajapaksa regime remain in place, particularly in security positions, and the new administration has pursued a tougher security approach to the protests.²³

41. Turning to the treatment of former LTTE members, DFAT indicates that although the LTTE was comprehensively defeated and no longer exists as an organised force within Sri Lanka, Sri Lankan authorities remain concerned over its potential re-emergence, and to separatist tendencies in general. The UK country guidance decision similarly expresses the view that the core focus of the regime is to prevent any potential resurgence of a separatist movement within Sri Lanka which has as its ultimate goal the establishment of Tamil Eelam.²⁴
42. According to information from DFAT and in the UK Tribunal country guidance decision, Sri Lankan authorities collect and maintain sophisticated intelligence on former LTTE members, supporters and other separatists. The Sri Lankan government operates a general electronic database which stores all relevant information held on an individual, whether this has been obtained from the United Kingdom or from within Sri Lanka itself. According to the assessment of the UK Tribunal, the contents of this database will in general determine the immediate or short-term consequences for a returnee. 'Stop' and 'watch' lists are derived from the database. Returnees on the 'watch' list are other those who because of their existing profile are deemed to be of sufficiently strong adverse interest to warrant detention once they travel back to their home area, or those not of sufficient interest to justify detention at that point in time, but who will be monitored after return to their home area. The 'stop' list includes individuals with an extant court order, arrest warrant or order to impound their passport, and these persons would be detained at the airport.²⁵
43. The DFAT report outlines the procedures for the return of asylum seekers from Australia, whether returning voluntarily or not. On arrival, returnees are interviewed by the Chief Immigration Officer and, depending on the circumstances of their departure and their personal history, may also be interviewed by the CID and intelligence agencies.²⁶ According to DFAT, returnees' identity documents are checked against immigration, intelligence and criminal databases. Police take an investigative process to confirm the identity of those travelling on temporary travel documents, which may include interviewing the return passenger, contacting local police, neighbours and family, and checking criminal and court records. This process would identify anyone trying to conceal a terrorist or criminal background, or avoid court orders or arrest warrants.²⁷ The UK Home Office suggests that additional questioning beyond verification of identity is only reasonably likely when a person is already on either the 'stop' list or 'watch' list.²⁸
44. It seems from the country information that former LTTE members are generally re-integrated into society and are able to participate in public life. DFAT refers to ex-combatants having established a political party and run for election. However, there are also reports that ex-cadre are subject to harassment and discrimination, and that the government continues to make arrests under the Prevention of Terrorism Act for alleged LTTE-supportive behaviour.²⁹

²³ UNHRC, 'Situation of Human Rights in Sri Lanka: Comprehensive Report of the United Nations High Commissioner for Human Rights A/HRC/51/5', 4 October 2022.

²⁴ KK and RS (*Sur place* activities: risk) Sri Lanka CG [2021] UKUT 130 (IAC).

²⁵ KK and RS (*Sur place* activities: risk) Sri Lanka CG [2021] UKUT 130 (IAC); DFAT, 'Country Information Report Sri Lanka', 23 December 2021, 20211223094818.

²⁶ DFAT, 'Country Information Report Sri Lanka', 23 December 2021, 20211223094818.

²⁷ DFAT, 'Country Information Report Sri Lanka', 23 December 2021, 20211223094818.

²⁸ UK Home Office, 'Country Policy and Information Note Sri Lanka: Tamil Separatism', August 2022.

²⁹ DFAT, 'Country Information Report Sri Lanka', 23 December 2021, 20211223094818.

In March 2022 the Sri Lankan government passed reforms to the Prevention of Terrorism Act (PTA), long criticised for allowing lengthy arbitrary detention and implicitly encouraging the use of torture. However, the amendments leave intact some of the Act's most problematic provisions, including merely reducing the amount of time that a person may be held without charge to 12 months rather than 18, including judicial oversight to safeguard against torture but retaining the clause allowing for the use of confessions made to police while in police custody, and allowing a person to be held for 72 hours before being brought before a magistrate. Although the government announced a de facto moratorium on use of the Act in June 2022, it was again used following Wickremesinghe's appointment as President. Although historically most detainees have been suspected of LTTE involvement, it would seem that the Act has been largely used to detain members of the Muslim community in recent years following the 2019 Easter Sunday attacks. The country information refers to recent arrests of over 80 Tamils for allegedly LTTE supportive behaviour, such as sharing social media posts which included LTTE images or Tamil nationalist iconography, organising a memorial event, and alleged attempts to resurrect the LTTE, although DFAT says it is not aware of returnees from Australia being charged under the PTA. According to figures cited in the most recent USDOS report, as at November 2023 there were an estimated 35 Tamils held in pretrial detention for offenses related to the LTTE.³⁰

45. In addition, it seems from the country information that former LTTE cadres, regardless of their role or whether they have been rehabilitated, are subject to ongoing surveillance and harassment. The UN High Commissioner for Human Rights (UNHCHR) refers to former LTTE cadres being subject to intensive, constant surveillance, regardless of whether they have undergone the Government's rehabilitation scheme.³¹ DFAT indicates that some Tamils linked to the LTTE continue to report police monitoring and harassment. Multiple sources in the north told DFAT that former LTTE members, including those considered low-profile, are monitored to guard against the LTTE's potential re-emergence. Harassment is said to include frequent visits by police, visits to family members, threats and seizure of mobile devices, along with more subtle methods such as inviting a person to tea and questioning them about activities, or questioning neighbours of former suspected LTTE members. Overall, DFAT assessed that 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.
46. DFAT has also indicated that authorities may monitor members of the Tamil diaspora returning to Sri Lanka, depending on their security risk profile. DFAT assesses that certain profiles would be of particular interest, including Tamils who were formerly part of the LTTE particularly in, but not necessarily limited to, high profile roles. However DFAT then states that Tamils living abroad with links to the LTTE are unlikely to return to Sri Lanka voluntarily.³² I note that while there have been relatively large numbers of Tamils returning to Sri Lanka since the end of the war,³³ it is not clear what proportion of those are known LTTE combatants.

³⁰ DFAT, 'Country Information Report Sri Lanka', 23 December 2021, 20211223094818; UNHRC, 'Situation of Human Rights in Sri Lanka: Comprehensive Report of the United Nations High Commissioner for Human Rights A/HRC/51/5', 4 October 2022; UNHCHR, 'Promoting reconciliation, accountability and human rights in Sri Lanka', A/HRC/49/9, 18 March 2022; Human Rights Watch, 'Sri Lanka: UN Report Describes Alarming Human Rights Situation', 3 March 2022; Human Rights Watch, 'World Report 2023'; The Observer, 'Tamils fear prison and torture in Sri Lanka, 13 years after civil war ended', 27 March 2022; US Department of State, 'Country Reports on Human Rights Practices 2022 - Sri Lanka', 20 March 2023, 20230321155722.

³¹ UNHCHR, 'Situation of Human Rights in Sri Lanka', A/HRC/51/5, 4 October 2022; UNHCHR, 'Promoting reconciliation, accountability and human rights in Sri Lanka', A/HRC/49/9, 18 March 2022.

³² DFAT, 'Country Information Report Sri Lanka', 23 December 2021, 20211223094818.

³³ DFAT, 'Country Information Report Sri Lanka', 23 December 2021, 20211223094818.

47. DFAT makes a distinction between the interest of authorities in high profile and low-profile former members. It characterises high profile members as individuals who held senior positions in the LTTE's military wing and civilian administration, but also those suspected of terrorist or serious criminal offences during the war, or of providing weapons or explosives to the LTTE. DFAT identifies 'low-level' members as including former combatants. DFAT assesses that the vast majority of high profile former members remaining in Sri Lanka would have already come to attention, but any remaining high profile former LTTE members who came to attention would likely be arrested, detained, prosecuted and imprisoned, then later subject to some form of rehabilitation. The majority of low profile former members have also similarly been identified and rehabilitated, but any who now came to attention, particularly if suspected of a combat function, would likely be detained and possibly be rehabilitated. Following release, a low profile member might be monitored but would generally not be prosecuted.³⁴
48. I also take into consideration the information in the UK tribunal decision, and the tribunal's assessment that the Sri Lankan government is interested in persons who have or had a 'significant role' with the LTTE and/or Tamil separatism and will seek to identify those whom it perceives as constituting a threat to the integrity of the Sri Lankan state by reason of their committed activism in furtherance of the establishment of Tamil Eelam. While the decision was focused primarily on the risk attached to *sur place* diaspora activities, the Tribunal assessed that although not determinative, a history of links to the LTTE continues to represent a relevant factor in the overall assessment of an individual's profile in so far as it is reasonably likely to inform the perception of the government as to the propensity of the individual concerned to engage in separatist activity with a view to threatening the integrity of the Sri Lankan state. It also pointed to the potential that diaspora activism was not the only basis on which a returning Tamil might be regarded as posing a threat and therefore be at risk.
49. The applicant's actual role seems to sit somewhere between the categories identified by DFAT. He did not hold a senior leadership position in the sense DFAT seems to be referring to, but nor was he a low level 'ordinary' combatant. He has not claimed to have been involved in any terrorist activities or criminal offences. However, when I asked him about whether there were any particular activities he had been involved with that authorities might have an interest in prosecuting, he referred to providing intelligence to N which was then used to plan attacks, and I note that he was performing this role during the ceasefire period between 2002-2006³⁵ (which suggests that any resulting attacks may not have been taking place within the context of active conflict). He does not claim any involvement in relevant diaspora activities, although clearly retains separatist views. There is nothing to suggest that the interest in the applicant is so significant that he would appear on the stop list, but it would seem reasonably likely that the applicant's history would be recorded on the Sri Lankan intelligence database and that he may well be on a 'watch' list. This is because firstly, the country information indicates that many former LTTE members are subject to monitoring. The applicant left Sri Lanka illegally and without notice at a time that he was still subject to ongoing frequent reporting requirements, and at times also required to attend for questioning. Further, it is not improbable that further information about the applicant's role may have come to light since that time, whether through the arrests of N and T, former cadres-turned informants (which information in the UK tribunal decision indicates authorities continue to use), or some other means. The ongoing occasional monitoring and harassment of his family suggests that authorities retain at least some interest in his whereabouts.

³⁴ DFAT, 'Country Information Report Sri Lanka', 23 December 2021, 20211223094818.

³⁵ DFAT, 'Thematic Report People with Links to the Liberation Tigers of Tamil Eelam', 3 October 2014, CIS2F827D91260.

50. At the least, it seems probable that the applicant will be subject to ongoing monitoring and harassment but in my view there are aspects of the applicant's history and profile that heighten the risk of him being not only monitored but detained and questioned after return to his home area. Evidently, there continue to be instances of Tamils being detained under the PTA on the basis of suspicions of LTTE activity. The processes to which the applicant will be subject on return, including database checks, will alert Sri Lankan authorities to his return and any information held about him, including any information learnt after his departure. Although he went through rehabilitation, the applicant's actual role, and any relevant intelligence he may have held as a result, or involvement in potential terrorist or criminal acts, was not investigated. In addition, given his profile as an LTTE combatant (who may have subsequently been identified as having a role of some seniority) and who has spent a significant time abroad, and noting the information referred to in the UK tribunal decision that Sri Lankan authorities have a strong focus on diaspora activity as part of their determination to stamp out any possibility of separatist revival, he may also be investigated to determine any involvement in separatist activities in Australia.
51. There is also the matter that although the applicant has not been politically active, he does in fact continue to harbour views strongly in favour of the LTTE and separatism. He had sufficient commitment to these views in the past to voluntarily join the LTTE and engage in combat. He retains his views some 14 years after the end of the war, and after undergoing a two year rehabilitation program. I accept his inaction in Australia has been at least in part due to the possibility of being returned to Sri Lanka, both because he fears resulting harm there and because of a fear that being aligned with Tamil separatist groups could impact his ability to stay in Australia. It is difficult to say what, if any, engagement the applicant would have with political issues if he were living in Sri Lanka; to what degree he would avoid any such involvement because of a fear of harm, and to what degree it would be because the group and opportunity for the type of activity in which he was previously involved simply no longer exists. However, I take into account the likelihood that he would, at the least, voice his views in favour of the LTTE, Tamil rights and separatism (as he did at the IAA interview) or that if he did not, it would be because of a fear of harm.
52. There is ample country information relating to the risk of torture while in custody in Sri Lanka. The use of torture or mistreatment is described as 'endemic', 'common' and 'routine'. DFAT assesses that the risk of torture perpetrated by military, intelligence or police forces has decreased since the end of the war, but that it is still used, including as a routine tool of policing. DFAT assesses that Sri Lankans detained by authorities face a moderate risk of torture, particularly those who challenge or are perceived to challenge the Government.³⁶ The most recent USDOS report refers to the ongoing use of torture and excessive force to extract confessions. It also refers to reports of arbitrary arrest and detention, some of which included interrogations involving mistreatment or torture.³⁷
53. In the combination of the applicant's particular circumstances, I am satisfied there is a small but nonetheless real chance that in addition to experiencing monitoring and harassment, he will be detained and investigated and in that process, seriously harmed. I am satisfied the essential and significant reason for this will be his political opinion in support of the LTTE and Tamil separatism, and that the harm involves systematic and discriminatory conduct. As the harm will be inflicted by Sri Lankan authorities, I find that there is no effective protection

³⁶ DFAT, 'Country Information Report Sri Lanka', 23 December 2021, 20211223094818.

³⁷ US Department of State, 'Country Reports on Human Rights Practices 2022 - Sri Lanka', 20 March 2023, 20230321155722.

measures available, and that the real chance of harm relates to all areas of Sri Lanka. The applicant has a well-founded fear of persecution within the meaning of s.5J.

54. The applicant's history may raise issues that require consideration under s.5H(2) or other provisions of the Migration Act. These are outside the IAA's jurisdiction.

Refugee: conclusion

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

Decision

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

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

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

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

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

...

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

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

but does not include an act or omission:

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

...

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

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

...

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

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

...

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

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant;

but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

5H Meaning of refugee

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

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

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

...

5J Meaning of well-founded fear of persecution

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

5K Membership of a particular social group consisting of family

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

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

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

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

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

5L Membership of a particular social group other than family

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

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

5LA Effective protection measures

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

...

36 Protection visas – criteria provided for by this Act

...

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

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

...

Protection obligations

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

Determining nationality

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