



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA19/06252

Date and time of decision: 28 February 2019 09:52:00
F Kerr, 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 Christian Tamil from Sri Lanka. He arrived in Australia [in] March 2013. On 18 November 2016 he lodged an application for a Safe Haven Enterprise Visa (SHEV). On 14 January 2019 a delegate of the Minister (the delegate) refused to grant the visa.

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. No further information has been obtained or received.

Applicant's claims for protection

4. The applicant's claims can be summarised as follows:
 - When he was young his older brother ND voluntarily joined the Liberation Tigers of Tamil Eelam (LTTE). He and ND look alike.
 - ND left the family and entered the Vanni at an early age. The last time that he saw his brother was when he himself was approximately [age] years of age when ND came to [their home village].
 - In 2011, his family were notified that his brother had been detained at [Camp 1 in] Vavuniya as a member of the LTTE. His parents went to visit his brother.
 - Approximately two months later his parents went to visit ND and the Sri Lankan army (SLA) told them that he had escaped from the camp. His parents have searched for his brother but have been unable to find him. ND has not been in contact with his family since he escaped/disappeared from the rehabilitation camp in 2011. They believe the authorities are responsible for his escape/disappearance.
 - The authorities began interrogating him as he and his brother look alike. He was taken to the Criminal Investigation Department's (CID) office/camp several times for questioning. The CID beat him during questioning.
 - In 2012, about a month prior to his departure, he was taken to the CID's office/camp where he was detained for 2 days. He was subjected to harsh treatment while in custody.
 - His uncle, JP, was an active member of the Eelam People's Democratic Party (EPDP) and due to his influence he managed to get released from the CID's office/camp.
 - His uncle advised him to leave the country as he would not be able to guarantee his protection. The authorities were after him on account of his brother's escape from [Camp 1] and they look alike.
 - His uncle made arrangements via a smuggler for him to exit the country.
 - Although he travelled on his own passport, it was obtained with the assistance of his uncle.

- He believes that his life would be in danger if he returned to Sri Lanka as he is: a young Tamil male, he originated from the Northern Province, his brother was an LTTE cadre and was detained in a rehabilitation centre, his brother looks like him, the authorities think that his brother escaped from the rehabilitation camp, the authorities suspect that he could be his brother who escaped from the rehabilitation camp, he was interrogated and beaten by the CID officers in the past, he departed Sri Lanka illegally and he claimed asylum in Australia.
- Since arriving in Australia his parents told him that CID officers have come looking for him on two occasions.

Factual findings

Applicant's family background and connections to the LTTE

5. The applicant's identity is not at issue. In support of his claimed identity he has provided a copy of his national identity card (NIC) with a translation as well as a copy of [another document] issued [in] 2011. I accept his identity is as claimed and that he is a citizen of Sri Lanka, a Tamil and a Christian. I find that Sri Lanka is the receiving country for the purposes of this decision.
6. That his brother, ND, was detained in a detention centre because he was a member of the LTTE is a matter the applicant has been broadly consistent about across his interactions with the Department including a screening interview on 20 March 2013, an entry interview on 22 March 2013, written SHEV application and accompanying statutory declaration of 15 October 2016 and his SHEV interview held on 26 April 2018.
7. The details around this claim and, in turn, that he came to the attention of the authorities because of ND have, however, varied considerably. It was apparent on listening to his SHEV interview that the applicant was an unsatisfactory witness. His knowledge about the incidents on which his claims are based was lacking and at other times he appeared unable to remember key details such as when his brother escaped from the rehabilitation camp. When he was able to answer a question, his evidence was repetitive, vague and lacking in detail. In assessing his evidence I have taken into account the difficulties of recall over time, the scope for misunderstanding in interpreted material, cross cultural communication issues and the problems people who have lived through trauma may experience in presenting their story in a cohesive narrative. But even allowing for these matters, I have significant concerns about the credibility of aspects of the applicant's claims because of a number of inconsistencies in his evidence and the plausibility of parts of his claims. I am particularly concerned about how the applicant claims to have been affected by his brother's disappearance from the detention camp which led to his own experiences with the authorities which is at the heart of his claims for protection. On the evidence before me, I am satisfied the applicant has not been truthful in regard to some of his claims and in other respects has exaggerated or embellished incidents in his past in order to enhance his profile as a person to whom Australia may owe protection obligations.
8. The applicant is from the north. Country information before me indicates that it would not have been possible for a young civilian man living in the north during the conflict not to have had any contact with the LTTE¹ either voluntarily or forcibly.² Thousands of former LTTE

¹ UK Home Office "Report of a Home Office Fact-Finding Mission Sri Lanka: treatment of Tamils and people who have a real or perceived association with the former Liberation Tigers of Tamil Eelam (LTTE)", March 2017 CISED50AD3780

combatants or people suspected of links to the LTTE, including children who either surrendered or were captured were screened at checkpoints and at camps, including internally displaced persons (IDP) camps and were held in various often opaque systems of detention and rehabilitation and were only gradually released.³ Many remain unaccounted for and may have been the victims of summary executions or enforced disappearances.⁴

9. Although I note that in contrast to the claim in his written SHEV statement that ND joined voluntarily he told the delegate ND was forcibly recruited which is another inconsistency in his evidence, on the basis of the country information and some consistency throughout the visa application process, I accept that his brother ND joined the LTTE, worked in [an area of operations] and that he was sent to a rehabilitation/detention camp towards the end of the war.
10. He claims that it was because of his brother's escape from the detention centre that he himself was targeted by the authorities because they look alike. But he could not remember when his brother disappeared/escaped and has variously said:
 - He saw ND in 2012 when he visited him in the detention centre. He went back to the detention centre to visit ND and the other boys there told him ND was taken for interrogation and is missing (screening interview).
 - The last time the applicant saw ND was when he himself was [age] years old (around 2005). The last contact the family had with ND was in 2011 in detention (entry interview).
 - The family was notified sometime in 2011 that ND was detained at [Camp 1] in Vavuniya. His parents went to visit ND. Approximately two months later they were told by the SLA that ND has escaped from the camp. ND hasn't been in touch with the family since his escape/disappearance from the camp in 2011 (SHEV statement).
 - ND and his parents were all in a camp together and then because ND was in the LTTE he was taken to another camp. His parents visited ND once in the detention centre. Sometime after that ND was taken by the CID for interrogation and after that the family didn't hear anything about him. The applicant was in [grade] at [School 1] when it happened. The applicant found out ND was in a detention camp when a friend of ND who had been in the detention camp visited the applicant's parents in [Town 1] probably two or three months before the applicant left Sri Lanka. They said ND escaped from the detention centre and about a month after that the authorities starting giving him (the applicant) trouble. He couldn't remember what month the CID started giving him trouble but thought it was about six months after ND escaped. He couldn't remember what year it was either 2010, 2011 or 2012 (SHEV interview).
11. While I am unable to place much weight on what the applicant told the Department in the screening interview because there is no recording of that interview which would enable me to verify the questions that were asked and what the applicant said in response, I note that two days later in his entry interview (a recording of which is before me), his story had changed from him seeing ND in the detention centre in 2012 to not having seen him since approximately 2005 and the last contact the family had with him was in 2011.

² Office of the United Nations High Commissioner for Human Rights (OHCHR) "Report of the OHCHR Investigation on Sri Lanka (OISL) (A/HRC/30/CRP.2)", 16 September 2015 CISEC96CF13358; Daily Mirror (Sri Lanka) "Tragic phenomenon of forcible recruitment of Tamil civilians by the LTTE", 3 October 2015 CXBD6AODE16205.

³ Office of the United Nations High Commissioner for Human Rights (OHCHR) "Report of the OHCHR Investigation on Sri Lanka (OISL) (A/HRC/30/CRP.2)", 16 September 2015 CISEC96CF13358

⁴ Ibid at para 95

12. That is consistent with what he said in his SHEV statement: that the family didn't hear from ND after 2011. But his evidence changed again in his SHEV interview. After initially stating he was in [grade] at [School 1] when his brother was taken by the CID for interrogation and they didn't hear from him again he later said that ND escaped in either 2010, 2011 or 2012. I note the applicant's national identity card which was issued [in] 2009 gives as his profession 'Student' which may indicate that he was still at [School 1] in 2009 rather than 2007 as stated in his SHEV application form.
13. The applicant made the new claim in his SHEV interview that he had worked for the Sri Lankan navy (SLN) in the [specified] program in around 2012 (he wasn't sure) for about a year but had to leave because the CID came looking for him because of his brother and he couldn't continue; he left that job about two months before leaving Sri Lanka. As the delegate noted, this means he would have left the SLN job around November 2012. But in his SHEV statement he said the authorities started to come after ND escaped/disappeared in 2011 which is not what he told the delegate in his SHEV interview about it being when he was in [grade] at [School 1] (either 2007 or 2009) or in either 2010, 2011 or 2012. As the delegate noted, he also said he had no problems working for the SLN before his brother escaped the camp which tends to undermine the claim in his SHEV statement that the authorities started coming after his brother escaped/disappeared in 2011.
14. I have also taken into consideration that the applicant's claims regarding what he experienced at the hands of the authorities have similarly evolved. He has variously claimed:
 - He and ND look alike and they think the applicant is ND; they will mistake him for his brother. He was taken by the SLA from detention but was interrogated by the CID. The applicant was taken for interrogation once [in] March 2012 for a full day; he was questioned but not mistreated in any way. He was released because his [uncle] is a member of the EPDP; he came and released him (screening interview).
 - The authorities are after him because he and ND look alike. In 2012 he was taken for two days for interrogation. They asked about his family, kept him in a room, then his [uncle] came and released him (entry interview).
 - After ND's escape/disappearance in 2011, the Sri Lankan authorities began visiting his parents' home. They began interrogating him as he and ND look alike. He was taken to the CID office/camp near [Town 1] several times for questioning. The CID beat him with [implements] and their hands during such questioning. About a month before he left Sri Lanka he was taken to the CID camp and detained for two days. He was subjected to harsh treatment while in custody. His [uncle] was a member of the EPDP and managed to get the applicant released from the CID office (SHEV statement).
 - A month after the camp incident when ND escaped or disappeared, the CID started giving the applicant trouble. One evening after he came back from work the CID came and said he had to come for an interrogation. He was scared and tried to run but then they grabbed him by his shirt; they put him in the van and left. They kept him for three days, he was beaten up badly and tortured. They were asking questions like where are all the LTTE's weapons and where are the LTTE members now. His uncle was a member of the EPDP so he bribed someone that's how he got released on the fourth day. After that he went into hiding in Colombo (SHEV interview).
15. The applicant provided a photograph of his brother. It depicts a young man on a motorcycle with a young child looking on. It is not apparent from the recording of the SHEV interview which one is his brother. Nonetheless, he said the photograph was taken after his brother went to the Vanni which, on his evidence, was around 2005 and shortly before ND joined the

LTTE; on that basis I accept the young man on the motorcycle is ND. However, the photograph is of poor quality as are the applicant's own documents with photographs (NIC and [another document]) and I consider them of little utility for comparison purposes. I accept it is possible the two look alike. But I do not accept that the applicant would have been mistaken for his brother. Firstly, if the authorities were responsible for ND's disappearance, they would clearly be aware of what happened to ND in which case the claim they would mistake the applicant for ND makes no sense. Secondly, if ND had escaped, the applicant had two forms of government issued documentation in support of his identity (NIC issued in 2009 and [another document] issued in early 2011) and I do not consider it credible that he would have had any difficulty establishing his own identity and that he was not, in fact, his brother.

16. When the delegate put this to the applicant he said that the NIC photograph was taken when he was still a student and he looks quite different now, more like his brother and that's why they think he is ND. He also said that he thinks the CID have killed his brother and when the delegate asked why, in that case, they would mistake him for ND the applicant said he didn't know, he thinks ND is dead but the authorities suspect he's escaped. I do not find any of this convincing or credible. Moreover, his evidence indicates he was working for the SLN from sometime in 2011 and it is simply not credible that he would have been permitted to work for the authorities if, as he claims, they had any concerns that he may, in some way, have been affiliated with the LTTE.
17. At the end of his SHEV interview when the discrepancies in his evidence regarding the mistreatment he claimed he experienced at the hands of the authorities were put to him by the delegate, he said that when he arrived in Australia he didn't tell everything to the authorities because he didn't know how they would take it and the sort of treatment he would receive in Australia so out of fear he didn't give them the exact information at that time. Even if I accept this was the case, it does not explain other discrepancies in his more recent evidence, for example, why he said in his SHEV statement that he was taken to the CID office/camp near [Town 1] several times for questioning but in his SHEV interview only referred to one incident of questioning by the CID.
18. I am not satisfied the applicant is telling the truth about ND, what happened to him and when. Nor am I satisfied the applicant experienced harm at the hands of the authorities either on his own account or because of ND. I accept that the applicant was not living with the rest of his family in Vanni and is largely relying on what other members of his family, principally his parents, have told him about ND and his detention. However, ND's 'escape' and when it happened is critical to his own claims to have been singled out for interest by the authorities and it is simply not credible that the applicant would be unable to state with any certainty what year it was firstly, that ND either escaped or disappeared and secondly, when the CID started giving him problems because of it and what those problems were.
19. The issues identified above go well beyond any minor discrepancies that could be attributed to factors such as problems of recall, misunderstandings in interpreted material, cultural communication issues or lack of cohesive narration due to trauma. I am satisfied that the applicant has both fabricated and embellished aspects of his evidence in order to boost his protection claims.
20. As discussed above, I am prepared to accept that his brother ND was a member of the LTTE and that he was detained probably towards the end of the war in a detention centre. Because I do not consider him a credible witness, I have some reservations about whether or not ND escaped and remains in Sri Lanka or was, tragically, one of those who 'disappeared' while in detention and accordingly, whether in fact it is true that the family doesn't know what

happened to ND. Nonetheless, for these purposes and on the basis of some consistency between his entry interview and SHEV statement, I am willing to accept that the family hasn't heard from ND since 2011.

21. However, I reject the applicant's claims to have been taken in for questioning on any occasion, interrogated, beaten and tortured either because he looks like ND or for any other reason as a fabrication. I find that at the time he left Sri Lanka, he had no profile with the authorities and was not of any adverse interest because of ND or on his own account for any reason.
22. It follows that I do not accept that his uncle secured his release either by using his influence (SHEV statement) or paying a bribe (SHEV interview). I am prepared to accept that his uncle made all the arrangements for him to leave Sri Lanka by contacting a smuggler. But even if I accept that his uncle was a member of the EPDP, because I have found that the applicant was not a person of interest to the authorities, I find that his uncle did not advise him to leave Sri Lanka as he would not be able to guarantee his protection because he is sought by the authorities on account of his brother's escape. I find that the applicant's and/or his family's decision that he should leave Sri Lanka was unrelated to his brother or adverse attention from the authorities and I reject these claims as further fabrications.
23. I accept that the applicant spent some time (up to a couple of weeks) in Colombo making arrangements to leave Sri Lanka but as I do not accept that he was of adverse interest to the authorities, I reject as a further fabrication his claim, made for the first time in his SHEV interview, to have been in hiding in Colombo before departing Sri Lanka.
24. For the same reason, I reject as a fabrication his claim that CID officers went to his home twice looking for him as well as the other claims made for the first time in his SHEV interview: that his father was beaten by the CID when they went to his family home looking for him, that they threatened his parents, that the CID still thinks he is his brother and threatened to shoot him if they find him, that they have come maybe seven or eight times including as recently as 2017, that their phone is tapped so they can't tell him very much, that his [brother's] motorbike and [equipment] have been confiscated by the authorities in an attempt to force him to return because he looks like his brother, and that his [brother] was beaten when he went to the authorities to ask them to return his property.

Leaving Sri Lanka

25. The applicant left Sri Lanka through the airport in Colombo. He indicated on his SHEV application form that he left Sri Lanka legally using a passport issued by the Colombo Passport Office.
26. However, he claimed in his SHEV statement that, on one hand, the passport he travelled on was in his own name (obtained with the assistance of his uncle, JP) and on the other, that it was obtained illegally. In his SHEV interview, he claimed he approached the EPDP himself, paid a bribe and got a passport illegally in contrast to what he said in his entry interview which was that he didn't know how the passport was acquired. His representative submitted in his SHEV interview that the fact he travelled on a passport obtained through illegal means will be a problem for him.
27. As the passport was in his own name, it's not entirely clear what the applicant means when he states his passport was obtained illegally and this claim is at odds with what he said on his SHEV application form. In view of this and the other inconsistencies in his evidence, the country information before me regarding the multi-layered security measures in place in and

around Colombo airport immediately after the war⁵, the additional scrutiny to which his passport would have been subject by the [Country 1] authorities during the visa application process, and as I do not accept that he was of interest to the authorities at the time he left, I do not accept that would have needed, or sought to obtain, an illegal passport and I do not accept this claim. It follows that I do not accept what he told the delegate in his SHEV interview: that his uncle got help from people working for the government at the airport so that's why he was able to travel to [Country 1].

28. I find that the applicant's departure from Sri Lanka in 2012 was legal, that is, using a genuine, legally obtained Sri Lankan passport. He claims he lost the passport at sea and I accept this is plausible. I also accept that, should he return, he will be perceived as a returning asylum seeker.

Refugee assessment

29. 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

30. 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.

Harm as a young Tamil male from the north with connections to the LTTE

31. The applicant claims his life would be in danger because he is a young Tamil male from the Northern Province and because his brother was an LTTE cadre who was detained at a rehabilitation centre.
32. As discussed above, I accept that the applicant has family links to the LTTE, that is, his brother who I accept was detained in a rehabilitation camp and whose whereabouts are now unknown. Previously, persons suspected of certain links to the LTTE (including family links) that went

⁵ UK Home Office "Country of Origin Information Report Sri Lanka February", 18 February 2010 1595

beyond residency in a formerly LTTE controlled area were identified as being at risk.⁶ However, that assessment by the UNHCR and referred to by DFAT in its 2018 report is now six years old. Country information indicates that conditions in Sri Lanka have changed since the election of the Sirisena government and the security situation has improved markedly since the end of the war in 2009. The Sirisena government quickly abolished surveillance and censorship of media and civil society groups, embarked on constitutional reforms to restrict executive powers, and took steps to restore the independence of the judiciary. In contrast to the approach of the previous Rajapaksa government, it also initiated a new, more open dialogue with the international community, including human rights organisations, and signalled its willingness to address long-standing allegations of past human rights abuses and violations.⁷

33. There are reports that Tamils, particularly in the north and east, have continued to experience incidents of monitoring and harassment by the security forces.⁸ Similarly, 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 people associated with politically sensitive issues.⁹ Overall, however, the most recent information before me indicates an improvement in country conditions for Tamils although the government has been criticised for the slow rate of reform¹⁰ including the continuing displacement of Tamils from their land, restrictions on freedom of assembly, failure to implement transitional justice mechanisms and slow progress in investigating allegations of police and military misconduct¹¹, although this is attributed to huge backlogs and a lack of resources rather than lack of will.¹² There is, however, progress and the previous climate of fear no longer exists nor the same harassment.¹³
34. The country information indicates a change in the focus of the Sri Lankan authorities over the past years, focussing on identifying individuals perceived to be a threat to the State through having, or being perceived to have, a significant role in relation to post-conflict Tamil separatism and/or a renewal of hostilities in Sri Lanka.¹⁴ The *Prevention of Terrorism Act* (PTA) under which many Tamils were arbitrarily detained frequently for long periods without trial remains legally in force. Its operation, however, was suspended in late 2016 and it had not been used in 2017 to detain, charge or arrest any individual.¹⁵ There are still reports of torture occurring in Sri Lanka since the change of government, although DFAT is unable to verify allegations of torture in Sri Lanka in 2016 and 2017¹⁶ and assesses that irrespective of religion, ethnicity, geographic location, or other identity, Sri Lankans face a low risk of mistreatment

⁶ Department of Foreign Affairs and Trade (DFAT) "DFAT Country Information Report Sri Lanka" 23 May 2018, CIS7B839411064 at 3.48

⁷ UK Home Office "Country Policy and Information Note Sri Lanka: Tamil separatism" Version 5.0, 15 June 2017, OGD6E7028826

⁸ US Department of State "Country Reports on Human Rights Practices for 2016 Sri Lanka" 3 March 2017, OGD95BE926876

⁹ DFAT "DFAT Country Information Report Sri Lanka", 23 May 2018 CIS7B839411064 at 3.9

¹⁰ UK Home Office, "Report of a Home Office Fact-Finding Mission Sri Lanka: treatment of Tamils and people who have a real or perceived association with the former LTTE", 31 March 2017 OGD7C848D112 at 2.1.2

¹¹ Freedom House "Freedom in the World 2018 – Sri Lanka" 5 April 2018

¹² *ibid*

¹³ UK Home Office, "Report of a Home Office Fact-Finding Mission Sri Lanka: treatment of Tamils and people who have a real or perceived association with the former LTTE", 31 March 2017 OGD7C848D112 at 2.1.4

¹⁴ UK Home Office "Country Policy and Information Note Sri Lanka: Tamil separatism" Version 5.0, 15 June 2017, OGD6E7028826

¹⁵ DFAT "DFAT Cable response: UN Special Rapporteur (Ben Emmerson) on human rights and terrorism in Sri Lanka" 14 August 2017, CISED50AD5239

¹⁶ International Truth and Justice Project (ITJP) "Joseph Camp" 16 March 2017 CISED50AD3592; ITJP "Unstopped: 2016/17 Torture in Sri Lanka" 14 July 2017, CISED50AD4849; DFAT "DFAT Cable response: UN Special Rapporteur (Ben Emmerson) on human rights and terrorism in Sri Lanka" 14 August 2017 CISED50AD5239; Freedom House "Freedom in the World 2018 – Sri Lanka" 5 April 2018

that can amount to torture.¹⁷ Enforced disappearances, associated with the notorious so-called ‘white van abductions’ are mostly a thing of the past¹⁸ and the civilian authorities generally maintain effective control over the security forces although in 2017 there continued to be reports that police and security forces sometimes acted independently.¹⁹

35. The country information before me indicates that although some monitoring does still occur, overall the monitoring and harassment of Tamils in the north and east has significantly decreased and there have been considerable positive developments for Tamils politically. Tamils have a substantial level of political influence and their inclusion in political dialogue has increased since the change in government in 2015.²⁰ Freedom House, in a report provided to the delegate by the applicant’s representative states that Tamils report systematic discrimination in areas including government employment, university education and access to justice and that the status of Sinhala as the official language puts Tamils and other non-Sinhala speakers at a disadvantage.²¹ DFAT’s assessment is that monolingual Tamil speakers can have difficulty communicating with authorities but assesses that Sri Lankans of all backgrounds face a low risk of official or societal discrimination based on ethnicity, including in relation to access to education, employment or housing and that the limited Tamil appointments are a result of a number of factors including disrupted education because of the war and language constraints, a situation the government is attempting to address.²² DFAT’s 2018 report notes that recent local government elections saw former president Rajapaksa’s new party perform strongly and it has put the President under considerable pressure.²³ However, I consider the prospect of the former president returning to power and any possible change in the more positive environment for Tamils under the Sirisena government, speculative.
36. I note that in his entry interview, the applicant referred to experiencing problems from the SLN (beating, chased, nets cut) when he was out fishing. He did not repeat these claims in his SHEV statement and it was not an issue considered by the delegate but I note that in his SHEV interview he said that one of the reasons he went to work for the SLN was because they kept him like a slave and to protect himself, he had to work for them. The country information before me indicates that in many areas of the north, including parts of Jaffna where the applicant lived and worked, a special permit had to be obtained from the naval authorities to access coastal waters and fishermen had to submit their civil documentation on a daily basis when going out on the water,²⁴ and that the SLN tightly controlled access to fishing zones either on the basis of security concerns²⁵ or to further their own economic activities.²⁶ I consider this information, together with the overall monitoring, harassment, arrest or detention to which many Tamils were subject under the previous government²⁷, broadly consistent with the applicant’s experiences as a fisherman.

¹⁷ DFAT “DFAT Country Information Report Sri Lanka”, 23 May 2018 CIS7B839411064 at 4.19;

¹⁸ UK Home Office “Country Policy and Information Note Sri Lanka: Tamil separatism” Version 5.0, 15 June 2017, OGD95BE926876

¹⁹ US Department of State “Country Reports on Human Rights Practices for 2016 Sri Lanka” 3 March 2017, OGD95BE926876

²⁰ DFAT “DFAT Country Information Report Sri Lanka”, 23 May 2018 CIS7B839411064 at 3.5

²¹ Freedom House “Freedom in the World 2018 – Sri Lanka” 5 April 2018

²² DFAT “DFAT Country Information Report Sri Lanka”, 23 May 2018 CIS7B839411064 at 3.6

²³ Ibid at 2.18

²⁴ UN High Commissioner for Refugees (UNHCR) “Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka”, 21 December 2012 UNB0183EA8

²⁵ Austrian Centre for Country of Origin & Asylum Research and Documentation (ACCORD) “Sri Lanka: COI Compilation”, 31 December 2016, CIS38A80123251

²⁶ US Department of State “Country Reports on Human Rights Practices for 2016 Sri Lanka” 3 March 2017, OGD95BE926876

²⁷ DFAT “DFAT Country Information Report”, 24 January 2017, CISED50AD105 at 3.8

37. The applicant has only ever worked as a fisherman and I accept that if he returns to Sri Lanka he is likely to resume that work. It is not clear what the applicant meant by being kept “like a slave” but he did not suggest that he was unable to maintain and support himself through his work as a fisherman from leaving school until working for the SLN. His brother and father are also fishermen and the applicant has not claimed that they have encountered problems from the authorities which impact on their ability to earn a living and support the family. Furthermore, the country information indicates a positive shift in the nature of interactions between Tamils and the authorities since the change of government.²⁸ The applicant has not claimed that he would be unable to support himself (or his family) if he returns to Sri Lanka or that he would be otherwise unable to subsist and I am satisfied that there is not a real chance of serious harm on this basis.
38. In assessing whether the applicant faces a real chance of harm if he returns to Sri Lanka I have taken into account his personal circumstances and background and considered them against the country information before me. While there remains a potential for harm for those people viewed adversely by the authorities, particularly Tamils, the overall situation has changed, instances of mistreatment have dropped, and the focus of the government is away from the past and towards those who might seek to destabilise the unitary Sri Lankan state in future. The most recent country information before me indicates that unlike in the past, even those who have a previous connection with the LTTE are able to return to their communities without suffering ill-treatment; the police interest now, if any, is not in any previous involvement with the LTTE, but on whether the person has committed any criminal act such as using a forged identity to leave Sri Lanka.²⁹ The applicant does not fit this profile and the information before me does not support the conclusion that Tamils, young Tamil men from areas formerly controlled by the LTTE or even people with previous connections to the LTTE face a real chance of serious harm from the authorities or anybody else.
39. I have not accepted a number of the applicant’s claims and I do not accept that any suspicion attached to him personally or that he was of any adverse interest to the authorities at the time he left Sri Lanka. Although I accept that his brother was in the LTTE, I have not accepted that this resulted in the applicant being targeted for harm and there is no evidence before me that he has been involved in any activities or associations in Australia that might attract the interest of the Sri Lankan authorities on return. The country information indicates that monitoring and harassment in the north can be experienced by Tamils but this happens less frequently than before and I am not satisfied it amounts to serious harm. Nor am I satisfied that any discrimination the applicant may experience as a Tamil amounts to serious harm. Overall, I am not satisfied that there is a real chance that the applicant will be seriously harmed if he returns to Sri Lanka because he is a young Tamil male from a formerly LTTE controlled area, his family connection to the LTTE, his brother’s detention and escape/disappearance, because he looks like ND, his ethnicity and imputed political opinion, his occupation, or for any other reason or combination of reasons now or in the reasonably foreseeable future.

Returning asylum seeker

40. Returnees who depart Sri Lanka irregularly are generally considered to have committed an offence under the *Immigrants and Emigrants Act 1949* (the I&E Act).³⁰ I have found above that the applicant left Sri Lanka lawfully using his own genuine Sri Lankan passport. On that basis I am satisfied he is not at risk of prosecution for the offence of leaving Sri Lanka irregularly.

²⁸ Ibid at 3.9

²⁹ UK Home Office “Country Policy and Information Note Sri Lanka: Tamil separatism” Version 5.0, 15 June 2017, OG6E7028826 at 2.3.11

³⁰ DFAT “DFAT Country Information Report Sri Lanka”, 23 May 2018 CIS7B839411064 at 5.30

41. The applicant no longer has his passport and would be returning on a temporary travel document. DFAT advice is that, on arrival, returnees are subject to a series of investigative checks to confirm their identity and ascertain if someone was trying to conceal their identity due to a criminal or terrorist background or trying to avoid court orders or arrest warrants.³¹ All returnees are subject to these standard procedures regardless of ethnicity and religion; detainees are not subject to mistreatment during processing at the airport.³² Processing at the airport can take several hours due to administrative processes, staffing constraints, and interview lengths and because returnees are processed en masse, individuals cannot exit the airport until all returnees have been processed.³³
42. On the basis of the country information before me, it is likely the applicant will be questioned on return. But even if those background checks reveal his family links to the LTTE, I am not satisfied this would result in any suspicion over, or adverse interest in, him. Despite, on his evidence, those links being known, I have found that he was not personally under suspicion because he looks like ND or on his own account and the country information indicates that even those with a previous connection to the LTTE are not at risk of harm. As discussed above, I have some reservations about whether ND escaped or 'disappeared' while in custody and accordingly, whether he is still wanted or missing. However, I have not accepted that the applicant was questioned by the authorities about ND in the period after he claims ND went missing or that he was forced to leave Sri Lanka illegally because the authorities suspected him of being ND. I am satisfied that in the course of routine investigations, the applicant will be able to quickly establish that he has no relevant adverse profile, including for any activities conducted in Australia, and that there is not a real chance of him being harmed during that arrival process. I am not satisfied there is a real chance of the applicant being harmed because he has spent time away from Sri Lanka or sought asylum in Australia, or because of these matters together with his family links to the LTTE or his being a young Tamil male from the north.
43. Refugees and failed asylum seekers can face practical challenges to successful return to Sri Lanka and nearly half of returnees in the north had received a visit at their homes for a purpose other than registration.³⁴ However, the UNHCR interviewed refugee returnees in 2016, and only 0.3 per cent indicated they had any security concerns following their return.³⁵ Refugees and failed asylum seekers also reported social stigma from their communities upon return.³⁶ DFAT assesses that returnees may face some societal discrimination on return which may affect their ability to secure housing and employment.³⁷ Until coming to Australia the applicant worked as a fisherman in his own business, apart from a year working for the SLN. His family continues to live in [Town 1] and I am satisfied he will be able to re-establish himself in his home area without suffering harm in relation to either housing or employment. I accept it is possible the applicant may be monitored for a period and may experience some social stigma as a returning asylum seeker/refugee. However, I am not satisfied that a period of monitoring and some social stigma would amount to serious harm.
44. The country information indicates that being a returning asylum seeker or returnee from a western country will not itself result in harm nor does being of Tamil ethnicity. I find that the process of questioning and investigation itself does not amount to serious harm and

³¹ Ibid at 5.29

³² Ibid at 5.29

³³ Ibid at 5.28

³⁴ Ibid at 5.40

³⁵ Ibid at 5.41

³⁶ Ibid at 5.40

³⁷ Ibid at 5.42

considering his profile, I am satisfied the applicant is not at risk of being identified as a person of interest and subjected to serious harm, either during questioning at the airport or subsequently.

45. In considering his claims cumulatively, I have taken into consideration that he is a young Tamil male from a formerly LTTE controlled area, that he had a brother who was in the LTTE, his brother's detention and escape/disappearance, his resemblance to ND, his ethnicity and imputed political opinion, his occupation, and the fact that he will be returning as an asylum seeker who has spent some years in Australia. However, even considering all these personal circumstances together with the country information before me, I am not satisfied that there is a real chance of the applicant suffering serious harm for any of these reasons either on return or in the reasonably foreseeable future.

Refugee: conclusion

46. 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

47. 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

48. 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.

49. I have found the applicant to be generally not credible and I do not accept that, at the time he left Sri Lanka, he was a person of adverse interest to the authorities because of his brother who was in the LTTE and/or because they look alike. The country information indicates that he may experience some incidents of monitoring or harassment, and possibly some low-level discrimination/social stigma. I am satisfied, however, that there is not a real chance of him being harmed on the basis he is a young Tamil male from a formerly LTTE controlled area, his family relationship to his brother and his brother's detention and escape/disappearance, his occupation or because of any imputed political opinion on the basis of his ethnicity as being seen to oppose the government and support the LTTE. Nor am I satisfied there is a real chance of him being harmed because he claimed asylum in Australia

50. I note that the 'real risk' test imposes the same standard as the 'real chance' test.³⁸ On that basis, I am similarly not satisfied that any of the applicant's claims would give rise to a real risk of significant harm for the purpose of s.36(2)(aa) of the Act. I am not satisfied that any monitoring or harassment the applicant may face amounts to significant harm as defined in ss.36(2A) and 5(1) of the Act. Nor am I satisfied that there is a real risk of him facing discrimination or social stigma to a level that would amount to cruel or inhuman treatment or punishment, degrading treatment or punishment or any other form of significant harm.
51. I have also considered his claims cumulatively and have taken into consideration his personal circumstances and profile, together with the country information before me. Overall, I am not satisfied that any of his claims, even when taken together, mean that there is a real risk of significant harm within the meaning of ss.36(2A) and 5(1) now or in the reasonably foreseeable future if the applicant is returned to Sri Lanka.

Complementary protection: conclusion

52. 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.

³⁸ *MIAC v SZQRB* (2013) 210 FCR 505

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.