



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA19/06425

Date and time of decision: 2 April 2019 14:14:00
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) lodged an application for a Safe Haven Enterprise visa (SHEV) in May 2017. He claimed to fear persecution from Sri Lankan authorities because he is a Tamil male from the north, who will be imputed with being a supporter of the Liberation Tigers of Tamil Eelam (LTTE), and as a failed asylum seeker who departed Sri Lanka illegally.
2. On 26 February 2019 a delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the applicant a SHEV because the delegate found the applicant is not a person in respect of whom Australia has protection obligations.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act). No further information has been obtained or received.

Applicant's claims for protection

4. The applicant's claims can be summarised as follows:
 - In 2007 the LTTE wanted him to join them, however because he was an only child he was excused from joining, and given a letter from an LTTE commander to that effect.
 - After the war ended, he entered a displacement camp and the letter was discovered by the Sri Lankan Army (SLA). He was questioned on a number of occasions about the letter whilst in various camps, and believes Sri Lankan authorities suspected him of helping the LTTE.
 - [In] August 2012 the Criminal Investigation Department (CID) took him for questioning. He was interrogated about the letter, about whether he was an LTTE member, and was beaten. He denied he was ever an LTTE member. He was also asked about scars on his [body part], which were from a bike accident in about 2007, and accused of obtaining them from being involved in the war.
 - When the CID released him they threatened him and he was afraid he would be abducted, so he made plans to leave Sri Lanka with the help of a people smuggler.
 - The CID went searching for him at his mother's home in about 2013, and told his family he had to come back.
 - If he is returned to Sri Lanka he fears he will be taken into custody because he left Sri Lanka illegally, and that he may be killed if he is jailed.
 - He also fears harm as a Tamil male, and that the Sri Lankan government will falsely accuse him of being an LTTE member, and he will be beaten, interrogated, threatened, tortured or killed.

Refugee assessment

5. 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

6. 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.
7. The applicant has consistently claimed he is a Tamil who was born in the Kilinochchi District of the Northern Province of Sri Lanka in [year], and has provided a number of documents in support of his identity. There is no issue regarding the applicant’s identity. I accept he is of Tamil ethnicity, that he is a national of Sri Lanka from the Northern Province, and that Sri Lanka is the receiving country for the purposes of the Act.
8. The applicant has consistently claimed, and I accept, he is of Hindu faith. He did not claim to have suffered any harassment, discrimination or violence as a result of his religion or indicate he was unable to freely practise his religion whilst in Sri Lanka, or express any fear of harm on that basis if returned to Sri Lanka.
9. I accept the applicant’s consistent evidence regarding his early life in Sri Lanka. He was grown up in the Kilinochchi District of the Northern Province and, apart from periods spent in a number of camps for internally displaced persons (IDPs), always resided in the family home in that district in Sri Lanka. His father left the family in [year] and he does not know where his father is. He attended school in the Kilinochchi District [between specified years]. He worked with his [relative] [on farms] from [year] until September 2012 when he left for Australia, however he did not work during the time he was in the IDP camps. I also accept the applicant’s consistent evidence that he married his wife in 2007, and that they have one child together, born in [year].
10. The applicant claims that in 2007 the LTTE were forcibly recruiting people, and they wanted him to join. He described the LTTE having a policy of forcing one child from each family to join them, and that he was detained for several hours by the LTTE for this purpose, and only released after his mother intervened. He said his mother obtained a letter from an LTTE commander saying he was the only child at home and excusing him from joining the LTTE. He did not join the LTTE or do anything to assist them during the conflict. When the war ended, in May 2009, everyone was told to enter the IDP camp, and before he entered [a named]

camp the SLA discovered the letter in his backpack. He was questioned by the CID about why he had the letter, and he believes they thought he had the letter because he was helping the LTTE. In August 2009 the applicant was transferred to a different IDP camp, where he was questioned by three CID officers. One of the officers hit him, and he was released when his mother came and advised them he was not the LTTE member they were looking for. One week after being transferred to another camp, in April 2010, he was questioned by CID officers about the letter from the LTTE commander, and about being associated with the LTTE. The questioning went for about an hour, they accused him of lying, and told him he would be called for questioning again. One week later he was questioned again and asked who gave him the letter. The questioning went for about an hour and he was released.

11. Further, the applicant claims that [in] August 2012 the CID went to his home and took him into custody. He states this was a common occurrence at this time, as many Tamil males were being taken for questioning. A number of CID officers questioned him about the letter from the LTTE commander, they asked questions about the commander, and accused the applicant of being in the LTTE. As he was never an LTTE member he denied this. The officers also asked him about some scars on his [body part], which were from an accident when he fell off his bike in about 2007. They accused him of getting the scars from being involved in the war, and he denied this also. Some of the officers beat him, and he was released after several hours when his mother and wife visited him in custody, and his mother sought assistance from the International Committee of the Red Cross (ICRC). When he was released the CID said “we are releasing you, but we know how to deal with you”. At the time the police were abducting people and he was afraid this was a threat to harm or abduct him. He claims he developed back pain from the beating, but did not seek medical treatment after his release. Soon after his release he planned to leave Sri Lanka. His mother sold a piece of land and gave him the money for the journey.
12. The applicant’s evidence during the SHEV interview was consistent with the information provided with his SHEV application. He gave his evidence during the SHEV interview without hesitation, and I consider he did so in a manner suggesting he was recalling lived experience. His evidence is also supported by country information describing the LTTE practice of forcible and voluntary recruitment, and describing that hundreds of thousands of people being displaced during the long civil conflict, and regarding many Tamils, including civilians, and particularly in the north and east, reporting being monitored, harassed, arrested or detained by security forces during the conflict and under the Rajapaksa government, and security forces also imputed LTTE support based on ethnicity, as almost all LTTE members and supporters were Tamil.¹
13. Taking the applicant’s evidence and the country information into account, I consider it plausible, and I accept, that the applicant, as the only male, and only child in his family, was excused from joining the LTTE, and was given a letter to that effect, and that he was never an LTTE member or supporter. I also accept the letter was discovered by Sri Lankan authorities and he was detained and questioned by the CID on a number of occasions, whilst he was in various IDP camps and also on one occasion after his release from the IDP camp in August 2012, and that he was mistreated and threatened on some of those occasions. I accept the letter from the LTTE commander, and the applicant’s scars, may have raised some suspicion with Sri Lankan authorities regarding whether the applicant was an LTTE member or supporter, and whether he had been involved in the conflict. However, I consider it implausible that if the applicant were genuinely suspected of having connections to the LTTE he would have been released as a result of entreaties from either his mother, or the ICRC,

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

and I consider he was released because he was not of adverse interest to Sri Lankan authorities at that time.

14. During the SHEV interview the delegate asked the applicant if any of his family members were LTTE members, or associated with the LTTE, and the said his immediate family members were not, but some of his relatives had been with the organisation, and after they were detained they were killed. When asked who they were, he referred to a cousin, and said he died. There is nothing in the information before me to suggest the applicant was ever questioned about any family member's involvement with the LTTE, and the information provided by the applicant at the SHEV interview included no details regarding the profile of the person or persons who were killed, nor regarding when or how they died. The delegate specifically asked the applicant if he feared persecution in regard to the cousin who was a member of the LTTE, and the applicant said 'no, that is not the issue, the letter I am telling you about was the issue'. I find the applicant does not fear harm as a result of any family member's previous involvement with the LTTE.
15. Country information reports that towards the end of the civil conflict in May 2009, the government security forces arrested and detained a large number of LTTE members, most of whom were sent to government-run rehabilitation centres for rehabilitation programs that were typically for one year.² The 2010 Danish Immigration Service report indicates that the end of the conflict resulted in nearly 300,000 IDPs of which approximately 12,000 detainees with suspected LTTE links were screened out to rehabilitation camps in the North.³ The 2012 UNHCR guidelines assessed that a person's real or perceived links with the LTTE may have given rise to an international protection obligation at the time of publication. Taking into account the applicant's evidence overall, and the country information, I consider the treatment the applicant described from security forces in Sri Lanka was part of the troubling but routine treatment of Tamils at that time, rather than relating to any specific security threat he posed. Of note, the applicant was questioned on a number of occasions whilst in the IDP camps about any connection to the LTTE, but not detained for more than a few hours. I consider if he had genuinely been suspected of having links to the LTTE at that time he would have been sent to a rehabilitation camp. In addition, authorities in Sri Lanka had ample opportunity to detain, arrest and prosecute the applicant in relation to any offence he may have been suspected of after release from the IDP camp, in the approximately one and a half years he remained in Sri Lanka, but they did not. The failure to do so is indicative he did not have a profile of interest to authorities at that time, including as a result of any suspicion of LTTE involvement. I am not satisfied the applicant was of adverse interest to Sri Lankan authorities as a result of any LTTE links prior to his departure from Sri Lanka. I am prepared to accept the applicant had subjective fears for his safety as a result of his treatment by Sri Lankan authorities, including fearing abduction, and that he decided to leave Sri Lanka as a result.
16. The applicant claims the CID visited his mother's home, where his wife and child are living, once after he left Sri Lanka, in about 2013. In his statement of claims the applicant said the CID told his family he had to come back, and they said 'we will look after him', which was said as a threat to put him in custody or kill him. During the SHEV interview the applicant said the CID visited his family home in Sri Lanka once, his family told them he had gone overseas, and they said they would conduct enquiries when he returns. The CID has not attended his home since. Taking into account country information supports that Tamils in the north experience

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

³ Danish Immigration Service, "Human Rights and Security Issues concerning Tamils in Sri Lanka", 71, 1 October 2010, CIS19345, p 7 and 9

monitoring, and the applicant's own evidence that questioning of Tamil males was common at the time of this visit, it is plausible, and I accept, the CID attended the applicant's home as claimed. Of note, other than this visit, there have been no further visits to his family in Sri Lanka in the time the applicant has been in Australia, which is over six years. I do not accept this visit is indicative of the applicant having an adverse profile, and consider it resulted from the routine treatment of Tamils at that time.

17. The applicant claims to fear harm if returned to Sri Lanka because he is a Tamil male from the north of Sri Lanka, which was an area previously controlled by the LTTE, and that he will be imputed with a connection to the LTTE. In his statement of claims the applicant said Tamils, particularly Tamil men, are considered enemies by the government and the Sinhalese people. During the SHEV interview the delegate asked the applicant to provide further information about why he fears persecution for being a Tamil, and the applicant said there are ongoing problems in Sri Lanka for Tamils, as Tamils do not get any respect.
18. Country information reports that the situation for Tamils in Sri Lanka has changed significantly since the applicant left in 2012. Since Sirisena became President in 2015 there have been positive developments, and the overall situation for Tamils in Sri Lanka has improved. DFAT assesses the security situation in Sri Lanka is greatly improved since the conflict ended in May 2009, in particular in the north and east, and the Sri Lankan government exercises effective control over the entire country. Military involvement in civilian life has diminished, although military involvement in some civilian activities continues in the north. Monitoring and harassment of Tamils in day-to-day life has decreased significantly under the current government, however surveillance of Tamils in the north and east continues, particularly those associated with politically sensitive issues. Although the Sri Lankan Constitution provides that 'no citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any such grounds', ethnicity is a sensitive issue in Sri Lanka, and is a fundamental consideration in the reconciliation process to which the Sri Lankan government has committed to. Tamils now have a substantial level of political influence, and their inclusion in political dialogue has increased since the change of government in 2015. Tamil political parties are numerous, with the largest coalition of parties operation under the umbrella of the Tamil National Alliance.⁴ Symbolic changes have also contributed to a more positive outlook for reconciliation, such as the singing of the national anthem in Tamil as well as Sinhala at the 2016 Independence Day ceremony. DFAT 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. However, DFAT further assesses that societal discrimination on the basis of ethnicity can occur.⁵ Other than generally suggesting Tamils do not get any respect, the applicant provided no specific information about any discrimination he experienced in Sri Lanka. I accept as a Tamil from the north, the applicant may experience some societal discrimination, such as a lack of respect, however I am not satisfied such treatment would amount to serious harm, including a threat to life or liberty, or significant physical harassment or ill-treatment, or that his capacity to subsist will be threatened as a result, or that it otherwise may be considered serious harm. I am not satisfied the applicant has a well-founded fear of persecution for this reason.
19. During the civil war Tamils could be imputed with support for the LTTE as a consequence of their ethnicity.⁶ However, the 2017 UK Home Office report on Tamil separatism opines that a

⁴ DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064

⁵ DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105

⁶ DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064

person being of Tamil ethnicity would not in itself warrant international protection and neither, in general, would a person who evidences past membership or connection to the LTTE, unless they have or are perceived to have had a significant role in it, or if they are perceived to be active in post-conflict Tamil separatism and thus a threat to the state.⁷ 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.⁸ Of note, the applicant does not claim to have had any involvement with the LTTE, nor does he claim to have been involved in any political activity, either in Sri Lanka or in the diaspora. I have accepted the applicant was questioned about any LTTE involvement on a number of occasions by Sri Lankan authorities, however, the country information does not indicate that Tamils are currently at risk of persecution in Sri Lanka purely on account of their race, or 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.

20. Although virtually everyone agrees there has been progress towards alleviating the climate of fear in Sri Lanka, opinions differ markedly about the extent of that progress.⁹ The UN Special Rapporteur on torture, in his December 2016 report on Sri Lanka, noted the fragility of the reform process 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.¹⁰ 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’. However, the Special Rapporteur’s statement is inconsistent with DFAT’s assessment of the risk that a person of Tamil origin with a low level and/or indirect association would not likely be detained under the Prevention of Terrorism Act (PTA) on return to Sri Lanka.¹¹
21. DFAT 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 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

⁷ UK Home Office, "Country Policy and Information Note. Sri Lanka: Tamil separatism. Version 5.0", 15 June 2017, OG6E7028826

⁸ DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064

⁹ UK Home Office, "Country Policy and Information Note. Sri Lanka: Tamil separatism. Version 5.0", 15 June 2017, OG6E7028826

¹⁰ 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

¹¹ DFAT, "DFAT Cable response: UN Special Rapporteur (Ben Emmerson) on human rights and terrorism in Sri Lanka", 14 August 2017, CISED50AD5239

under the PTA, however DFAT cannot verify this claim.¹² 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 do not accept the applicant has a profile such that he would be at a real risk of being imputed with an LTTE connection, or be at risk of detention under the PTA.

22. The 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.¹³ 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.¹⁴
23. The applicant has indicated he fears being abducted if returned to Sri Lanka. DFAT references the 2015 report by the Office of the United Nations High Commissioner for Human Rights Investigation of Sri Lanka (OISL), covering the period 2002 to 2011, and which found frequent occurrences of extrajudicial killings, disappearances and kidnappings for ransom during the conflict, particularly in the north and east. The report largely attributed these to Sri Lankan security forces, the LTTE and paramilitary groups. The number of incidents of extrajudicial killings, disappearances and abductions for ransom, including incidents of violence involving former LTTE members, has significantly reduced since the end of the conflict.¹⁵ The country information does not highlight current issues of concern in relation to groups aligned with the government, for example paramilitary groups, are targeting individuals for harm for connections with the LTTE.¹⁶ 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 more prevalent in questioning of suspected LTTE members or supporters.¹⁷ 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.¹⁸

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

¹³ 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

¹⁴ ITJP, "Unstopped: 2016/17 Torture in Sri Lanka", 26 July 2017, CISED50AD4849

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

¹⁶ DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064; UK Home Office, "Country Policy and Information Note. Sri Lanka: Tamil separatism. Version 5.0", 15 June 2017, OG6E7028826; US Department of State, 'Sri Lanka 2017 Human Rights Report', 20 April 2018, OGD95BE927333

¹⁷ UK Home Office, "Country Policy and Information Note. Sri Lanka: Tamil separatism. Version 5.0", 15 June 2017, OG6E7028826

¹⁸ DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064

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.

24. I have accepted the applicant has some scars on his [body part], and that the CID questioned him about whether they were conflict-related. I will consider whether this would add to his risk on return to Sri Lanka. Country information confirms tens of thousands of people, both combatants and civilians, were killed, and many more were wounded during the conflict.¹⁹ A 2012 UK Home Office report considered information on the treatment of returnees having visible scars. Credible sources reported that a person with a limp or a scar may be asked to explain how they got the scar or injury, but that the presence of scarring is not determinative of an adverse profile.²⁰ The information in the UK Home Office report refers to reports released during 2012. The more recent country information relating to the situation for Tamils and those at risk does not indicate that people have been detained due to conflict-related scarring.²¹ I consider if the applicant's injuries are visible he may be asked to explain how he got them, however, given the large number of people injured during the conflict, I do not consider the evidence supports that on return to Sri Lanka the applicant's scars will lead to adverse attention from Sri Lankan authorities, or that he is at risk of harm for that reason.
25. Considering the applicant's circumstances and profile, in the context of the country information, I am not satisfied there is a real chance the applicant would be at risk of harm on return to Sri Lanka, now or in the reasonably foreseeable future, as a Tamil male with scarring, who resided in an area formerly under LTTE control, and who had no involvement with the LTTE; for any imputed membership of or political opinion in support of the LTTE; as a result of being previously detained and questioned by Sri Lankan authorities on a number of occasions, and being suspected of LTTE involvement, but released without being charged with an offence; and as a person who has not indicated he has participated in Tamil diaspora activities in Australia, or any activities in Sri Lanka or Australia that would be considered to constitute post-conflict Tamil separatism on return to Sri Lanka, or indicated that he would do so on return to Sri Lanka.
26. The applicant consistently described leaving Sri Lanka illegally by boat in September 2012, without a passport, and with the assistance of a people smuggler. I accept that evidence. He claims to fear harm as a result of his illegal departure. I consider it likely on return the applicant would be identified by Sri Lankan authorities as someone who departed Sri Lanka illegally, and who has lived overseas and is returning as a failed asylum seeker.
27. The applicant originates from the Northern Province, and always lived there whilst in Sri Lanka. I consider it is very likely he would return to the Northern Province of Sri Lanka, where his wife, child, and mother 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. I consider the applicant will have stable accommodation with his family. 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

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

²⁰ UK Home Office, "Sri Lanka – Bulletin: Treatment of Returns", 1 December 2012, CIS28615

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

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 asylum seekers reported social stigma from their communities upon return.²² It is possible the applicant, as a returning asylum seeker, may be monitored for a period of time on return, and experience some social stigma within his community as a failed asylum seeker and as a person who has not lived in Sri Lanka for a long time. However, I am not satisfied this treatment, if it does occur, would amount to serious harm in this case. I do not accept the challenges the applicant may face in terms of re-establishing himself, finding employment, facing a period of surveillance, or any social stigma he may experience as a returning asylum seeker from Australia, constitutes serious harm. There is nothing in the information before me to support the applicant's profile would be heightened simply as a result of him having spent time overseas, and I do not accept he is at risk of harm for that reason.

28. 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. 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.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

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

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

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 that he will be subjected to the processes and penalties imposed under the I&E Act described above, including a fine, and associated process costs. 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, being laws of general application that apply to all Sri Lankans equally. I am not satisfied such treatment amounts to systematic and discriminatory conduct. I am also not satisfied on the evidence before me that the treatment amounts to serious harm for this applicant. 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 individually, 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 societal discrimination as a Tamil, and some social stigma and monitoring for a period 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, including being detained for up to two days during investigations and waiting to be taken before a court and receiving a fine (as outlined above). However, I am not satisfied the treatment of the applicant on return would amount

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

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. I am also not satisfied that the processes or penalties, or the societal discrimination, social stigma or monitoring, the applicant may be subject to amounts to pain or suffering that is 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. I do not accept the treatment the applicant may face on return, including ethnically based social discrimination, or as a result of him being a returning asylum seeker and a person who departed illegally, amounts to significant harm for the applicant for the purposes of s.36(2A) whether considered separately, or together.

36. I have otherwise found there is not a real chance the applicant will face any harm on return to Sri Lanka because he is a Tamil male who originated from and resided in a former LTTE-controlled area of the Northern Province, or for any actual or imputed political opinion in support of the LTTE, as a result of any prior interaction with Sri Lankan authorities, or because of his scars. 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

37. 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.