



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA17/03007

SRI LANKA
IAA reference: IAA17/03009

SRI LANKA
IAA reference: IAA17/03008

Date and time of decision: 23 January 2018 15:11:00
Michelle Grau, Reviewer

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.

Decision

In respect of the referred applicant (IAA17/3007) 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*.

In respect of the other referred applicants (IAA17/3008; IAA17/3009), the IAA remits the decision for reconsideration with the direction that:

- the other referred applicants are members of the same family unit as the above-named applicant and satisfy the criteria in s.36(2)(b)(i) of the *Migration Act 1958*.

Background to the review

Visa application

1. The referred applicants are husband and wife and their child. They were married in [year]. The first named applicant is the wife and the second named applicant is the husband. The third named applicant is their child, who was born in Australia. They applied for a safe haven enterprise visa on [date] December 2016.
2. The delegate accepted the first named applicant was a member of the Sea Tigers in the LTTE and she was sent to rehabilitation centre and that the second named applicant was forcibly recruited to the LTTE. However, on [date] June 2017 the delegate refused the applications on the basis that she was not satisfied the applicants were persons in respect of whom Australia has protection obligations.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. On 27 July 2017 the agent provide two submissions in respect of the first and second named applicants. The submissions included new statutory declarations by each of them.
5. The agent asked that the applicants be put on notice should the IAA be considering making a decision adverse on grounds that differ from the delegate's decision. However, I consider the applicants have had plenty of opportunity to put their case and have been represented. Further, the statutory framework only requires the IAA to give the applicant any new information that would be the reason for affirming the decision under review, and there is no right to a hearing. In this case, the IAA does not rely on any new information.
6. It was submitted the delegate failed to accord appropriate weight in considering the applicant's testimony and submissions; did not give proper consideration to the applicant's hidden profile from the authorities and inadequately assessed the risk of ongoing targeted persecuted harm. It was submitted there is strong evidence of marginalisation and stigma faced by former LTTE members and her profile as a rehabilitee continues make her of interest to authorities undergoing surveillance and monitoring and she fears identification at the airport as former rehabilitees' names are placed on watch lists at the airport. It was submitted there is aggravated vulnerability of ethnic Tamil women being targeted for sexual violence.

New Information – first named applicant

7. In respect of the first named applicant, new information was provided as follows:
 - a. The applicant added that when captured she was tortured by [details deleted] and she has significant scars on her [body]. She did not understand the importance of scarring so did not provide the information earlier. She was uncomfortable and ashamed to talk about this information with a male lawyer and interpreter. The applicant has scars on her [body] [after] she was captured and provided photos of scars on her [body]. The applicant fears she will be identified as LTTE due to her scarring.

- b. The applicant's fighter name was [Ms A]. She did not declare it at interview as she did not think it was important. The applicant gave a false Tiger name to authorities as [Ms B], rather than her real war name of [Ms A]. She did not know anyone by [Ms B] and it was a name she chose to give to authorities to mislead them. While she was detained and questioned a number of times in rehabilitation centre she maintained her story of a different alias. There were other Sea Tigers at rehabilitation but no one that she knew personally. While in rehabilitation, the army would regularly visit and put many women in fear, including the applicant.
 - c. The applicant provided additional new information about her monitoring and harassment following rehabilitation release. Between 2010 and 2013 she was kept under surveillance, and required to seek permission to travel outside [District 1]. By virtue of her profile as a rehabilitee, she continued to be of interest to authorities undergoing surveillance and monitoring. The applicant knows of at least one person who she formerly worked with in Sea Tigers and who is now a government informant.
 - d. Further news [articles] from [2005] were provided which gave the names of the persons captured and arrested and included the applicant's first and last name and her age.
 - e. The applicant found video footage of herself marching as an LTTE cadre in 2003 during a [celebration] by the LTTE. There is also footage of her at Black Tigers celebration. [Sentence deleted]. In 2003 she signed up to Black Tigers but she was never given a target, so never carried out a job for them. The footage is an example of publicly available records which confirm her LTTE involvement well before 2009. She also had many pictures taken with [a particular senior LTTE official] and other high ranking LTTE members. She does not have access to them but is fearful authorities may have uncovered them.
 - f. Country information referred to in the submissions. It was submitted the 2005 news articles about the unlawful rescue is from [various Tamil news sources] which were blocked on Sri Lankan internet servers in Sri Lanka between 2007 and at least until 2010 (and may have only been lifted in 2015). The information about her identity was therefore not readily available when she was held in rehabilitation. Even if it were available, the applicant misled officials as to her identity and nature and length of LTTE involvement.
8. The first named applicant stated there were exceptional circumstances to consider the information because failure to do so may result in decision being affirmed notwithstanding she is at risk of harm and protection obligations are owed and the information is partly new, as having been presented to the delegate and consistent with that information already provided. The information is also credible and personal as it is about her own experiences and would have affected the decision. The applicant had understood that the documentation provided was sufficient for her identity and involvement in the unlawful escape incident. After refusal of her application, she understood it was not, so searched for further documents, which have now been provided.
9. The first named applicant stated she did not mention the Black Tigers earlier because she did not have evidence of her involvement and was not confident to raise the information. She was of the view it was credible personal information that may have affected the consideration of the claims.

10. It was submitted the new information should be considered because it was not inconsistent with the evidence provided of her past experiences and provides further weight and substantiates her claims of interest in her by the authorities given her former LTTE role and adverse profile due to her unlawful escape from detention.

473DD consideration

11. In respect of the new information about her torture and scars upon capture, joining of the Black Tigers, the army visiting at rehabilitation, not personally knowing any Sea Tiger in rehabilitation, her post rehabilitation surveillance and not being able to leave [District 1], knowing a Sea Tiger who is an informant, I consider the applicant could have provided this information before the decision was made as it was information known to her. The information does not appear to relate to any changes since the time of the delegate's decision. The applicant had many opportunities at interviews, and in her statements to provide this information. Further these issues were discussed in the protection interview, but the applicant did not mention this new information. When asked to describe her capture, she did not mention [details of her torture] or having scarring on her [body]. At interview the applicant was asked a number of times about any post rehabilitation monitoring or harassment. However, she did not mention she could not travel outside [District 1]. She was given an opportunity to discuss her LTTE involvement but did not mention joining the Black Tigers. The applicant's fear of informants was discussed, but she did not mention she personally knew one. Further, at interview she was given an opportunity to talk with her lawyer and provide any further information. At the end of the interview she provided a summary of her claims and added she had lied to authorities about the length of her LTTE involvement. Further, she had another opportunity in post interview submissions, in which she provided new information, saying she joined the LTTE voluntarily, rather than being forced, and reiterated authorities did not identify her as being the person who was [rescued]. I consider if the applicant had joined the Black Tigers she would have mentioned that earlier. I do not accept that she was not confident because she did not have evidence of it, as she made claims in which there was no corroborating evidence. I do not accept that she could not have disclosed she had scars on her [body] to a male lawyer and interpreter as she need not have shown the scars. Further, she was interviewed by a female immigration delegate. Further, the applicant had legal representation to assist in the application and at interview and in submissions. It was evident from post interview submissions that the lawyer had also advised the applicants in the natural justice break and after interview that it was their last chance to put all their claims to immigration. I consider the fact that these issues were discussed but this new information not mentioned at interview or in post interview submissions leads me to doubt the genuineness of the claims. The fact that the applicant is only now raising new claims and adding to her account of things already discussed at interview leads me to doubt the genuineness of the claims. However, I accept that the applicant has scars is credible personal information. But I do not accept that the information would have affected the consideration of her claims as the delegate accepted her claims that she was a Sea Tiger. The information does not meet s473DD(b).
12. I have considered whether there are exceptional circumstances. However, I do not consider there are exceptional circumstances as the applicant has had many opportunities to provide the information and she has had legal representation at many stages of the process. She was advised by Immigration of the confidential nature of the process and need to provide all her information a number of times. It was evident also her lawyers had advised her it was the last chance to provide information at the interview and after it. As a result, new information was provided. Further, I am not satisfied the information would have affected the consideration of

her claims. I have considered the applicant's circumstances, but I am not satisfied that there are exceptional circumstances to justify having regard to the new information (s.473DD(a)).

13. I consider for the same reasons as above that the applicant could have provided information that she used an alias fighter name earlier. However, I accept the applicant has consistently maintained that authorities were not aware of her full LTTE involvement because she misled them. At interview and in post interview submissions she reiterated she misled authorities. How she misled them was not discussed at interview. The applicant's fighter name is corroborated by news paper reports referred to below. I consider the information that she used an alias fighter name is credible personal information which may have affected the decision. It therefore satisfies s473DD(b)(ii).
14. As discussed above, I consider the applicant had opportunities to provide this information earlier. However, I accept that she was not aware of the importance of mentioning her fighter or alias name. How she misled authorities was not discussed at interview. Further, the first named applicant was not aware of the corroborating evidence of the newspaper articles. I consider there are exceptional circumstances to consider the information.
15. I have therefore considered that information.
16. In respect of the new documentation (news articles and video footage) I consider the applicant could have provided it earlier as it was publicly available prior to the decision being made. Further, she provided some documentation so understood the importance of providing it. I do not accept that she did not understand that she needed to provide all her information and as much documentation as she could. She was reminded of the need to provide all of her information a number of times by immigration and she was legally represented. It is also not possible to distinguish if any of the video footage is of the applicant and therefore I am not satisfied it is credible personal information. In respect of the video footage, I am not satisfied that it meets s473DD(b). However, given the news articles include the applicant's name and approximate age, I accept that it could be credible personal information that may have affected the decision and satisfies s473DD(b)(ii).
17. I accept that the new articles corroborate her claim. I note the articles were publicly available and she had provided a news article previously. Further, the applicant was legally represented and well aware of the need to provide all her information. Nevertheless I accept it may be crucial to her claims of being LTTE high profile and of having escaped which, if true, would affect the decision and she was not aware of the news articles. Further, I accept it is credible personal information. Cumulatively, I am satisfied there are exceptional circumstances to consider the information and satisfied as to s473DD(a). I have therefore considered the new articles.
18. In respect of the new country information in the submission this is general information and predates the delegate's decision and therefore s473DD(b) is not satisfied. Further, I do not consider there are exceptional circumstances to consider it noting the applicant was legally represented and s473DD(a) is not satisfied. I have not considered the information.

New information -The second named applicant

19. It was submitted the second named applicant's LTTE involvement and his injury and avoidance of rehabilitation is a matter of interest to authorities.

20. The second named applicant provided additional information about hiding his membership of the LTTE from authorities. It was submitted it was not inconsistent and provided further weight and substantiation of his ongoing interest.
21. However, I consider the second named applicant could have provided this information prior to the delegate's decision as he had many opportunities to provide the information. Further, given its late addition and the lack of details provided leads me to doubt the genuineness of these claims. I do not accept it is credible personal information. I am not satisfied as to s473DD(b). Further, I do not consider there are exceptional circumstances to consider the information as the applicant has had plenty of opportunity to provide the information and failed to do so and I do not consider the information is credible. I am not satisfied as to s473DD(a) and have not considered the information.

Applicants' claims for protection

22. The first named and second named applicants make their own individual claims and all applicants also rely on the family unit criteria.

First named applicant

23. The first named applicant's claims can be summarised as follows:

- The first named applicant is a female Tamil Hindu from Northern Province.
- According to the arrival interview the applicant was taken by the LTTE by force in [2009]. In [2009] the army took her under suspicion of being [LTTE]. She was detained and held by security forces in [a] camp for a year. Since her release the army have been visiting her home asking her to report and to sign the register. Unidentified people enquired about her at home [in] 2013. They harass her on the way to work. She fears the army will take her and imprison torture and kill her. Her husband [sustained an injury] and it is difficult for him and he also has these problems.
- However, according to her statement in the application in 2001 she was taken and conscripted by the LTTE and given training, including weapons training. She was assigned to [a unit] with the Sea Tigers. She remained with the LTTE during peace of 2002 and 2005. However, according to the protection interview and post interview submissions, she joined the LTTE of her own free will at [age].
- In [2005] Sri Lankan forces arrested the applicant and she [was severely injured in the process]. She lost consciousness and was taken to [a location] and was guarded by [the] police.
- LTTE cadres abducted the applicant from [the location she was being held] and one policeman [was] killed. [Details of rescue removed]. However, according to the protection interview two policemen were killed.
- The applicant was reunited with the LTTE and continued to work with them until the final days. She was with the LTTE in the jungles and the Sea Tigers.
- The applicant surrendered to the army at the end of war. She lied to the security forces and said she had been taken by the LTTE two months earlier and concealed her past with the LTTE. She was detained at [a] rehabilitation camp and investigated. Luckily no one identified [her]. After release she went home and began work in [another role].

- She always lived in fear of being arrested for her past as an LTTE Sea Tigress. If she returns she will be in danger as the authorities find out she is a former Sea Tiger and authorities are still tracking down and arresting former LTTE fighters. According to protection interview and post interview submissions the authorities did not identify her as being the person who had previous issues with the authorities. Had they known they would not have been released and she would have received a harsher punishment and probably be killed because of the deaths of the two policemen.
- She married a former LTTE cadre.
- The applicant provided a [detention] attestation which indicated the applicant was visited by [a Non-Governmental Organisation] in [2009] and that she was released from [a rehabilitation centre] [in] 2010. She also provided a letter and certificate from the Ministry of Rehabilitation and Prison reforms.

Second named applicant

- The second named applicant is a male Tamil Hindu from Northern Province. He is the spouse of the first named applicant.
- He was taken by the LTTE [in] 2006 when he was [with] his brother. He received [a number of] days training, which included weapons training. Afterwards he was sent to [a particular section of the LTTE]. He also worked with [another section of the LTTE].
- He [sustained an injury] at the end of the [war]. He was taken to hospital for treatment and that is the reason he managed to escape interrogation by the Sri Lankan forces.
- He provided an IDP camp return form dated [in] 2009 which included his [family].
- The second named applicant is convinced if his wife returns she will be interrogated and mistreated.

Third named applicant

- The third named applicant is the first and second named's child who was born in Australia in 2014, who has not made separate claims.

Refugee assessment

24. 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

25. 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.
26. I accept the applicants are Tamil Hindus from Northern Province.
27. I accept the first named applicant was an LTTE member as she has consistently claimed this and she provided documentation that indicates she was detained at a rehabilitation centre after the war, which is consistent with her being LTTE and an LTTE rehabilitee.
28. The first named applicant claimed she was detained from [2009] until [2010]. She provided an untranslated certificate and [letter] and translated evidence that [agency Non-Governmental Organisation] visited her in rehabilitation in 2009 and that she was released in 2010. She also had a certificate of [completion] that she completed in 2010 at the rehabilitation camp. Based on the documents and the country information that many thousands of LTTE or those with suspected LTTE links were sent to rehabilitation centres at the end of the war, I accept the first named applicant was so detained.
29. The delegate did not accept the applicant's claim that the Sri Lankan forces captured her in 2005 and she was rescued [by] the LTTE. The news article provided at interview did not include the applicant's surname so no weight was given to it. Further, her account was inconsistent as in her statement and the news articles one policeman was killed in her rescue, but in her protection interview and post interview submissions she claimed two policemen were killed.
30. However, the two articles in [2005] provided to the IAA included the applicants surname and also her age which accorded with the applicant's age. The article noted [others] who were captured were charged. The articles were consistent with the applicant's account of her capture and unlawful escape. I accept these articles corroborate the applicant's claim of capture and her [rescue]. Further, other than the arrival interview, the applicant has consistently claimed she was captured and rescued and policeman killed in the process. Her account has also been relatively consistent.
31. I accept the first named applicant was captured in 2005 and [rescued] and police or policeman was killed in the process. Given the applicant was considered to be of such interest that the LTTE rescued [her] and that police were killed in the rescue, I accept this raises the applicant's LTTE profile.
32. While in rehabilitation, the applicant claimed she misled the authorities and only told them she was with the LTTE for a short period and they did not discover that she was involved in the [rescue] or death of the policeman. She claimed she provided an alias fighter name to mislead authorities.
33. Country information in the referred material indicates that the rehabilitation process was used to screen high and low profile LTTE members through interviews, informants and other relevant information that demonstrated the depth of involvement period of involvement and activities.

34. While I have some doubts that the authorities would not have known of the applicant's lengthy involvement and her true role, particularly given the publicity her escape received, I am willing to accept that her use of an alias name and the absence of informers that the authorities may not have identified the applicant as being linked to her unlawful rescue in 2005. Given the alias, and the many incidents and killings during the war, it is credible the authorities may not have investigated the 2005 event in respect to or linked the applicant. I accept the first named applicant misled authorities by using an alias fighter name and did not disclose the capture or rescue.
35. I find the authorities were aware of the applicant's LTTE involvement but not her true fighter alias. I accept they may not have been aware of her rescue from capture in 2005 and therefore her involvement in the death of a policeman in that rescue.
36. While the applicant claimed she was required to report and did not, she also claimed she was harassed by authorities on the way to work and they made enquiries at her home and visited her monthly. These claims do not make sense. It is not credible that she was required to report but refused to, and at the same time the authorities visited her but did not arrest her or require her to report as she had been instructed. I consider if she were wanted by authorities or she had been told to report and did not, that they would have arrested her. I do not accept that she was required to report and failed to do so. If that were the case they would have arrested and detained her.
37. However, I accept that she was monitored, harassed and checked on often as this is consistent with country information of former LTTE members and rehabilitees. Country information also indicates that former LTTE members are subject to harassment, monitoring and sometimes rearrest.
- LTTE, Tamil, female, rehabilitee*
38. I have considered the first named applicant's claims to fear harm on the basis of her LTTE involvement, profile and her misleading authorities about the LTTE involvement and unlawful rescue in 2005.
39. I accept that the applicant is a married Tamil Hindu female from Northern Province who was a member of the LTTE Sea Tigers. I accept she was captured in 2005 and unlawfully rescued by [LTTE] and that a policeman was killed in the process.
40. I have accepted she was in a rehabilitation centre in 2009- 2010 and the authorities knew of her LTTE involvement as a Sea Tiger. I have accepted she misled authorities and accept that it is possible they were not aware of and did not link her to the 2005 unlawful escape. I have accepted she was harassed and monitored upon release until her departure from Sri Lanka. I have not accepted she was required to report and failed to do so.
41. I accept at least until the end of the civil war in 2009 that Sri Lankan citizens of Tamil ethnicity suffered disproportionately at the hands of the Sri Lankan authorities, particularly in North and East areas. I am mindful of the information that people with significant links to the LTTE may still face a real chance of harm, if returned to Sri Lanka.
42. The UNHCR eligibility guidelines confirmed in 2012 that due to improved human rights and security situation there was no longer a need for group based protection mechanisms or for the presumption of eligibility for Sri Lankans of Tamil ethnicity. More recent information in the referred material indicates that is also the case now.

43. The 2012 UNHCR Guidelines also indicated specific risk categories which include former LTTE combatants or cadres. Recent guidance from the UK Home Office indicates with the LTTE a spent force, the Sri Lankan government's focus has shifted to identifying persons perceived to be a threat to the integrity of Sri Lanka due to a significant role in relation to post conflict Tamil separatism within the Diaspora and or renewal of hostilities within Sri Lanka.
44. The first named applicant completed her rehabilitation as former LTTE in 2010. She has been employed in [occupation] between 2010 and 2013, which on its face indicates she was no longer of significant adverse interest to authorities.
45. I have accepted she was monitored and harassed upon release and continued to be so on the way to work. DFAT assesses that the highest risk of monitoring, arrest, detention or prosecution include the LTTE's former leadership and former LTTE members suspected of committing terrorist or serious criminal acts or who have provided weapons to the LTTE. Since the end of the conflict thousands of LTTE members have been arrested, detained and sent to rehabilitation centres and the majority have been released. Those low profile LTTE members who have been released may be monitored but are generally not prosecuted.
46. Further, DFAT advises that the monitoring and harassment of Tamils in day to day life has decreased significantly under Sirisena government. Politically, the new government has taken a more proactive approach to human rights and the issue of reconciliation than previous governments. The overall prevalence of monitoring has greatly reduced. Members of the Tamil community have described a positive shift in the nature of the interactions with authorities, including feeling able to question their motives or object to monitoring.
47. However, I have accepted the applicant was captured and unlawfully rescued by LTTE in 2005 and that the authorities may not have been aware of the applicant's involvement in those events as she misled authorities with a fighter alias.
48. Further, I consider the fact that she was rescued by other LTTE indicates she had a higher LTTE profile. Further, given she was part of the unlawful rescue and a policeman was killed in the process, I accept that the applicant's adverse profile increases.
49. While she has been rehabilitated which would normally indicate she was not of interest or risk of serious harm, I am concerned that authorities may not be aware of the full extent of her past rescue and involvement in the death of a policeman. As such there is a possibility if that information were to become known to authorities that there is a real risk that the applicant may face further investigation, arrest and/or prosecution.
50. I accept that upon return to Sri Lanka the applicant will face questioning and investigation because of her illegal departure. I accept she will return as a failed asylum seeker on a temporary travel document.
51. In respect of her illegal departure, country information in the referred material indicates she would face a fine of up to 200,000 rupees, which can be paid in instalments. If she arrives over the weekend she may spend a couple of days in detention before being released. However, I do not accept that this amounts to serious harm. The referred country information indicates that all returnees are treated the same regardless of their ethnicity and religion and the laws are not applied in a way that is discriminatory or selectively enforced against a particular group of those returnees. I do not accept that Tamils are treated differently. Further, the country information is that they are not subject to mistreatment during processing at the airport.

52. Further, and in any event, I do not accept that the IAEA provisions that deal with breach of the departure laws from Sri Lanka are discriminatory on their face, or disclose discriminatory intent or that they are implemented in a discriminatory manner. I find that the Sri Lanka departure laws are laws of general application.
53. I accept that if the applicant returned to Sri Lanka, she would do so as a failed asylum seeker. I note the information in the DFAT reports that thousands of Tamils have been returned to Sri Lanka since the end of the Sri Lankan civil war, including from Australia, and claimed asylum. I note there have been reported instances of returnees being harmed, of persons with substantial links to the LTTE or outstanding warrants.
54. While I do not accept the applicant has continued links to the LTTE, the applicant has substantial past LTTE links as a former Sea Tiger and will be identified as a rehabilitee. I consider given she is a rehabilitee, former LTTE that the applicant may face more prolonged questioning and investigation either at the airport and subsequently. DFAT notes police undertake an investigative process to confirm identity, which would address whether someone was trying to conceal their identity due to criminal or terrorist background or trying to avoid court orders or arrest warrants. Given the applicant has previously misled authorities about her LTTE fighter identity and her unlawful escape, I consider there is a more than remote possibility that this may be discovered. If this is discovered or police consider she is not being truthful, I accept there is a risk she faces harm during questioning and arrest and detention and physical mistreatment.
55. In particular, I consider the applicant faces a real chance of arrest and detention and possible prosecution or detention in a rehabilitation centre. Due to her undisclosed/unknown unlawful rescue and death of a policeman as an LTTE Sea Tiger, I consider there is more than a remote possibility that the applicant may be arrested, face charges or detained for further rehabilitation and physical mistreatment if this event is linked to the applicant.
56. I consider the combination of her higher LTTE profile, involvement in the death of a policeman at the [rescue] (which she has not disclosed), her continued monitoring and her gender increase the chances of the applicant facing serious harm upon her return to Sri Lanka when questioned and investigated at the airport and when she returns home.
57. DFAT assesses the risk of torture or mistreatment for the majority of returnees is low and continues to reduce. Country information in the referred material also notes that DFAT is aware of reported instances of torture and the UN Special Rapporteur in 2016 reported torture might be carried out by police in regular criminal investigations and the risk can increase when there is a perceived threat to national security. While the risk has declined and is in a relatively small number of cases DFAT noted the focus can be on extracting confessions. Given the applicant's high LTTE profile, her unlawful escape and lack of full disclosure of her past LTTE activities and involvement in the death of a policeman, I consider the risk of physical mistreatment or torture cannot be discounted in the applicant's case and is not remote. I find there is real chance of serious physical mistreatment amounting to serious harm during questioning given her profile and lack of full disclosure previously.
58. I have considered the applicant's circumstances. I accept she is a female rehabilitated Tamil Sea Tiger from the North, who was unlawfully rescued by the LTTE and a policeman was killed. I have accepted that she misled authorities about her links to the rescue. I accept that with her higher LTTE profile, her LTTE rescue where police were killed, that the applicant's LTTE profile is higher than other LTTE cadres. Further, I accept that she has been continually monitored and harassed by authorities. I accept that she will return as a failed asylum seeker

on a temporary travel document and illegal departure and she will be identified as a former LTTE and rehabilitee. I accept that given her circumstances she faces more prolonged questioning, scrutiny at the airport and follow up and monitoring subsequent to that and serious physical mistreatment.

59. After assessing all the evidence and the applicant's cumulative circumstances, in particular her lengthy involvement with the LTTE, capture and escape, that she misled authorities about her LTTE involvement, her rehabilitation, continued monitoring, seeking asylum and illegal departure and being a Tamil female in combination and being mindful of both the process and the outcome of the prosecution the applicant will face from the Sri Lankan authorities arising from his illegal departure, I am satisfied that the chance of facing serious harm is not remote if she returns to Sri Lanka.
60. I have had regard to all of the evidence before me and I have considered the applicant's claims individually and cumulatively, as well as considering the personal circumstances of the applicant. Cumulatively, I am satisfied the applicant has a well-founded fear of persecution from CID, Sri Lankan authorities, for a combination of reasons in s.5J(1)(a), including her political opinion, race, and membership of a particular social group in the reasonably foreseeable future, if she returns to Sri Lanka.
61. I accept that the applicant faces a real chance of persecution in all areas of Sri Lanka as she is at risk of harm from the government authorities. Further, s5J(2) does not apply because the State is the agent of harm and effective protection measures are not available.
62. Further, s5J (3) does not apply because there is no permissible modification of behaviour that would mitigate the risk.

Refugee: conclusion

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

Member of same family unit

64. Under s.36(2)(b)(i) or s.36(2)(c)(i) of the Act, an applicant may meet the criteria for a protection visa if they are a member of the same family unit as a person mentioned in s.36(2)(a) or (aa) who holds a protection visa of the same class as that applied for by the applicant. A person is a 'member of the same family unit' as another if either is a member of the family unit of the other or each is a member of the family unit of a third person: s.5(1). For the purpose of s.5(1), the expression 'member of the family unit' is defined in r.1.12 of the Migration Regulations 1994 to include spouse and dependent children.
65. The delegate accepted the claimed familial relationships between the first named applicant, her husband and their child and there is no information before to contradict this claim. Further, there is a birth certificate for the third named applicant which confirms the first and second applicants are her parents. I find that the applicant's claimed husband is the spouse of the first named applicant and that her daughter (the third named applicant) is the dependent child of the first named applicant.
66. As the first named applicant is a person mentioned in s.36(2)(a), her husband and daughter meet s.36(2)(b)(i).

Decision

In respect of the referred applicant (IAA1703007) 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*.

In respect of the other referred applicants (IAA17/3008; IAA17/3009), the IAA remits the decision for reconsideration with the direction that:

- the other referred applicants are members of the same family unit as the above-named first named applicant and satisfy the criteria in s.36(2)(b)(i) 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.