



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA16/00691

Date and time of decision: 30 November 2016 09:11:00
Mark Oakman, 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 an referred applicant, or their relative or other dependant.

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Tamil of the Hindu faith from [District 1], Eastern Province, Sri Lanka. He arrived in Australia [in] November 2012 and lodged an application for a Safe Haven Enterprise visa (SHEV) (XE-790) [in] April 2016. [In] August 2016 a delegate of the Minister for Immigration and Border Protection (the delegate) refused the visa.

Information before the IAA

2. I have had regard to the material referred by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
3. On 19 October 2016 the IAA received a submission and further information from the applicant's representative. To the extent the submission discusses evidence, including country information, which was before the delegate and responds to the delegate's decision based on that material, I consider this does not constitute new information and I have had regard to it.
4. The further information is a web page link to an internet news article dated 23 August 2016 concerning the alleged poisoning of 104 former detainees of rehabilitation camps. The particular internet news article was not before the delegate and I consider it new information. The applicant's representative submitted that the information could not be provided previously as the article was only written after the date of the delegate's decision. The applicant mentioned the allegation concerning the poisoning of the 104 detainees at the SHEV interview, the same matter was reported in various media articles dated earlier than the article supplied by the applicant's representative and the incident clearly pre-dates the date of the delegate's decision. 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 and subsequently given to the IAA. They can be summarised as follows:
 - He fears harm from the Sri Lankan authorities and from Tamil militia such as the Karuna Group and Piliyan for the following reasons:
 - his past membership of the Liberation Tigers of Tamil Eelam (LTTE) and his imputed political opinion of being pro-LTTE;
 - his Tamil ethnicity;
 - he will be a failed asylum seeker and he left Sri Lanka illegally.

Factual findings

Receiving country

6. On the basis of the documents and oral evidence given by the applicant, I accept that the applicant is a national of Sri Lanka from [District 1], Eastern Province. I find that the applicant's

receiving country is Sri Lanka. The applicant has consistently claimed, and I accept, he is Tamil and Hindu.

Problems in Sri Lanka

7. The applicant states that he was born in [year] and grew up in [District 1]. From around 1995 the Sri Lankan Army (SLA) would come to the village and round up all the Tamils. The SLA separated the young Tamil males, including himself, and they were beaten and accused of being LTTE. He was forced to work for the SLA doing labour such as [activity] and he and others would be subject to physical and verbal abuse. In 1997 there was a big fight between the SLA and the LTTE near his village and he and his family were displaced and moved within the [District 1] District to where the family had [property].
8. He says that in 1999 the LTTE established a large camp close to his family home. In 2001 the LTTE told each family in the village that one person must work for them and as a result he was forcibly recruited into the LTTE. He was taken to a named LTTE training camp two to three hours from his home. He underwent physical training and propaganda sessions and later received weapons training related to the AK-47. There was no fighting in the area at this time. After about ten months to a year he was moved to the LTTE camp near his home. At the camp he was required to [operate equipment], as the LTTE had at least one [profession] in each camp. He [assisted] LTTE personnel and he did not engage in any fighting. Although he did not want to do this work he could not escape as [District 1] was mostly LTTE controlled and he and his family would be in danger if he tried.
9. He states that in 2004 the LTTE had a split and the Karuna and Piliyan Group (Karuna Group) was formed. The camp commander told them that they could leave if they wished but warned them against joining the [location] based LTTE. The applicant and many others at the camp took advantage of this opportunity to leave. Other people at the camp who knew him chose to join the Karuna Group including a named person (Mr A). [Mr A] went on to hold an important position in the Karuna Group. When he left the LTTE he stayed with his [relative] in another village and hid there until he could arrange to leave Sri Lanka a few months later. While he was in hiding the Karuna Group began demanding that everyone in the LTTE must join them.
10. The applicant says [in]July 2004 he used an agent to legally leave Sri Lanka and work in [country 1]. Sometime while he was in [country 1] he was contacted by a named person from the Karuna Group about joining them. He told the caller that he had to repay his trip costs so he needed to remain working in [country 1] for some time. He believes the caller obtained his contact number from one of the many other Sri Lankan workers in [country 1] at that time. When his work contract ended in [country 1] he returned to Sri Lanka [in] September 2008 and stayed at his [sibling's] place. While staying at his [sibling's] his parents told him some people they thought were Karuna Group members came to the house looking for him. Due to this dangerous situation he made arrangements through an agent to leave Sri Lanka and work in [country 2] in September 2008. He did not encounter any problems leaving Sri Lanka for [country 2].
11. He states that he worked as a [occupation]in [country 2] until June 2011. In November 2008 his [sibling] told him that a man who was a family friend was abducted in what was believed to be a white van incident. In 2010 the man's son was also abducted in a white van incident. Both the man and his son previously drove tractors for the LTTE and lived in the applicant's family's village. When his [country 2] contract expired he was afraid to return to Sri Lanka but he was unable to stay in [country 2].

12. The applicant says he returned to Sri Lanka from [country 2] around June 2011 travelling on his passport. He cleared the customs and immigration area at the airport and was just entering the arrivals hall and spotted his family when two men in plain clothes approached him. The men took his passport and checked his name against a list and told him they needed to talk to him. He refused to go with them and the men called on two other plain clothed men for assistance. He called out to his mother and his family approached him and the group of men and started to protest. His mother grabbed hold of him, cried and noisily refused to allow the men to take him away while a crowd of onlookers gathered. His mother told the men that she and the applicant would report to their local police station if there was a need for an investigation. The plain clothed men were nervous and angry and let the applicant go with words to the effect of 'we'll see you later' and retained his passport.
13. He claims he went to his girlfriend's family home, which is about [number] kilometres from his family's home, from the airport. About three days later his mother went to her local police station to explain what happened at the airport and find out what the problem was about and they asked him to come in to the station. Three days after that he and his mother went to the station. He was interrogated by a Muslim, Tamil speaking police officer who questioned him about his involvement with the LTTE but also told details him about his involvement with the LTTE and how long he served with the LTTE. The police officer asked for money to release him but he told the police officer he didn't have money with him. The police officer prepared a document in Sinhala and made the applicant sign it. He was released but told to report in and sign every week until the police officer got a reply to the papers he was made to sign. He came in to the police station to report for about two weeks then stopped going out of fear that something bad would happen to him. He remained at his girlfriend's family's home. During that time people, who identified themselves once or twice as the Criminal Investigation Department (CID), visited his parents' house four or so times to ask where he was and to say he should report in to the police station. In about June or July 2012 his girlfriend's parents said he should leave their house, which was [not far] to a police station, as it was not safe for him or them. He made arrangements to leave Sri Lanka.
14. The Department of Foreign Affairs and Trade (DFAT) confirms¹ that people living in LTTE controlled areas during the war were required to interact with the LTTE as a matter of course and both voluntary and forced recruitment was used by the LTTE. The UN High Commissioner for Refugees (UNHCR) confirms that post-war, arbitrary detentions were widely reported, as well as reports of detainees being interrogated, with the detainees usually civilians suspected of LTTE links, particularly in the north and east.² The Karuna Group was active in the east of the country and reported as being involved in terror and crime as well as being responsible for extrajudicial killings, deaths in custody and abductions, apparently carried out with the knowledge and tacit agreement of Governments actors and local authorities.³ The Karuna Group was formed in March 2004 following a split in the LTTE forces in [District 1] and [City 1] in the east.⁴ Country information also indicates that under the former Rajapaksa government the security forces in the north and east were known to monitor any possible LTTE activity and other forms of civil resistance or anti-government activity.⁵ Many Tamils, in the north and east in particular, reported being monitored, harassed, arrested and/or detained by security forces

¹ DFAT, "DFAT Country Information Report Sri Lanka" 18 December 2015, CISEC96CF14143, 3.32.

² UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012, UNB0183EA8, pp17 and 18.

³ Ibid p19.

⁴ Centre on Conflict, Development and Peacebuilding (CCDP) - Graduate Institute of International and Development Studies, Geneva, "An Institutional History of of the Liberation Tigers of Tamil Eelam (LTTE)", CCDP Working Papers, 1 November 2014, CISA447F082828, pp58-59.

⁵ DFAT, "DFAT Country Information Report Sri Lanka" 18 December 2015, CISEC96CF14143, 2.39.

under the Rajapaksa government.⁶ During interrogations it was not uncommon for the Sri Lankan authorities to require a detainee to sign a document that was in Sinhala or blank.⁷

15. The applicant did not mention his LTTE membership in his arrival interview and also made a number of claims at that point which he subsequently said were false. However, I accept his explanation that he was told by others at the detention centre that to admit he was in the LTTE would lead to him being sent back to Sri Lanka; the false documents and accompanying story would allow him to stay; and after speaking to his counsellor and lawyers he later understood the importance of telling the truth in his visa application process. He was generally consistent in his evidence from his SHEV application and at the SHEV interview with only a few minor discrepancies with dates such as when he arrived back from [country 1] in 2008 – March (SHEV application), September (written statement) or mid-year (SHEV interview). Similarly, in his written statement he mentions a visit by suspected Karuna Group members to his parents' home in the period between his return from [country 1] and his departure to [country 2] but said at the SHEV interview that nothing significant happened at that time. I consider these discrepancies to be attributable to problems in recall over time. I find the applicant to be a generally credible witness and his evidence at the SHEV interview appeared, from the tape, to be delivered largely in a confident and compelling manner.
16. Based on his evidence and the country information I accept that the applicant was forcibly recruited into the LTTE in 2001; that he received ten months to a year's training, including weapons training, at a LTTE training camp before being posted to a LTTE camp near his parents' home where he was a LTTE [occupation running errands for] LTTE personnel and was never involved in fighting; that he left the LTTE in early 2004 taking advantage of the split between the LTTE and the Karuna Group; that he lived and worked in [country 1] from July 2004 to approximately mid-2008 and was contacted by phone by the Karuna Group in [country 1]; that he lived and worked in [country 2] from September 2008 to June 2011; that while he was in [country 2] he learnt from his [sibling] that a family friend, and later that friend's [child], were abducted; that he attended the local police station with his mother several days after he arrived back from [country 2]; at the police station he was questioned about his membership of the LTTE and the police officer was already aware of the details of his membership of the LTTE, that he was made to sign a document in Sinhala that he could not read and he was released but told to report back to the police station weekly until a decision was made on his case; that he reported to the police station for two weeks then stopped; that from his return from [country 2] he was living at his girlfriend's family's home and not his parent's home; that his parents were visited on four or so occasions by men who once or twice identified themselves as CID to ask after his whereabouts and said he should be reporting to the police station; and that around June or July 2012 his girlfriend's parents told him he should leave their house and he started to make arrangements to leave Sri Lanka.
17. I note that the delegate accepted most of the applicant's claims except in relation to the incident with the plain clothes men and his family at the airport in June 2011 when he arrived back from [country 2], which the delegate found to be far-fetched. It was submitted on behalf of the applicant that such incidents – family and onlooker intervention or interference with arbitrary acts by the authorities – is quite common in Sri Lanka. The incident certainly appears unusual and in the absence of any supporting references in the country information I do not accept the submission made on the applicant's behalf. However, based on my finding as to the applicant's general credibility and as the incident is not inconsistent with the applicant's low level adverse profile with the Sri Lankan authorities, as discussed below, I am prepared to

⁶ Ibid 3.7.

⁷ Freedom from Torture, "Tainted Peace: Torture in Sri Lanka since May 2009", 1 August 2015, CISEC96CF13070, p35.

accept that after he cleared customs and immigration at the airport he was approached by some men in plain clothes who took his passport and wanted to question him, after checking his name against a list, but he was allowed to leave the airport after his family noisily intervened and his mother undertook that the applicant would report at the local police station in the next few days.

18. I accept, in the absence of any evidence to the contrary, that the Sri Lanka authorities have not enquired about the applicant's whereabouts since he left Sri Lanka for Australia.

Failed Asylum Seeker

19. The applicant claims to have left Sri Lanka in October 2012 to travel to Australia as a passenger in a boat organised by a smuggler. His passport was taken by plain clothes men at the airport in Sri Lanka in June 2011. I find that, if he were to return to Sri Lanka, he will be considered a failed asylum seeker who departed illegally by the Sri Lankan authorities.

Refugee assessment

20. Section 5H(1) of the Act provides that a person is a refugee if, in a case where the person has a nationality, he or she is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Well-founded fear of persecution

21. Under s.5J of the Act 'well-founded fear of persecution' involves a number of components which include that:

- the person fears persecution and there is a real chance that the person would be persecuted
- the real chance of persecution relates to all areas of the receiving country
- the persecution involves serious harm and systematic and discriminatory conduct
- the essential and significant reason (or reasons) for the persecution is race, religion, nationality, membership of a particular social group or political opinion
- the person does not have a well-founded fear of persecution if effective protection measures are available to the person, and
- the person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour, other than certain types of modification.

22. The UNHCR's current Eligibility Guidelines for Sri Lanka⁸ note that a person's real or perceived previous links with the LTTE may give rise to a need for international refugee protection. However, originating from an area that was previously controlled by the LTTE does not in itself do so. Although the nature of these links can vary, this may include:

⁸ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012, UNB0183EA8, pp26 and 27.

- Persons who held senior positions with considerable authority in the LTTE civilian administration, when the LTTE was in control of large parts of what are now the northern and eastern provinces of Sri Lanka;
 - Former LTTE combatants or “cadres”;
 - Former LTTE combatants or “cadres” who, due to injury or other reason, were employed by the LTTE in functions within the administration, intelligence, “computer branch” or media (newspaper and radio);
 - Former LTTE supporters who may never have undergone military training, but were involved in sheltering or transporting LTTE personnel, or the supply and transport of goods for the LTTE;
 - LTTE fundraisers and propaganda activists and those with, or perceived as having had, links to the Sri Lankan diaspora that provided funding and other support to the LTTE; or
 - Persons with family links or who are dependent on or otherwise closely related to persons with the above profiles.
23. DFAT refers to the UNHCR’s guidelines and notes⁹ that accurately identifying people according to those categories can be difficult and the UNHCR recognises that each case will depend on its individual circumstances.¹⁰ DFAT also confirms¹¹ that the Sri Lankan authorities remain sensitive to the potential re-emergence of the LTTE and monitor former members and supporters of the LTTE.
24. Advice from DFAT is that upon arrival in Sri Lanka, involuntary returnees are processed by the Department of Immigration and Emigration, the State Intelligence Service and the CID based at the airport. Processing arrivals can take several hours, primarily due to the administrative processes and staffing constraints at the airport.¹² During the processing of returnees, the returnee, their identity and their travel documents are checked against immigration and intelligence databases and for any outstanding criminal matters.¹³
25. For returnees travelling on temporary travel documents, police undertake an investigative process to confirm the person’s identity, for anyone trying to conceal their identity due to a criminal or terrorist background or trying to avoid court orders or arrest warrants. This often involves interviewing the returning passenger, contacting the person’s claimed home suburb or town police, contacting the person’s claimed neighbours and family and checking criminal and court records. DFAT assesses that returnees are treated according to these standard procedures, regardless of their ethnicity and religion, and are not subject to mistreatment during their processing at the airport.¹⁴
26. DFAT has been advised that no returnees from Australia to Sri Lanka have been charged under the *Prevention of Terrorism Act 1979* (Sri Lanka) (PTA). DFAT cannot verify that claim, but says it is credible.¹⁵ DFAT reports that there have been thousands of asylum seekers returned to Sri Lanka since 2009, including 1500 from Australia, with relatively few allegations of torture and

⁹ DFAT, “DFAT Country Information Report Sri Lanka” 18 December 2015, CISEC96CF14143, 3.35.

¹⁰ UNHCR, “UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka”, 21 December 2012, UNB0183EA8, p25.

¹¹ DFAT, “DFAT Country Information Report Sri Lanka” 18 December 2015, CISEC96CF14143, 3.36.

¹² Ibid 5.29.

¹³ Ibid 5.30.

¹⁴ Ibid 5.31.

¹⁵ Ibid 5.34.

mistreatment and assesses the risk of harm for the majority of returnees as low.¹⁶ While DFAT notes there are a small number of reports of mistreatment upon return by asylum seekers, they cannot verify these reports, which are often anonymous and made to third parties.¹⁷ Country information containing such reports was considered by the delegate.¹⁸ DFAT assesses that the risk of torture or mistreatment of high profile former LTTE supporters who are suspected of committing serious crimes as reduced under the Sirisena government, although it remains higher overall than the risk to the majority of low profile people with LTTE links, and notes that allegations of torture pertain to a relatively small number of cases compared to the total Sri Lankan population.¹⁹

27. The UK Home Office (UKHO) 2016 report discusses protection claims as based on a person's actual or perceived political opinion of support for or involvement in the LTTE or other Tamil separatist groups, including membership of, or participation with, such groups overseas. The report notes that in the UKHO view simply being a Tamil does not give rise to protection claims.²⁰ The UKHO notes there have been positive developments in Sri Lanka since President Sirisena became President in January 2015. White van abductions are now seldom reported, and the number of torture complaints has reduced, although new cases of Tamil victims continue to emerge, both of torture and occasional white van abductions.²¹ The authorities continue to monitor people, particularly in the north and east and persons perceived to sympathise with the LTTE continue to be intimidated, harassed, arrested, detained and tortured.²² UKHO notes that, despite improvements, there continue to be reports of abductions, torture complaints and police use of excessive force against Tamils perceived to support the LTTE.²³
28. The US Department of State (USDOS) 2016 report notes there were no reports of extra-judicial killings in 2015 in Sri Lanka but the use of force against civilians, though rare, remains a problem.²⁴ There are credible reports that the military and security forces have abducted, tortured, raped and sexually abused citizens and in the north and east security forces are responsible for detaining those accused of LTTE connections, with observers reporting that interrogations sometimes included mistreatment and torture.²⁵
29. The United Nations Special Rapporteur on Torture reports²⁶ that torture is a common practice carried out in relation to regular criminal investigations by the CID; where there is a real or perceived threat to national security there is an increase in the acts of torture during detention and interrogation; and in dealing with detention under the PTA torture and ill-treatment is almost a routine method of work.

¹⁶ Ibid 4.23 and 5.37.

¹⁷ Ibid 4.22.

¹⁸ Including Freedom from Torture, "Tainted Peace: Torture in Sri Lanka since May 2009", 1 August 2015, CISEC96CF13070; and International Truth & Justice Project Sri Lanka, "Silenced: survivors of torture and sexual violence in 2015", 7 January 2016, CIS38A801275.

¹⁹ DFAT, "DFAT Country Information Report Sri Lanka" 18 December 2015, CISEC96CF14143, 4.18, 4.20 and 4.21.

²⁰ UKHO, "Country Information and Guidance. Sri Lanka: Tamil separatism. Version 2.0", 19 May 2016, OGD7C848D17, 1.1.1 and 2.3.1.

²¹ Ibid 2.3.6, 2.3.7, 6.6.2, 6.6.6, 6.6.7 and 6.6.11.

²² Ibid 2.3.8.

²³ Ibid 2.3.10.

²⁴ USDOS, "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320, p2.

²⁵ Ibid pp7 – 9.

²⁶ United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (UNSR), "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 2016, CIS38A8012799, p3.

30. DFAT assesses²⁷ that low profile former LTTE members who were not already released following a period of detention and who now came to the attention of the Sri Lankan authorities would be detained and may be sent to a rehabilitation centre. The Canadian Immigration and Refugee Board (CIRB) in its 2015 report suggests²⁸ that the Sri Lankan Government continues to look for those LTTE fighters who 'simply walked away' and were not captured or surrendered during the final months of the war; that some Sri Lankan rehabilitation centres were relatively benign with education and job training, whereas others were more punitive and prison like; some reports warned of the possibility of torture; and there were allegations of mistreatment at rehabilitation centres and sometimes after release from such a centre. The UN Special Rapporteur on Torture states that the number of rehabilitation centres had reduced from a height of 24 facilities with some 12,000 detainees to, in 2016, only one facility, the Poonthotam Rehabilitation Centre with approximately 40 detainees; that the living conditions in the rehabilitation centre were considerably more humane than in the prisons; and the report makes no mention of any complaints of torture or mistreatment.²⁹
31. The applicant was a member of the LTTE in [District 1] from 2001 to 2004; he was forcibly recruited; he was trained as a cadre but was never involved in fighting; in the two to three years he was based at the LTTE camp near his parents' home he worked as a [occupation] and [ran errands] for the LTTE; and he left the LTTE around March 2004 when the split caused by the Karuna Group occurred. Largely due to his extensive absence from the country from July 2004 to mid-2008 and again from September 2008 to June 2011, he first came to the adverse attention of the Sri Lankan authorities as he was leaving the airport in June 2011 on his return from [country 2]. He was confronted when he entered the arrivals area after clearing immigration and customs but was allowed to leave the airport after the intervention of his family and with an undertaking to report to the local police. When he reported to his mother's local police station he was questioned about his LTTE membership and the police were already aware of the details of his time with the LTTE. At the police station he was made to sign a document in Sinhala that he could not read, released and told to report back to the police station weekly until a decision was made about his case. The applicant reported for two weeks before stopping and spent another 12 months or so hiding at his girlfriend's family's home until he was asked to leave. While he was staying at his girlfriend's family's home the CID visited his parent's home four or so times to ask after his whereabouts and to remind him he needed to report to the police station. There have been no further enquiries about the applicant by the authorities since he left for Australia in 2012.
32. Noting the UNHCR's Guidelines, the applicant was a LTTE cadre (but didn't actually fight) and he [ran errands] for the LTTE (as a trained member, not as an untrained supporter). I am satisfied that, based on his forced recruitment, the training he received and his driving duties, and the circumstances under which he left the LTTE, he was a low level member of the LTTE and cannot be considered a former high level or high profile member of the LTTE. His status as a low level former member of the LTTE is confirmed by the action taken by the Sri Lankan authorities against him: he was allowed to leave the airport after his family intervened; he was allowed to leave the police station, under a weekly reporting requirement, while a decision was made about him; and there was some follow up about his failure to report during 2012 but not afterwards.

²⁷ DFAT, "DFAT Country Information Report Sri Lanka" 18 December 2015, CISEC96CF14143, 3.43.

²⁸ CIRB, "Sri Lanka: Treatment of suspected members or supporters of the Liberation Tigers of Tamil Eelam (LTTE), including information about how many are in detention; whether the government continues to screen Tamils in an attempt to identify LTTE suspects (2011-January 2015).", 11 February 2015, OGFDFC61A5, sections 1.1, 2.2 and 2.3.

²⁹ UNSRT "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 2016, CIS38A8012799, pp4-5.

33. The country information, including the DFAT material, confirms that former low level LTTE members, who were not previously held in detention and sent to a rehabilitation centre, are at risk of detention and may be sent to rehabilitation.
34. The applicant's representative also made detailed submissions on the likelihood of the applicant being sent for rehabilitation and the likelihood of mistreatment when at a rehabilitation centre. Based on the country information, particularly the statements of the UN Special Rapporteur on Torture, I am not satisfied that the applicant faces a real chance of being sent to the Poonthotam Rehabilitation Centre.
35. However, when processed at Colombo airport on his return, on temporary travel documents as he does not have his passport, the evidence indicates that the authorities are, besides consulting their various intelligence databases, likely to contact the police near his parent's home. At either the point when his details are checked at the airport – as happened in June 2011 – or when they contact the local police, I am satisfied the authorities will become aware that the applicant was a low level member of the LTTE and left Sri Lanka after failing to report as required and while the authorities were deciding what to do about his case. Once the Sri Lankan authorities become aware of his profile then he faces the risk of detention. Because of his particular low profile as a former LTTE member it is by no means certain that he will be detained, however, I am satisfied on the evidence that there is a more than remote chance that he will be detained by the Sri Lankan authorities.
36. The country information is not entirely in agreement on the extent of any reduction in the incidence of torture between the former Rajapaksa and the current Sirisena governments in Sri Lanka. Overall, I accept that the incidence of torture may be lower than in the past in Sri Lanka. However, I am satisfied based on the weight of country information that in the context of any investigation and detention triggered by the applicant's return to Sri Lanka, there is nevertheless a real chance that he will be subjected to significant physical ill-treatment while in detention as a person with his history. I find that physical harassment or ill-treatment of the kind likely to be inflicted is serious harm within the meaning of s.5J(4)(b) of the Act. I am satisfied that the conduct of the authorities in inflicting such serious harm is systematic and discriminatory, as the country information shows that such mistreatment is routinely inflicted by the Sri Lankan authorities on actual or suspected LTTE members and supporters. I find that the harm would be for the essential and significant reason of a political opinion imputed to the applicant as a member of the LTTE. I am satisfied that the harm amounts to persecution within the meaning of s.5J(4) and is for reasons mentioned in s.5J(1)(a).
37. DFAT advises³⁰ that Sri Lankan security forces retain effective control throughout Sri Lanka. As the harm feared by the applicant would be inflicted by the Sri Lankan authorities, I find that effective protection measures are not available to him and that the real chance of harm relates to all areas of the receiving country. As the harm arises as a result of the applicant's past history and Tamil ethnicity, I find that there is no behaviour that he can modify for the purposes of s.5J(3). The applicant has a well-founded fear of persecution within the meaning of s.5J.

Refugee: conclusion

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

³⁰ DFAT, "DFAT Country Information Report Sri Lanka" 18 December 2015, CISEC96CF14143, 5.25 and 5.26.

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.