



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA

IAA reference: IAA16/00349

Date and time of decision: 26 July 2016 14:14:16

Lesley Hunt, 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 claims to be a national of Sri Lanka of Tamil ethnicity. He arrived in Australia by boat [in] August 2012. [In] February 2016 he lodged an application for a Safe Haven Enterprise Visa (XE 790) (SHEV).
2. [In] June 2016 a delegate of the Minister for Immigration and Border Protection refused the visa application. The delegate found the applicant to be reasonably credible and consistent in providing information about his claims. The delegate accepted the applicant's identity claim and found he is a national of Sri Lanka of Tamil ethnicity born on [date] in the Northern Province of Sri Lanka. The delegate accepted that the applicant's [Relative A] assisted the Liberation Tigers of Tamil Eelam (LTTE), that she went missing in 2004 and her whereabouts are unknown. The delegate accepted that the applicant worked for [Agency 1]; that in March 2007 he was detained and tortured for three days by the Sri Lankan authorities and interrogated about an [accident] which caused the death of [a number of] SLA officers; and that [Agency 1] intervened and negotiated his release. The delegate did not accept that the applicant's [Relative A's] involvement with the LTTE contributed to the authorities' adverse interest in the applicant or that the applicant has been of ongoing adverse interest to the Sri Lankan authorities from 2007 to 2012.

Information before the IAA

3. I have had regard to the material referred by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. In addition a written submission was received from the representative together with several photographs taken from the applicant's Facebook page. The written submission sets out legal argument and puts forward two new claims. I do not consider the legal argument to be new information. I find that the new claims and photographs are additional to those raised previously by the applicant and are new information. Given my findings below I find it is not necessary for me to consider the information. I am not satisfied that there are exceptional circumstances to justify considering the new information.

Applicant's claims for protection

5. The applicant's claims are contained in the information referred to the IAA. They can be summarised as follows:
 - He was born in [his home town], Vavuniya District, Northern Province of Sri Lanka. His mother and father died of natural causes in 2005 and 2012 respectively. He had [specified siblings]. One [sibling] died of natural causes in [year]; another [sibling] went missing in 2004 and [their] whereabouts remain unknown; another [sibling] lives in [Country 1] with [a spouse]; and [another sibling] continues to live in Sri Lanka.
 - The applicant is married with a young [child]. His wife works as [an occupation 1] and she and her [child] live with her family in [Village 1], [Town 1], [Region 1] in the north of Sri Lanka.

- In 1990 the applicant and his family were displaced by the war and lived in various locations in Vavuniya and [District 1] in the North including the [Camp 1] funded by the UNHCR and [another] camp run by the LTTE.
- His education was disrupted by the war. He completed [number] years of formal schooling in [year]. He then worked with his father farming land on which they grew [crops].
- His [Relative A] was a member of the LTTE from 1992 to 2000. He was young but thinks she was in the political division. She disappeared in 2004 and has not been heard of since then. The Sri Lankan Army (SLA) told his father not to report her disappearance and that she had joined the LTTE.
- In June 2005 the applicant started working as [an Occupation 2] for [Agency 1]. He completed [an Occupation 2] training course at [City 1]. He continued to live at [his home town] and travelld to[a town in City 1] for the work. He would work for three weeks in [City 1] and then had one week off and returned to [his home town]. His work involved [Occupation 2] in the [City 1] area and other areas. In September 2006 this work ceased because [Agency 1] wound up its operations because of the security situation. The applicant returned to working with his father on the land.
- Sometime in 2007 the applicant's father made inquiries to the political division of the LTTE regarding his missing [relative]. They searched their networks and confirmed that she was not with them. The applicant assumes his [Relative A] was abducted by the SLA.
- In March 2007 [Agency 1] recommenced their [Occupation 2] operations and the applicant resumed his work with them, mainly in the [City 1] area.
- Soon after resuming employment with [Agency 1] [there was an accident] in [his home town] killing [a number of] senior SLA officials. The applicant and [a number of] other [Agency 1] [Occupation 2 workers] were told by the SLA to attend the SLA camp in [Town 2] about one kilometre from his home. They gave him a letter confirming their order. He and the other [number] [Occupation 2 workers] attended the camp as ordered. They were sent to a larger camp in [another location] about 3km from the applicant's home.
- The applicant was held for three days at this second camp. He was interrogated by two senior army officers who repeatedly accused him of [causing the accident] that killed the SLA officers. The applicant was severely beaten and tortured. Pins were inserted under his fingernails and they became infected and later fell off. He was hung upside down and beaten. His head was tied so that he could not move and drops of water were dropped onto his head from a height. This became incredibly painful and was like being hit with stones. The applicant was released after [Agency 1] intervened and negotiated his release and the release of the [number] other [Occupation 2 workers]. He had to report to the SLA camp once a week.
- The applicant continued to work for [Agency 1]. He found it difficult to do this and report once a week to the SLA camp in [his home town] as it is a seven hour bus journey and there are many checkpoints. As a result the applicant stopped working for [Agency 1] in June 2007. He remained with his family in [his home town] and continued to report to the SLA every week. At some point the other [Occupation 2 workers] disappeared; he does not know what happened to them.
- In September 2007 at night officers from the SLA and CID entered the applicant's home by force searching for him. He was at his [Relative B's] home nearby. He was warned

by his family not to return home. He spent that night at a friend's place and next morning he fled to [Village 1] in [District 2]. He learnt that his [sibling] was beaten by the SLA when they came again to look for the applicant.

- [In] December 2007 the applicant married in [Village 1]. They did not register the marriage until [April] 2010.
- In 2008 due to the fighting the applicant, his wife and her family were displaced to various locations in [District 2]. During this period the applicant was hit by shrapnel during an SL military air raid. He was treated by the LTTE at an LTTE hospital. He has scars on his [specified body parts] from these wounds.
- In April 2009 the applicant and his family were captured by the SLA and taken to a government-run [named] IDP camp in [Town 3], Vavuniya District. Thousands of IDPs were rounded up and sent to this camp. In August 2009 the applicant and his wife were released from the camp – he believes because his wife was [an occupation 1]. Her family were released separately at a later time.
- The applicant and his wife rented a house in [Town 4], Vavuniya District. It was not possible for them to be resettled in either of their family homes. The applicant's wife worked as [an occupation 1] at a camp in [Town 4].
- The applicant attended a [Occupation 3] training course in September 2009 in [Town 5]. The course was run by [Agency 1]. He completed the course in October 2009 and resumed employment with [Agency 1] as a [Occupation 3]. He commuted every day to [another town in District 2].
- In April 2010 the applicant's home in [Town 4] was visited by two CID officers while the applicant was at work. His father, who was visiting at the time, told him it was the same officers who visited his home in [his home town] in September 2007.
- The applicant travelled to [Country 1] because he feared for his safety. He already had a passport and obtained a visa from the [Country 1] Embassy in Colombo. He flew from Colombo to [a city in Country 1] by plane. His wife went to live with her family in [Village 1]. In July 2010 the applicant returned to Sri Lanka to live with his wife as she was pregnant and he wanted to be there for the birth of their baby. Their [child] was born on [date].
- The applicant did not resume his employment with [Agency 1] as he wanted to keep a low profile. He helped cultivate the land belonging to his wife's family. The applicant's father died [in] May 2012 and the applicant and his wife travelled to [his home town] for the funeral. They returned the next day to [Village 1] because the applicant was anxious about remaining in [his home town]. The applicant learnt that a few days later officers from either the SLA or CID visited his family's home in [his home town].
- About two weeks later CID officers went to the applicant's home in [Village 1]. They told his wife that the applicant had to attend the SLA [District 2] camp. The applicant immediately went into hiding at his [Relative B's] home in [District 1] in the Northern province, about [distance] away from his home. The officers returned to his home in [Village 1] in July 2012 looking for the applicant. They took a photograph of the applicant which the applicant's wife had.
- The applicant decided to leave Sri Lanka and his [Relative B] made the arrangements for him. He left Sri Lanka by boat [in] August 2012. He did not have his passport with him as it was at his home in [Village 1].

- The applicant fears being harmed by the Sri Lankan authorities because of the death of the SLA officers in March 2007; because he is Tamil and has lived in LTTE controlled areas; because he has scarring on his body; and because of his [Relative A's] membership of the LTTE.

Refugee assessment

6. 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

7. 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.

Does the applicant have a well-founded fear of persecution?

Nationality and Identity

8. The applicant provided copies of his National Identity Card, Passport, Birth certificate, Marriage Certificate and other documents to the Immigration Department. On the basis of these documents and the applicant's credible oral evidence I accept that he is a national of Sri Lanka and no other country. I also accept that he is a Tamil and lived in the Northern Province of Sri Lanka.

Tamil from the North with family links to the LTTE

9. The applicant's claims have been generally consistent in his entry interview [in] January 2013, his written statement of claims dated [in] November 2015, and at his interview with the delegate (SHEV Interview) held [in] April 2016. I note that the delegate found the applicant to be generally credible and consistent in providing information in support of his claims of fearing harm in Sri Lanka.

10. The applicant provided consistent detailed information regarding his address and travel history. On the information before me I am satisfied that the applicant's address and travel history is as he has stated in his statutory declaration and outlined in pages two to four above. Accordingly I accept that the applicant has always lived in the north of Sri Lanka and his work has taken him to [City 1] in the Eastern Province of Sri Lanka.
11. The applicant claims that his [Relative A] worked with the LTTE from 1992 to 2000; that this work meant that she lived in the Vanni from 1992 to 2000; that she returned to the family home in [their home town] after becoming frustrated with the LTTE and quitting. At his SHEV interview the applicant clarified that he did not know what her role with the LTTE was as he was only about [age range] years old when she left and about [age range] years old when she returned home and that she did not discuss her role with the LTTE very much when she came home and not with him.
12. The applicant claims that his [Relative A] disappeared in 2004 on the way to their [Relative B's] home. At the SHEV interview the applicant clarified that his father made a complaint to [Agency 2] and after this the SLA contacted his father and told his father not to blame them, that his [Relative A] had joined the LTTE, and not to talk about this to others. The applicant clarified that nobody else in his family joined the LTTE.
13. The delegate put to the applicant that in his entry interview whilst he stated that his [Relative A] went missing in 2004, he also indicated that nobody in his family were members of a political group or organisation and this is inconsistent with his claim that his [Relative A] was with the LTTE. The applicant responded that when answering this question he did not consider the LTTE to be a political group and also that perhaps the question had not been interpreted properly. The delegate found the applicant to be generally credible and accepted that it is plausible that the applicant's [Relative A] went missing in 2004 and that this was a result of her assisting the LTTE.
14. The applicant claims that in early 2007 the applicant's father made inquiries to the political division of the LTTE regarding his missing daughter. They searched their networks and confirmed that she was not with them. The applicant therefore assumes his [Relative A] was abducted by the SLA in 2004.
15. On the information before me I am satisfied that the applicant is a Tamil who was born and lived in the north of Sri Lanka and that his [Relative A] joined the LTTE from 1992 to 2000, went missing in 2004, and her whereabouts remain unknown.

Employment with [Agency 1]

16. The applicant states that he was employed by [Agency 1] and trained by them in [Occupation 2] techniques and as a [Occupation 3]. As evidence in support of this claim the applicant has submitted a "Certificate for [Occupation 2 workers]" signed by the Programme manager at [Agency 1]; a letter dated [in] July 2013 certifying that the applicant worked as [an Occupation 2] for [Agency 1] in "[City 1] and Jaffna" from [a date in] June 2005 to [a date in] September 2006 and from [March] 2007 to [June] 2007 and that in 2009 he was rehired as [an Occupation 3] and worked in [Town 5] from [October] 2009 to [April] 2010. He also submitted a Certificate indicating he successfully completed the [Occupation 3] Training Course in [Occupation 2] conducted by [Agency 1] [in] September 2009.
17. The documents from [Agency 1] submitted by the applicant appear to be genuine. In his SHEV interview the applicant provided considerable detail about his work as [an Occupation 2] and

displayed a high level of knowledge of [Occupation 2] and the work of [Agency 1] in Sri Lanka. I am satisfied that the applicant was trained and worked as [an Occupation 2] and as a [Occupation 3] for [Agency 1] in the north and east of Sri Lanka as claimed. I note that the delegate also accepted the applicant's claims in this regard.

Detention and torture by the SLA in March 2007

18. The applicant claims that in March 2007 he was detained for three days, interrogated and tortured by officers from the SLA. This occurred because [number] SLA officers were killed [in an accident] in [his home town] near where the applicant lived. As a result, the applicant and [number] other [Occupation 2 workers] with [Agency 1] were ordered to attend the SLA camp in [Town 2], about one kilometre from his home. He was given a letter from the SLA confirming this. From that camp the men were taken to a larger camp in [another location], about three kilometres from the applicant's home. The applicant claims he was repeatedly accused of [causing the accident]. He denied the allegation however the officers wanted a confession. They told him that the [accident] occurred in a high security zone in his home area and as the LTTE could not access that area he must have been instructed by the LTTE to [cause the accident]. The applicant provided considerable detail regarding the form of torture used, the questions asked, accusations made, and the SLA's reasons for suspecting him and the other [Occupation 2 workers] for the [accident]. He stated that they were released when [Agency 1] intervened and persuaded the SLA that the men could not have been responsible because they were on their way home from work at the time of the [accident]. The applicant was required to report regularly to the SLA camp after his release.
19. The applicant has provided consistent and detailed information regarding this incident. Given his overall credibility and consistency and the plausibility of his account, I accept that the applicant's detention and torture by the SLA in March 2007 occurred as claimed. I note that the delegate accepted the applicant's work history as claimed and found it plausible in the circumstances that the applicant was suspected of [causing the accident], detained and tortured for three days by Sri Lankan authorities and interrogated about the [accident] that killed [number] SLA officers. Country information reports referred to by the delegate support the applicant's claims in this regard.¹ The delegate also accepted as plausible that the applicant was released after the intervention of [Agency 1] as claimed.

Ongoing adverse interest by the SLA 2007-2012

20. The applicant claims that the [number] other [Occupation 2 workers] who were detained with him disappeared around September 2007 and at that time a group of SLA and CID officers came to his home looking for him; he was not home, and they beat his [sibling]. As a result of this the applicant fled to [Village 1], [District 2]. Sometime later he married his wife, who lived in that area and they remained living there until they were displaced to various locations in the district due to the war. The applicant claims that he was injured with shrapnel during an SLA air raid, was treated in an LTTE hospital and has permanent scarring as a result.
21. The applicant claims that in April 2009 he, his wife and her family and other Tamils were taken by the SLA to a government-run IDP camp in [Town 5] where they remained until August 2009. He states that in September 2009 he resumed work with [Agency 1]. However this time he trained and worked for [Agency 1] as [an Occupation 3] not [an Occupation 2 worker]. He claims that in April 2010 two CID officers went to his home in [Town 4]. The applicant was at work. His father, who was visiting at the time, recognised the CID officers as the same ones

¹ Human Rights Watch, "Return to War: Human Rights under Siege", 1 August 2007.

who came looking for him in September 2007. The applicant was fearful and made arrangements to travel to [Country 1]. He went to Colombo where he stayed for two weeks and obtained a tourist visa for [Country 1] using his passport which had been issued to him previously. He returned to his home in [Town 4] in July 2010 as his wife [required support]. He had no difficulty exiting or re-entering Sri Lanka.

22. The applicant claims that after attending his father's funeral in May 2012 in [his home town] and returning to his home in [Village 1], CID officers visited his family's home in [his home town] and two weeks later visited his and his wife's home in [Village 1]. They took a photograph of the applicant that his wife had. After learning this applicant made arrangements to depart Sri Lanka for Australia.
23. I have some concerns as to the credibility of the applicant's claims that the SLA and / or CID had an ongoing interest in him and came searching for him as claimed between 2007 and 2012. I note that the delegate put to the applicant that his brief stay in [Country 1] and his return to his home from there in July 2010 undermines his claim to fear harm from the CID and SLA at this time. The delegate also noted that the applicant was able to travel to Colombo to obtain his [Country 1] visa, depart and re-enter Sri Lanka with no difficulty. I note the applicant's view is that the SLA and CID interest in him may have been triggered by the disappearance in September 2007 of the [number] [Occupation 2 workers] who were detained with him on suspicion of [causing the accident] that killed [number] SLA officers in March 2007. Whilst there is no corroborative evidence to support the claim that the [number] [Occupation 2 workers] disappeared, it is nonetheless plausible given the nature of the conflict occurring in the region and the significant number of associated disappearances and killings. Amnesty International Annual Reports for 2010 and 2011 observed that enforced disappearances and abductions for ransom carried out by members of the security forces were reported in many parts of the country, particularly in northern and eastern Sri Lanka and in Colombo.² The report states in part: "While disappearances in previous years often appeared related to the conflict, during the year they most often appeared connected with extortion and other criminal activity, sometimes involving government actors."³
24. I note also that independent reports refer to constant monitoring of Tamils in the north and east of Sri Lanka during these years. For example, the UNHCR in its Eligibility Guidelines refers to a report from the Internal Displacement Monitoring Centre (IDMC), which states that after President Rajapakse came to power in 2005 the Sri Lankan Army tripled in size and became increasingly more involved in civilian life in the North and East of the country. The military increased its presence throughout the North and East of Sri Lanka after the war ended in May 2009. In September 2012 the ratio of military personnel to civilians was estimated to be 1:5 in Mullaitivu and 1:10 in Kilinochchi.⁴
25. The United Kingdom Border Agency states that: "Northern areas once ruled by the LTTE are now dominated by the military, which has taken over civil administration and controls all aspects of daily life – undermining what little remains of local capacity".⁵
26. DFAT states that: "Under the Rajapaksa government the security and intelligence forces in the north and east were known to monitor any possible LTTE activity and any form of civil resistance or anti-Government sentiment. Some community members were questioned by

² United Kingdom Border Agency, "Country of Origin Information report, Sri Lanka", 7 March 2012.

³ Ibid

⁴ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 1 December 2012.

⁵ United Kingdom Border Agency, "Country of Origin Information report, Sri Lanka", 7 March 2012.

authorities after they were visited by Non-Government Organisations (NGOs) or foreign government officials. Although not officially mandated to do so, in many areas military officers and personnel took a visible and active role in aspects of civilian life. This included participating in community functions, opening development projects such as schools and houses and undertaking community work. The Sirisena government has publicly claimed that military involvement in civilian activities has ceased. DFAT assesses that there has been an overall decrease in monitoring in 2015, but some individuals in the north and east still report being questioned and observed by the military and report that the sizeable military presence remains a factor in aspects of civilian life.”⁶

27. Whilst the applicant’s returning to work for [Agency 1] in September 2009, albeit as a [Occupation 3] and not [an Occupation 2 worker], and his return to his home from [Country 1] in July 2010 after going there in fear of the SLA in May 2010, undermine his claims of fearing the SLA and the CID to an extent, the country information reports support his claims that government agents were looking for him and wanting to question him. It is also plausible that the applicant’s [Relative A’s] involvement with the LTTE and his previous detention and reporting requirements led to the SLA / CID officers wanting to question him.
28. Given the applicant’s overall consistency and credibility, and for the reasons outlined above, I am prepared to give him the benefit of the doubt and accept that SLA and CID officers in the areas where the applicant was living were monitoring him and wanted to question him from time to time. Given the applicant’s previous experience of detention and torture I am prepared to accept that this in turn led to the applicant’s departure from Sri Lanka in August 2012 and his fear of returning there.

Returning to Sri Lanka as a failed asylum seeker

29. I note that if the applicant is returned to Sri Lanka it will be as a failed asylum seeker who departed Sri Lanka illegally. As such the applicant will be required to go through the following process on arrival in Sri Lanka.
30. According to DFAT, on return to Sri Lanka the applicant will be questioned at the airport and will undergo identification, character and security checks. These checks are undertaken by the Department of Immigration and Emigration, the State Intelligence Service and the Airport Criminal Intelligence Division. Under the Sri Lankan Immigrants and Emigrants Act it is an offence to depart from Sri Lanka other than from an official port of entry or exit. The applicant will therefore be arrested and charged under the Immigration and Emigration Act in relation to his illegal departure from Sri Lanka.⁷
31. Failed asylum seekers returning to Sri Lanka from Australia and other countries are held on remand, released on bail, to appear at a later date before a magistrate and charged with having departed the country illegally in breach of Sri Lanka’s immigration and emigration laws. I note that this is prosecution for an offence and not persecution. The penalty specified under Sri Lankan law can include imprisonment for up to five years and a fine of up to 200,000 Sri Lankan Rupees. According to DFAT no returnee who was a passenger on a people smuggling boat has ever been sentenced to a term of imprisonment for illegal departure and the fines imposed range between 5 and 50 thousand Sri Lankan Rupees. People smugglers who

⁶ Department of Foreign Affairs and Trade, “DFAT Country Report – Sri Lanka”, 16 February 2015.

⁷ DFAT “DFAT Country Information report – Sri Lanka”, 18 December 2015.

organized the boats have been sentenced to terms of imprisonment however passengers are generally viewed as victims of crime.⁸

32. DFAT reports that: "In the north and east, Sri Lankan security forces maintain a significant presence and a high level of awareness of the civilian populations of the area."⁹ According to DFAT: "Sri Lankan authorities remain sensitive to the potential re-emergence of the LTTE throughout the country. According to expert testimony provided to a hearing of the UK's Upper Tribunal on Immigration and Asylum, Sri Lankan authorities collect and maintain sophisticated intelligence on former LTTE members and supporters, including 'stop' and 'watch' electronic databases. 'Stop' lists include names of those for whom there is an extant court order, arrest warrant or order to impound their Sri Lankan passport while 'watch' lists include names of those for whom Sri Lankan security services consider to be of interest, including for separatist or criminal activities. Those on a watch list are not likely to be detained, although there have been some media reports claiming that individuals, mostly Tamils, travelling from the United Kingdom have been detained on arrival at the airport. DFAT has not been able to verify these reports but notes that those on a watch list are likely to be monitored."¹⁰
33. The UNHCR in its Eligibility Guidelines refers to particular groups of people who may be at risk of harm in Sri Lanka and warrant protection. There is reference to people with family links or who are dependent on or otherwise closely related to persons who were former LTTE combatants or "cadres".¹¹
34. I note that the applicant is a Tamil from the north of Sri Lanka. I have accepted that his [Relative A] was a member of the LTTE for eight years, went missing in 2004 and her whereabouts remain unknown. I have accepted that the applicant was [an Occupation 2 worker] who worked for [Agency 1] in the north and east of Sri Lanka. I have accepted that he was detained with other [Occupation 2 workers] for three days in 2007, interrogated with regard to the deaths of [number] SLA officers, and tortured. I have accepted that he was released from detention after the intervention by [Agency 1] and was required to report regularly to the SLA. I have accepted that in 2008 the applicant was injured by shrapnel during an SLA air raid in [Town 6] in the north, that he was treated in an LTTE run hospital, and that he has permanent scarring from these injuries. I have accepted that the applicant was taken by the SLA to an IDP camp in [Town 3] in April 2009 and he remained there with his wife until August 2009. I have accepted that the applicant was monitored and from time to time between 2007 and 2012 the CID / SLA wanted to question him. Whilst none of these factors on their own may result in a real chance of serious harm for the applicant, I am satisfied that all these factors combined may lead to the applicant being seriously harmed in the foreseeable future Sri Lanka.
35. I am satisfied that on his return to Sri Lanka, when questioned by the authorities as all returnees are, the applicant's profile, as outlined in the previous paragraph, will come to light. I am satisfied that in these circumstances there is a small but nevertheless real chance of the applicant facing more than short term detention either at the airport or in his village by the CID or SLA when he returns to his home in the Northern Province.

⁸ Ibid

⁹ Ibid

¹⁰ Ibid

¹¹ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 1 December 2012.

36. Independent reports indicate that mistreatment of people in detention is not uncommon in Sri Lanka. The December 2015 report from DFAT states: "DFAT is aware of a small number of allegations of torture or mistreatment raised by asylum seekers who have been returned to Sri Lanka but cannot verify these reports. Verification is complicated by the fact that many allegations are made anonymously, often to third parties...There have been thousands of asylum seekers returned to Sri Lanka since 2009, including from Australia, the US, Canada, the UK and other European countries, with relatively few allegations of torture or mistreatment (see also 'Treatment of Returnees', below). Although DFAT does not routinely monitor the situation of returnees, DFAT assesses that the risk of torture or mistreatment for the majority of returnees is low, including those suspected of offences under the *Immigrants and Emigrants Act*. Under the previous Rajapaksa government, DFAT assessed that the risk of torture or mistreatment for returnees was greater for those suspected of committing serious crimes, including terrorism offences. This was due mostly to the greater exposure these returnees had to authorities on their return which generally includes extended periods of pre-trial detention. While overall monitoring has reduced under the Sirisena government and general fears about mistreatment have reduced, it is difficult to verify if the intent to improve general conditions has yet led to a lower risk of torture or mistreatment of returnees."¹²
37. The United Kingdom's Border Agency COIS report refers to an Amnesty International report that torture and other ill-treatment of detainees including sexual violence remained widespread in Sri Lanka especially at the moment of apprehension and during early stages of pre-trial detention. Victims reported torture of both adult and juvenile detainees; these included individuals arrested in the context of security operations as well as suspects in ordinary criminal cases.¹³
38. The UNHCR in its Eligibility Guidelines refers to a report from the Asian Human Rights Commission which states that: "Torture is endemic in Sri Lanka and is practised at every police station and detention centre including those kept under the Terrorism Investigating Division." (TID). In addition, military intelligence and other security personnel were reportedly subjecting documented and undocumented detainees in the north and east to interrogation, frequently including torture. These detainees were reportedly civilians suspected of LTTE connections. In its November 2011 session, the UN Committee against Torture expressed concern over allegations of widespread use of torture and ill-treatment, including in police custody. There are numerous reports of confessions obtained by coercive means.¹⁴
39. The United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment visited Sri Lanka and released a preliminary report in May 2016. In his report the Special Rapporteur stated that torture continues to be used. He stated: "After many interviews conducted by my team and myself at random throughout my visit with both detainees and those who have been released, I am persuaded that torture is a common practice carried out in relation to regular criminal investigations in large majority by the Criminal Investigation Department (CID) of the police. In cases where there is a real or perceived threat to national security there is a corresponding increase in acts of torture and ill-treatment during detention and interrogation in Terrorism Investigation Division (TID) facilities."¹⁵ This report was not referred to by the delegate. However I find that, given it is a

¹² UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 1 December 2012.

¹³ Amnesty International, "Amnesty International Report 2014/2015 – Sri Lanka", 25 February 2015.

¹⁴ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 1 December 2012.

¹⁵ Mendez, JE 2016, "Preliminary observations and recommendations of the Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment", Mr. Juan E. Mendez, 7 May, p.8

United Nations report written in May 2016, and given the reforms anticipated after the change of government at the January 2015 elections in Sri Lanka and referred to by the delegate in the SHEV interview, there are exceptional circumstances which justify the consideration of the new information.

40. On the information before me I am satisfied that in the particular circumstances of the applicant he faces a real chance of more than short term imprisonment and as a consequence mistreatment whilst imprisoned. This mistreatment would be serious harm and involve systematic and discriminatory conduct and would be by reason of the combined factors of the applicant's Tamil ethnicity and imputed political opinion. These would be the essential and significant reasons for the harm. I am satisfied that the real chance of serious harm relates to all areas of Sri Lanka and effective protection measures are not available to the applicant.

Refugee: conclusion

41. 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

...

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.

91W Evidence of identity and bogus documents

- (1) The Minister or an officer may, either orally or in writing, request an applicant for a protection visa to produce, for inspection by the Minister or the officer, documentary evidence of the applicant's identity, nationality or citizenship.
- (2) The Minister must refuse to grant the protection visa to the applicant if:

- (a) the applicant has been given a request under subsection (1); and
 - (b) the applicant refuses or fails to comply with the request, or produces a bogus document in response to the request; and
 - (c) the applicant does not have a reasonable explanation for refusing or failing to comply with the request, or for producing the bogus document; and
 - (d) when the request was made, the applicant was given a warning, either orally or in writing, that the Minister cannot grant the protection visa to the applicant if the applicant:
 - (i) refuses or fails to comply with the request; or
 - (ii) produces a bogus document in response to the request.
- (3) Subsection (2) does not apply if the Minister is satisfied that the applicant:
- (a) has a reasonable explanation for refusing or failing to comply with the request or producing the bogus document; and
 - (b) either:
 - (i) produces documentary evidence of his or her identity, nationality or citizenship; or
 - (ii) has taken reasonable steps to produce such evidence.
- (4) For the purposes of this section, a person produces a document if the person produces, gives, presents or provides the document or causes the document to be produced, given, presented or provided.
- ...

91WA Providing bogus documents or destroying identity documents

- (1) The Minister must refuse to grant a protection visa to an applicant for a protection visa if:
 - (a) the applicant provides a bogus document as evidence of the applicant's identity, nationality or citizenship; or
 - (b) the Minister is satisfied that the applicant:
 - (i) has destroyed or disposed of documentary evidence of the applicant's identity, nationality or citizenship; or
 - (ii) has caused such documentary evidence to be destroyed or disposed of.
 - (2) Subsection (1) does not apply if the Minister is satisfied that the applicant:
 - (a) has a reasonable explanation for providing the bogus document or for the destruction or disposal of the documentary evidence; and
 - (b) either:
 - (i) provides documentary evidence of his or her identity, nationality or citizenship; or
 - (ii) has taken reasonable steps to provide such evidence.
 - (3) For the purposes of this section, a person provides a document if the person provides, gives or presents the document or causes the document to be provided, given or presented.
- ...