



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA18/05732

Date and time of decision: 7 January 2019 18:35:00
J Maclean, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Tamil Hindu born in the Trincomalee District of the Eastern Province of Sri Lanka. In April 2017 he lodged an application for a Safe Haven Enterprise visa (SHEV). A delegate of the Minister for Immigration and Border Protection (the delegate) refused the grant of this Visa on 19 September 2018.

Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
3. On 14 October 2018 the IAA received an email from the applicant's [representative], including a submission signed by the applicant. In so far as the submission reiterates the applicant's claims, and responds to the delegate's findings, I consider this to be argument rather than new information, and I have had regard to it.
4. At the end of the submission the applicant indicates he is willing to provide any further information requested by the IAA, and requests the IAA invite him for an interview to discuss his claims. Section 473DB(1) of the Act provides that subject to Part 7AA, the IAA must review a fast track reviewable decision without accepting or requesting new information and without interviewing the referred applicant. Section 473DC(2) further provides there is no obligation on the IAA to get, request or accept any new information including new information from an applicant in the form of an interview, although there is a discretion to do so. A representative [assisted] the applicant to prepare his visa application, and a representative [was] also present at the SHEV interview and provided a written submission after the interview. The applicant was advised at the commencement of the SHEV interview he may not have another chance to provide information to support his claim, and he was asked a number of times at the conclusion of that interview if there was anything else he would like to say, or any further comments, and he said 'that is all I can tell'. He was also told that any additional information provided before a decision is made would be considered. I am satisfied the applicant has had an opportunity to present his claims and address the matters that are in issue in this review, including in the submission made after the SHEV interview. I am not satisfied in the circumstances of this application an interview is required, or that it is necessary to request any further information. Accordingly I have not invited the applicant to attend an interview or provide anything further.

Applicant's claims for protection

5. The applicant's claims can be summarised as follows:
 - He is a Tamil Hindu who was born in the Trincomalee District of the Eastern Province of Sri Lanka.
 - His [uncle] went missing when he was [age] years old, and after that his family started getting visits from the Criminal Investigation Department (CID). His [family] told him his uncle was a Liberation Tigers of Tamil Eelam (LTTE) member. Initially the CID questioned his father and [brother] about his uncle, however after his brother went to [Country 1]

the CID started to question him about his uncle, and he was regularly stopped on his way to work.

- He worked as a fisherman before leaving Sri Lanka. The Sri Lankan Navy (SLN) harassed him when he went fishing, and suspected him of transporting fuel to the LTTE. He told them he had no connection with the LTTE, however they refused to believe him and threatened to kill him and hit him with ropes and poles. He could not go to work regularly due to the harassment.
- He feared for his life and left Sri Lanka to protect his life.
- Since departing Sri Lanka the CID went back to his house once. His family told them he is in Australia.
- He fears being tortured, imprisoned or killed by Sri Lankan authorities because of his Tamil ethnicity, because the SLN suspect he is an LTTE supporter, and because the CID is interested in obtaining details about his uncle.

Refugee assessment

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

Well-founded fear of persecution

7. Under s.5J of the Act ‘well-founded fear of persecution’ involves a number of components which include that:
 - the person fears persecution and there is a real chance that the person would be persecuted
 - the real chance of persecution relates to all areas of the receiving country
 - the persecution involves serious harm and systematic and discriminatory conduct
 - the essential and significant reason (or reasons) for the persecution is race, religion, nationality, membership of a particular social group or political opinion
 - the person does not have a well-founded fear of persecution if effective protection measures are available to the person, and
 - the person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour, other than certain types of modification.
8. The applicant claims to be a Tamil Hindu who was born in the Trincomalee District of the Eastern Province of Sri Lanka in [year]. There is no issue regarding the applicant’s identity. I accept the applicant is a national of Sri Lanka from the Eastern Province, and that Sri Lanka is the receiving country for the purposes of the Act.
9. I accept the applicant’s consistent evidence regarding his early life in Sri Lanka. He grew up in the Trincomalee District of the Eastern Province and resided in the family home until 2008,

when he married and moved to his wife's house in the same village. He attended school in the Trincomalee District, up to [level] in [specified year]. After leaving school he worked as a fisherman. He has one [child] with his wife, born in [year].

10. I accept the applicant's consistent description of his family home being located [close to a] SLN camp [and] a Sri Lankan Army (SLA) [camp]. He was consistent in stating that the majority of people in the village are Sinhalese, and the minority Tamils. In his statement of claims he states that Tamils in the village suffered due to the presence of authorities, who want all Tamils to evacuate the village. During the Arrival interview the applicant said the main reason he left Sri Lanka was because they were restricted in being able to move around, and when they went fishing in the night time sometimes the navy attacked them. He also noted that people in civilian clothes came and threatened them and asked about the whereabouts of his uncle. He said he does not know who they are, but people in the village said they are CID. In his statement of claims and during the SHEV interview the applicant said his uncle was an LTTE member, and that he did not disclose that during the Arrival interview because he was asked to provide his claims in brief, and the relevance to his claims was not explained. During the SHEV interview the applicant said his [family] told him his uncle's profile was 'a little bit higher, and he went to the battlefield', however no further information was provided regarding the uncle's role with the LTTE. Country information supports there was both voluntary and forced recruitment to the LTTE, and that the majority-Tamil civilian populations of the areas controlled by the LTTE were required to interact with the LTTE as a matter of course.¹ Taking that into account, I am prepared to accept the applicant's uncle may have been an LTTE member, and that he disappeared when the applicant was [age] years old, in about [year]. The applicant's evidence about his uncle having a higher profile was vague and unconvincing, and I do not accept his uncle was other than a low-level LTTE member.

11. The applicant claims his family was harassed by Sri Lankan authorities after his uncle went missing. Initially his father and [brother] were questioned, and as a result his brother went to [Country 1]. After his brother left Sri Lanka the CID started to harass the applicant and question him about his uncle. He was regularly stopped on his way to work, and although he told them he did not know anything about his uncle they refused to believe him. During the SHEV interview the applicant said that before 2008 authorities dressed in civil dress questioned his brother about his uncle's whereabouts, and as a result his brother left for [Country 1], after which they started to question the applicant. The applicant said he married quickly as he thought if he was married he would be safe, but he continued to be questioned about his uncle's whereabouts. He said 'many times' he was questioned about his uncle's whereabouts and what he is doing, and that he was taken by force from his home, blindfolded, and detained. If he was taken in the morning he would be detained until the evening and released, and during the detention he was beaten. He said before he was married he was taken two to three times, and after marriage 'very often they continued to chase him'. When the delegate asked who was harassing him the applicant said he did not know as they wore civil clothes, but neighbours said they were CID. The delegate asked the applicant about his brother who went to [Country 2] in 2013. The applicant said one of his [brothers] was chased and harassed after the applicant left the country, and so that brother left for [Country 2]. For a number of reasons I do not accept the applicant was questioned about his uncle's whereabouts by Sri Lankan authorities, or any other group. Firstly, I consider the applicant's evidence was generalised, vague and unconvincing. Secondly, the applicant's claim has developed over time, referring only to people coming and threatening and asking questions at the Arrival interview, and being harassed and regularly stopped on his way to work and asked about his uncle in his statement of claim, but describing being detained and beaten many times during the SHEV interview,

¹ DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064

which leads me to believe this claim has been fabricated to support the applicant's protection application. Thirdly, given the applicant's young age at the time his uncle disappeared, and the length of time that had elapsed before the applicant claims he was first questioned about his uncle, about 10 years, I find it entirely implausible that authorities, or any other group, would have questioned the applicant about his uncle's disappearance in those circumstances. Similarly, I do not accept authorities, or any other group, would have continued to question the applicant's brother in the manner claimed, or that such questioning was the reason [one] brother left for [Country 1] in 2008, or [another] brother left for [Country 2] in 2013. The applicant also noted during the SHEV interview, when asked about his current family situation, that [a third] brother went to live with his sister in a suburb of Trincomalee, about one and a half or two hours away from his family home, because of the fears in the area. No information was provided about any harassment or mistreatment this brother faced in Sri Lanka, and although I accept he may reside with his sister, I do not accept he moved as a result of security concerns or harassment from authorities.

12. The applicant claims the SLN harassed him when he went fishing, and suspected him of transporting fuel to the LTTE. They did not believe he had no connection with the LTTE, and they threatened to kill him and hit him with ropes and poles, and due to the harassment he could not go to work regularly. During the SHEV interview the applicant said as a Tamil he was not able to move around easily because of threats from the SLA and SLN. He described being beaten when he went to sea, and being suspected of supplying petrol to the LTTE. The delegate noted the applicant would have started fishing in late [2002], and asked how often he was stopped by the SLN. The applicant said every time he went to sea he would be intercepted and questioned about where he went, and if they were not satisfied with the answer he would be taken to an island under their control and beaten. He said many times the SLN took him and his boat to the island, accused him of assisting the LTTE and beat him. If there were fish in the boat they went rotten, and they would take some of the fuel from the boat so they could not travel far from their control. If he was taken in the night he was released the next morning. The applicant described an incident that occurred about one month before he left Sri Lanka, when a number of boats were heading out to sea and the SLN ordered him and other fishermen to jump into the sea so they could look at the boat. One man on another boat went missing. Sinhalese fishermen were not subjected to this treatment. The applicant's evidence was consistent in describing mistreatment from the SLN, and in suggesting Sinhalese fishermen were not of adverse interest. The applicant's account of the treatment he received from the SLN was provided in sufficient detail, such that I consider is suggestive of lived experience. Taking that into account, along with the country information which supports that many Tamils, particularly in the north and east, reported being monitored, harassed, arrested or detained by security forces during the conflict,² I accept the applicant may have been harassed and questioned by the SLN during the period he worked as a fisherman in the Trincomalee District, including being questioned about any involvement with the LTTE, and at times he may have also been mistreated. The applicant's evidence was that all Tamil fishermen were harassed, but that Sinhalese fishermen were not, and I consider the treatment of the applicant resulted from the routine, but troubling, treatment of Tamils at that time, rather than from any specific security threat he posed.
13. During the SHEV interview the applicant was asked if any family members were involved with the LTTE. He referred to his [uncle] being involved with the LTTE (as noted above), and also said his [brother's] wife's [relative] was taken by a white van and he disappeared because he is a close relative. The applicant provided no details about when or where this abduction occurred, nor any information regarding the profile of the person who disappeared. Given the

² DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064

context in which this claim was raised it appears the applicant is claiming that the person who disappeared was closely related to his uncle, and that was the reason for his disappearance. Country information reports that during the civil conflict tens of thousands of people were killed, and systematic abductions occurred, often leading to enforced disappearances.³ Taking that into account, I accept it is plausible that a distant relative of the applicant's disappeared, however, there is no credible evidence to support that incident was related to the applicant's uncle, and I do not accept it was.

14. The applicant's statement of claims refers to the CID going to the applicant's house once since he departed Sri Lanka, and his family told them he is in Australia. At the SHEV interview the applicant said authorities are still interested in him and they come continuously and ask his wife about his whereabouts, and they are interested to arrest him. He said he spoke to his wife recently and she told him somebody came to ask her questions about three months ago, and indicated they wanted to talk to the applicant. That person said they were staying with the applicant in [Australia] and asked when he is coming back. When asked how many times these visits had occurred over the years, the applicant said that they know he is married and they ask his wife every two to three months, and in the last three months they started to come very often, however he could not ask his wife how many times because she was crying. The applicant's explanation as to why he could not give a more accurate count of the amount of times his wife had been visited in recent months is simply not credible, particularly given the importance of this issue to the applicant's protection application. Having accepted the applicant was questioned and detained by authorities on a number of occasions prior to his departure, I consider it is plausible, and I accept, that authorities may have visited the applicant's family after he departed Sri Lanka to make enquiries. However, I consider it implausible that the purported interest in the applicant would have continued for four and a half years after he departed Sri Lanka, or that it would have escalated in the few months prior to the SHEV interview. When the applicant was asked if the people searching for him ever looked for him at his parent's house he said after he was married and moved to live with his wife they never did. I consider it illogical that if any person were genuinely searching for the applicant they would limit their enquiries to questioning his wife, and consider it likely they would also question other close relatives. I consider the applicant has exaggerated the level of interest Sri Lankan authorities had in him after his departure in 2013, and I do not accept authorities, or any other person, continues to visit his wife or family making enquiries about the applicant.
15. The applicant fears harm from the authorities in Sri Lanka as a result of his Tamil ethnicity, his prior residence in an area previously controlled by the LTTE, and being imputed to be a supporter of the LTTE. The applicant's post-SHEV interview submission indicates that if the applicant returns to Sri Lanka he will be perceived to be an LTTE supporter, and also as coming from an LTTE family as a result of his [uncle's] LTTE involvement. It is suggested he falls into a high-risk category, and that authorities will believe he is a contributor to the re-emergence of the LTTE. As a result of his profile he will be detained under the Prevention of Terrorism Act (PTA), and he will be forced to go through the screening and rehabilitation process, during which he will be harmed.
16. Although virtually everyone agrees there has been progress towards alleviating the climate of fear in Sri Lanka, opinions differ about the extent of that progress.⁴ The UN Special Rapporteur on Torture, in his December 2016 report on Sri Lanka, noted the fragility of the reform process

³ DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064

⁴ UK Home Office, "Country Policy and Information Note. Sri Lanka: Tamil separatism. Version 5.0", 15 June 2017, OG6E7028826

and that the country is at a critical moment in its history in terms of setting up the necessary mechanisms to remedy its past large-scale human rights violations and prevent their recurrence. He observed that while the practice of torture is less prevalent today than during the conflict and the methods used less severe, a “culture of torture” persists against suspects being interviewed and a causal link seems to exist between the level of real or perceived threat to national security and the severity of the physical suffering inflicted during detention and interrogation.⁵ In July 2017, following an in-country visit to Sri Lanka, the UN Special Rapporteur on human rights and terrorism expressed concern that ‘entire communities have been stigmatised and targeted for harassment and arbitrary arrest and detention, and any person suspected of association, however indirect, with the LTTE remains at immediate risk of detention and torture’.⁶

17. The more recent 2018 DFAT report refers to allegations by several local and international organisations regarding torture by Sri Lankan military and intelligence forces, mostly from the period immediately following the conflict and involving people with imputed links to the LTTE. Reports have been made by credible sources such as Freedom from Torture and the International Truth and Justice Project, and other sources reported in the DFAT and UK Home Office reports, such as Amnesty International and Human Rights Watch, of ongoing arrests and mistreatment amounting to torture perpetrated by security forces and police in Sri Lanka, predominantly affecting Tamils.⁷ The applicant’s post-SHEV interview submission also refers to a number of recent media reports regarding the treatment of Tamils, including those with no, or low-level involvement with the LTTE. One recent report refers to the actions of a Sri Lankan military officer who motioned a throat slitting gesture to Tamil protesters in London. I have had regard to that information. In July 2017 the ITJP reported on victims of torture who had fled to Europe, and found that in 2016/17 both the military and police continued to abduct, unlawfully detain, torture and rape Tamils. Of the victims interviewed, the main risk factor leading to interrogation and torture appeared to be an association with LTTE cadres and/or authorities’ concerns that the suspects were involved in regrouping the LTTE.⁸
18. The human rights abuses described in the country information have primarily affected people with a real or perceived LTTE profile or anti-government or political activist profiles and refer to a very small number of people. The United States State Department reported in 2016 that arbitrary arrests and detention had decreased from 2014 and that the use of force against civilians by officials, although remaining a problem, was increasingly rare.⁹ The Human Rights Commission of Sri Lanka report from October 2016 to the UN Committee Against Torture reported that torture is ‘routine [and] practiced all over the country, mainly in relation to police detentions’.¹⁰ The UK Home Office reported in 2017 that since the current government has come into office “white van abductions” were very seldom reported and the number of torture complaints has reduced. It notes however, that new cases continue to emerge of the police mistreating Tamils in order to extract confessions in criminal investigations, and was

⁵ United Nations, "Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Sri Lanka A/HRC/34/54/Add.2", 22 December 2016, CIS38A80123313

⁶ DFAT, "DFAT Cable response: UN Special Rapporteur (Ben Emmerson) on human rights and terrorism in Sri Lanka", 14 August 2017, CISED50AD5239

⁷ Freedom from Torture, "Sri Lanka – Update on torture since 2009", 6 May 2016, CIS38A8012881; International Truth & Justice Project Sri Lanka ("ITJP"), "Silenced: survivors of torture and sexual violence in 2015", 7 January 2016, CIS38A801275; UK Home Office, "Country Policy and Information Note. Sri Lanka: Tamil separatism. Version 5.0", 15 June 2017, OG6E7028826; DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064

⁸ ITJP, "Unstopped: 2016/17 Torture in Sri Lanka", 26 July 2017, CISED50AD4849

⁹ United States ("US") Department of State, "Sri Lanka – Country report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320

¹⁰ DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064

more prevalent in questioning of suspected LTTE members or supporters.¹¹ Consistent with this, DFAT states that recent publications indicate torture continues to be perpetrated primarily by police against Tamils, but notes that local sources have indicated this is primarily due to outdated policing methods rather than being ethnically based, that the message from senior officials prohibiting the use of torture has been slow to filter down, and relevantly assessed that overall there is a low risk of Tamils being tortured.¹² I am satisfied that the risk of torture from military and intelligence forces has decreased since the end of the civil conflict, and that the risk of the applicant, with his history and profile, being tortured in Sri Lanka, or suffering a white van abduction, in Sri Lanka is remote.

19. With regard to the applicant's claim to fear harm on return to Sri Lanka as a Tamil from the Eastern Province, an area previously controlled by the LTTE, the 2017 UK Home Office report notes the focus of the Sri Lankan government has changed, and the focus is now not so much on identifying anyone with past LTTE links. The government's present objective is to identify those who pose a threat to the government or a unified Sri Lanka, through involvement with Tamil separatist activities in the country or through links to the Tamil Diaspora. Those former LTTE members that are most at risk are persons perceived to have a significant role, such as the LTTE's former leadership (either combat or civilian) and former members suspected of committing serious criminal acts during the conflict. The UK Home Office and DFAT have more recently confirmed the UNHCR position that simply being of Tamil ethnicity, or a Tamil from an area formerly under LTTE control, no longer gives rise to a need for international protection, the rationale being that almost every Tamil who resided in those areas during the conflict had some sort of connection with the LTTE.¹³
20. Credible country information reports that the LTTE in Sri Lanka is a spent force, and there have been no terrorist instances since the end of the civil war.¹⁴ The LTTE no longer exists as an organised force in Sri Lanka, however DFAT confirms Sri Lankan authorities remain sensitive to the potential re-emergence of the LTTE throughout the country, and are likely to maintain intelligence on former LTTE members and supporters, and high-profile former LTTE members would continue to be of interest to the authorities and subject to monitoring. Further, DFAT assesses that close relatives of high-profile former LTTE members who remain wanted by Sri Lankan authorities may be subject to monitoring. DFAT assesses that, while monitoring of Tamils in day-to-day life has decreased significantly under the current government, surveillance of Tamils in the north and east continues, particularly those associated with politically sensitive issues.¹⁵ The country information does not indicate that Tamils are currently at risk of persecution in Sri Lanka purely on account of their race, nor when they originate from, or reside in, an area previously controlled by the LTTE. Those reports no longer support a finding that Tamil ethnicity of itself imputes LTTE membership or a pro LTTE opinion, even when combined with other factors such as gender, age or place of origin.
21. With regard to the claim the applicant is at risk of detention under the PTA, country information reports the PTA is currently suspended, but still in legal force. Under the PTA suspects can be held without charge for three-month periods, not exceeding a total of 18 months. Human Rights Watch reported in January 2018 that the PTA had not been used in

¹¹ UK Home Office, "Country Policy and Information Note. Sri Lanka: Tamil separatism. Version 5.0", 15 June 2017, OG6E7028826

¹² DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064

¹³ UK Home Office, "Country Policy and Information Note. Sri Lanka: Tamil separatism. Version 5.0", 15 June 2017, OG6E7028826; DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064

¹⁴ UK Home Office, "Country Policy and Information Note. Sri Lanka: Tamil separatism. Version 5.0", 15 June 2017, OG6E7028826

¹⁵ DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064

2017, and DFAT understands that fewer individuals are currently detained under the PTA than during the conflict. According to the Bureau of the Commissioner General of Rehabilitation, by November 2017, 12,882 people, primarily former LTTE, had completed rehabilitation, however only one centre with eight inmates remained open in December 2017. Of note, DFAT reports the Sri Lankan government claims no returnee from Australia has been charged under the PTA, however DFAT cannot verify this claim.¹⁶ I consider the small number of detainees, who are ex-LTTE combatants, reflects there is no longer a systemic practice of detaining those suspected of any involvement with the LTTE, and only those with significant links to the LTTE are now at risk of detention under the PTA. I note the applicant was questioned and detained by authorities on a number of occasions between 2002 and 2013, including about involvement with the LTTE, and I consider they had the opportunity to detain him had they wished to do so, however they did not, which is indicative that the applicant did not have a profile of interest at that time. I do not accept the applicant has a profile such that he would be at real risk of detention under the PTA.

22. Considering the applicant's circumstances and profile – as a Tamil male who worked as a fisherman and resided in an area formerly under LTTE control, and who had no direct involvement with the LTTE, however his uncle was a low-level LTTE member who disappeared many years ago; he was questioned and detained by Sri Lankan authorities on a number of occasions, including regarding suspected LTTE involvement, and released without being charged with an offence; he has resided outside Sri Lanka for a number of years; he has not indicated he has participated in any Tamil diaspora activities in Australia, or suggested he would engage in activities which are politically sensitive, or could be considered to constitute post-conflict Tamil separatism on return to Sri Lanka – I am not satisfied the applicant was of adverse interest to Sri Lankan authorities, or any other group, at the time he left Sri Lanka, or that there is a real chance he would be of interest to Sri Lankan authorities, or any other group, because of any imputed political opinion in support of the LTTE or for any family links to the LTTE. Accordingly, I am not satisfied the applicant would be at risk of harm on return to Sri Lanka for those reasons.
23. The applicant's representative submits that Sri Lankan authorities will see the applicant as a contributor to the re-emergence of the LTTE, and that the applicant's name is likely to be on a 'watch' list, which includes the names of individuals Sri Lankan security services consider to be of interest. As noted above, Sri Lankan authorities remain sensitive to the potential re-emergence of the LTTE throughout the country. According to expert testimony provided to a hearing of the UK's Upper Tribunal on Immigration and Asylum, Sri Lankan authorities collect and maintain sophisticated intelligence on former LTTE members and supporters, including 'stop' and 'watch' electronic databases. 'Stop' lists include names of those individuals who have an extant court order, arrest warrant or order to impound their Sri Lankan passport. 'Watch' lists include names of those individuals whom the Sri Lankan security services consider to be of interest, including for suspected separatist or criminal activities.¹⁷ The UK Home Office reports that those on the 'watch list' are persons of interest to the authorities for minor offences, or are former LTTE cadres.¹⁸ DFAT assesses those on a watch list are likely to be monitored.¹⁹ Although the applicant was detained and questioned on a number of occasions by Sri Lankan authorities, he was never arrested, and there is no credible evidence he has been involved in criminal activities in Sri Lanka or Australia, nor that he has been involved in

¹⁶ DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064

¹⁷ DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064

¹⁸ UK Home Office, "Country Policy and Information Note. Sri Lanka: Tamil separatism. Version 5.0", 15 June 2017, OG6E7028826

¹⁹ DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064

separatist activities in Australia. The applicant's profile is not such that he is likely to be on the stop or watch databases.

24. The applicant's post-SHEV interview submission asserts the applicant will suffer significant economic hardship that threatens his capacity to subsist, and he will be denied access to basic services where the denial threatens the person's capacity to subsist and the denial of capacity to earn a livelihood will threaten the applicant's capacity to subsist. Other than the bare assertion, no country has been provided to support these propositions. Of note, no information has been provided about the applicant ever being denied access to services whilst he was in Sri Lanka, nor any indication of which service he is likely to be denied. The applicant indicated in his statement of claims that he could not go to work regularly due to the harassment from Sri Lankan authorities, and during the SHEV interview he described difficulties working as a fisherman, such as being questioned by authorities, and his boat being detained for a period of time resulting in any fish becoming rotten. He also noted that Sinhalese fishermen were not subjected to the same restrictions as Tamil fishermen. Country information reports that the SLN reintroduced a pass system for fishing in the Trincomalee district in 2010, however Sinhalese fishermen were allowed to fish without any restriction.²⁰ That report is from 2010, however I accept the applicant may be required to obtain a pass if he wishes to engage in fishing in the future, on return to Sri Lanka. I accept that this requirement is discriminatory and systematic conduct by Sri Lankan authorities based on his Tamil ethnicity, and results in a level of day to day harassment while undertaking fishing that may impact on his future capacity to earn a living as a fisherman. I note the applicant's evidence was that he engaged in fishing from 2002 until 2013, and despite the difficulties he noted, he did not suggest he was unable to support himself and his family, or that he would be unable to do so in the future. Country information supports that the security situation in the north and east of Sri Lanka has improved, and the most recent DFAT report notes that military involvement in civilian life has diminished, although military involvement in some civilian activities continues in the north. Taking into account the country information, and the applicant's evidence, I do not accept that any harassment the applicant may experience in relation to his work as a fisherman would be to such an extent that it would threaten his capacity to subsist or otherwise constitute serious harm.
25. The applicant was consistent in describing that he departed Sri Lanka illegally by boat in April 2013, with the assistance of a people smuggler, and I accept that evidence. I accept if the applicant returns to Sri Lanka he would do so as a failed asylum seeker, and he would be identified by Sri Lankan authorities as someone who departed Sri Lanka illegally.
26. The applicant originates from the Eastern Province of Sri Lanka, and I accept it is very likely he would return to that province, where his wife, [child], parents, and [other family members] continue to reside. DFAT reports that despite positive government sentiment, refugees and failed asylum seekers face practical challenges to successful return to Sri Lanka, and many have difficulties finding suitable employment and accommodation. DFAT assesses that reintegration issues are not due to failure to obtain asylum, but rather due to the employment and accommodation difficulties they may face. A UNHCR survey in 2015 reported that 49 per cent of refugee returnees in the north had received a visit at their homes for a purpose other than registration, with almost half of those visits from the police. The UNHCR also interviewed refugee returnees in 2016, and only 0.3 per cent indicated they had any security concerns following their return. While the government has reportedly decreased systematic surveillance of returnees, DFAT is aware of anecdotal evidence of regular visits and phone calls by the CID to failed asylum seekers in the north as recently as 2017. In addition, refugees and failed

²⁰ "SLN reintroduces pass system for fishing in Trincomalee", Tamil net, 02 August 2010, CX296936

asylum seekers reported social stigma from their communities upon return.²¹ It is possible the applicant, as a returning asylum seeker, may experience some social stigma, however, I am not satisfied this treatment would amount to serious harm.

27. Entry and exit from Sri Lanka is governed by the Immigrants and Emigrants Act 1949 (the I&E Act). Under the I&E Act it is an offence to depart other than via an approved port of departure. Information from DFAT indicates all involuntary returnees undergo checks on arrival in Sri Lanka, including by the Department of Immigration and Emigration, the State Intelligence Service and the CID. For those travelling on a temporary travel document, as would be the case for the applicant, investigation is undertaken to confirm identity, which often includes an interview, contacting authorities in their home area, and neighbours and family, and checking criminal or court records, a process that can take several hours.
28. According to DFAT all returnees are treated according to standard procedures irrespective of ethnicity, and are not subject to mistreatment during processing at the airport. Most returnees are questioned upon return (usually at the airport), and where an illegal departure from Sri Lanka is suspected they can be charged under the I&E Act. Those who are charged are, at the earliest opportunity after investigations are completed, transported to the closest Magistrate's Court, after which custody and responsibility shifts to the court or prison services. The magistrate then makes a determination as to the next steps for each individual, and individuals can remain in police custody at the CID's Airport Office for up to 24 hours after arrival. Should a magistrate not be available before this time – for example, because of a weekend or public holiday – those charged may be detained for up to two days in an airport holding cell.²² Although there are some reports, in the country information in the referred material, of returnees being mistreated, they are predominantly people suspected of having substantial links to the LTTE, rather than relating to being a failed Tamil asylum seeker.²³
29. Those charged under the I&E Act are required to appear in court in the location where the offence occurred, which may involve legal and transport costs. Penalties for leaving Sri Lanka illegally can include imprisonment of up to five years and a fine of up to 200,000 Sri Lankan rupees, which may be paid by instalment. In practice no returnee who was merely a passenger on a people smuggling venture has been given a custodial sentence, and the usual result is a fine which can be paid by instalments. DFAT notes that, while the fines issued for passengers of people smuggling ventures are often low, the cumulative costs associated with regular court appearances over protracted lengths of time can be high. Given the applicant has not claimed to have been involved in people smuggling, it is likely if he pleads guilty he will be granted bail by the Magistrate on the basis of personal surety or guarantee by a family member. Although DFAT was unable to obtain any data in support, it reports there is anecdotal evidence that most passengers of people smuggling ventures spend many years on bail, and that most are free to go after paying a fine. Bail is usually granted to voluntary returnees, however bail conditions are discretionary, and can involve monthly reporting to police at the returnee's expense.²⁴
30. I accept that given his mode of departure from Sri Lanka the applicant may be questioned and detained for up to two days in an airport holding cell, and subjected to the processes and penalties imposed under the I&E Act, as described above, including a fine, and associated process costs. DFAT has advised that detainees are not subject to mistreatment during

²¹ DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064

²² DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064

²³ Freedom From Torture, "Sri Lanka – Update on torture since 2009", 6 May 2016, CIS38A8012881; International Truth and Justice Project, "Silenced: survivors of torture and sexual violence in 2015", 7 January 2016, CIS38A801275

²⁴ DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064

processing at the airport, including for those suspected of offences under the I&E Act.²⁵ The evidence before me does not indicate the I&E Act processes and penalties the applicant may face are discriminatory in nature or in its application or enforcement. I am not satisfied such treatment amounts to systematic and discriminatory conduct. On that basis, I am not satisfied there is a real chance of persecution on account of the applicant having departed Sri Lanka illegally.

31. Considering the above factors separately, or together, I am not satisfied the applicant has a well-founded fear of persecution.

Refugee: conclusion

32. The applicant does not meet the requirements of the definition of refugee in s.5H(1). The applicant does not meet s.36(2)(a).

Complementary protection assessment

33. A criterion for a protection visa is that the applicant is a non-citizen in Australia (other than a person who is a refugee) in respect of whom the Minister (or Reviewer) is satisfied Australia has protection obligations because there are substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm.

Real risk of significant harm

34. Under s.36(2A), a person will suffer 'significant harm' if:

- the person will be arbitrarily deprived of his or her life
- the death penalty will be carried out on the person
- the person will be subjected to torture
- the person will be subjected to cruel or inhuman treatment or punishment, or
- the person will be subjected to degrading treatment or punishment.

35. I accept on return to Sri Lanka it is possible the applicant may face some social stigma as a returning asylum seeker, and also that it is likely he will be subject to a series of administrative processes as a result of his illegal departure, as outlined above. However, I am not satisfied the treatment of the applicant would experience on return amounts to significant harm as defined. There is no evidence to indicate the applicant faces a real risk of the death penalty for any reason, and I do not accept there is a real risk the applicant will be arbitrarily deprived of his life or tortured during or as a result of his treatment on return. Having taken into account his personal attributes, I am also not satisfied that the processes or penalties, or the social stigma, the applicant may be subject to amounts to pain or suffering that could be regarded as cruel or inhuman in nature, severe pain or suffering, or extreme humiliation for the purposes of the definition of cruel or inhuman treatment or punishment or degrading treatment or punishment.

²⁵ DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064

36. I also accept the applicant may face some level of discrimination as a Tamil fisherman from the east. However, I am not satisfied on the available evidence that the discriminatory treatment the applicant may face as a Tamil fisherman from the east amounts to significant harm as defined. I accept the applicant may be required to obtain a pass from Sri Lankan authorities if he undertakes work as a fisherman, however I am not satisfied this requirement amounts to severe pain or suffering, or pain or suffering that could reasonably be considered cruel or inhuman in nature. Similarly, such actions may be considered harassing, but they do not amount to extreme humiliation. I am not satisfied the discriminatory treatment the applicant may face as a Tamil fisherman from the east amounts to significant harm.
37. Considering these factors together, I do not accept the treatment the applicant may face as a Tamil fisherman from the east, as a returning asylum seeker, and a person who departed illegally amounts to significant harm for the purposes of s.36(2A).
38. I have otherwise found there is not a real chance the applicant will face harm on return to Sri Lanka because of his Tamil ethnicity, or for any actual or imputed political opinion resulting from any connections to the LTTE, including as a result of his place of origin and residence in a former LTTE-controlled area, or because his uncle was an LTTE member who went missing several years ago. For the same reasons, I am also not satisfied there is a real risk of any harm, including significant harm, should he be returned to Sri Lanka.

Complementary protection: conclusion

39. There are not substantial grounds for believing that, as a necessary and foreseeable consequence of being returned from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm. The applicant does not meet s.36(2)(aa).

Decision

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

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

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

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

...

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

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature; but does not include an act or omission:
 - (c) that is not inconsistent with Article 7 of the Covenant; or
 - (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

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

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

...

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

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

...

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

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant; but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

5H Meaning of refugee

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

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

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

...

5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
 - (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
 - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
 - (c) the real chance of persecution relates to all areas of a receiving country.

Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.

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

5K Membership of a particular social group consisting of family

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

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

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

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

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

5L Membership of a particular social group other than family

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

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

5LA Effective protection measures

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

...

36 Protection visas – criteria provided for by this Act

...

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

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

...

Protection obligations

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

Determining nationality

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