



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA20/08737

Date and time of decision: 2 December 2020 10:41:00
J Maclean, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Tamil who was born in the Eastern Province of Sri Lanka. In June 2017 he lodged a valid application for a Safe Haven Enterprise Visa (SHEV). On 28 October 2020 a delegate of the Minister for Immigration (the delegate) refused to grant the visa because the delegate found the applicant is not a person in respect of whom Australia has protection obligations.

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). No further information has been obtained or received.

Applicant's claims for protection

3. The applicant's claims can be summarised as follows:
 - He is a Christian Tamil who was born in [year] in Trincomalee District, Sri Lanka, and is unmarried and does not have any children.
 - His father was in the Eelam People's Revolutionary Liberation Front (EPRLF) until the Liberation Tigers of Tamil Eelam (LTTE) eliminated all other rebel groups. He believes his father left the EPRLF at that point.
 - After leaving the EPRLF his father was harassed and interrogated by the Sri Lankan Army (SLA) about the location of weapons. He was beaten and arrested once, and during one interrogation, when the applicant was about [age] years old, he was accidentally hit on the head with the butt of a gun when SLA officers were hitting his father.
 - In about 2005 his parents separated, and his father moved out, after which the SLA came to the house a few times enquiring about his father. They left because his mother told them she did not know where he is.
 - In about 2005, along with everyone else in the village, he received self-defence training from the LTTE. The purpose of this was for Tamil people to know how to protect themselves in case of an SLA attack.
 - The LTTE then tried to recruit him. His mother did not want him to join because he was the only son and she was now a single mother. From 2005 his mother enrolled him in a different school and he lived at the school boarding house under the care of the 'Father'.
 - He experienced discrimination and harassment in Sri Lanka.
 - In about 2006 the LTTE bombed an SLA bus near the boarding house whilst he was on the street with friends. The SLA threatened to detain them if they did not return to their accommodation.
 - He told his mother about the incident. She was very worried his life would be impacted by the ongoing conflict and decided it would be safer for the family to seek refuge in India.
 - His mother organised for he and his [specified family members] to go to India with their grandmother, with his mother following later.

- In India he lived as a refugee in refugee camps, and worked in labouring jobs. He always had problems with the police and the Q Branch, when he returned to the camp after the 6 PM curfew for refugees.
- In 2012 he returned to the camp from work at night and was arrested under suspicion by the Tamil Nadu police. He was assaulted and interrogated but released the next morning without charge.
- He arrived in Australia in May 2013, travelling by boat from India.
- If he is returned to Sri Lanka he fears he will be seriously harmed by Sri Lankan authorities, such as the SLA and Criminal Investigation Department (CID), because of his ethnicity as a Tamil person, his imputed political opinion as an LTTE supporter, and imputed political opinion as a person against the Sri Lankan government due to his father's known involvement in the EPRLF, because he is a failed asylum seeker who left Sri Lanka illegally and lived in India for a number of years, and as a result of the 2014 departmental data breach.

Refugee assessment

4. 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

5. 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.

Background and identity

6. The applicant claims he is a Tamil who was born in Trincomalee District in the Eastern Province of Sri Lanka in [year]. Documentary evidence has been provided to support his identity. I accept his identity is as claimed, that he is a national of Sri Lanka, and Sri Lanka is the receiving country for the purposes of the Act. I also accept he is of Tamil ethnicity.

7. The applicant has consistently claimed he is a Christian, and I accept that to be the case. He has not claimed he was ever prevented from practising his religion in Sri Lanka, that he was harmed for doing so, or that he has any fear of harm on return to Sri Lanka for that reason.
8. I accept the applicant's broadly consistent evidence regarding his early life in Sri Lanka and his family background. With the exception of a period of time in 2005/06 when he resided in a hostel to attend school, he always lived in the family home in Trincomalee, Eastern Province, Sri Lanka. He attended school in Trincomalee until [grade], after which he left Sri Lanka. He has [specified family members]. His parents separated in about 2005, and his father moved out of the family home. He has not had any contact with his father since that time.

Events in Sri Lanka and India

9. In his statement of claims the applicant states that Trincomalee was under the control of the SLA with the existence of resistance movements such as the EPRLF, which his father was a member of until the LTTE eliminated all other rebel groups. During the SHEV interview, when asked what movement his father was involved with, initially the applicant appeared to refer to 'ENDLF'. The delegate noted his statement of claims referred to the EPRLF, and the applicant suggested that must be correct, that there were many movements, and he must be confused about that. He also went on to suggest that he does not want to relive the bad experiences of the past, and finds it difficult to recollect those memories. The applicant was unable to provide any details about how long his father was involved with the group, what his involvement was, and when he left the group. When asked his father's reasons for leaving the group, he said at the time he was [age range] years old, and his parents did not discuss such details with him, so does not have much detail about that.
10. The applicant claims after his father left the EPRLF the SLA came to the house and interrogated him about the location of weapons. His father was beaten and arrested once, and on one occasion when the SLA were hitting his father the applicant was hit on the head with the butt of a gun and sustained [an injury]. In his statement of claims the applicant indicates this injury occurred when he was about [age] years old, which would be about 2004. However, at the SHEV interview he said he was probably [younger age range] at the time, which would be between about 2001 to 2003. The applicant appeared to suggest his father may have been arrested or questioned on other occasions when the applicant was not at home.
11. Country information describes the EPRLF as one of a number of paramilitary groups that previously existed in Sri Lanka, and that these groups split into many different groups, and it was difficult to name them or determine their affiliation.¹ DFAT reports that a number of militant groups emerged to advance the cause of Tamil statehood, the most prominent being the LTTE, which established and maintained de facto control of Tamil-populated areas in the north and east, and gained notoriety for its recruitment of children. Many Tamils, particularly in the north and east, reported being monitored, harassed, arrested or detained by security forces during the war, which started in 1983 and ended in May 2009. While LTTE members and supporters were almost all Tamil, security forces also imputed LTTE support based on ethnicity, and emergency regulations were, at times, applied in a discriminatory manner.²
12. In the context of the country information, I can accept the applicant's father was a member of a Tamil paramilitary group, namely the EPRLF, but that he left the group before 2005. At the SHEV interview the applicant said he had provided his evidence to the best of his knowledge,

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

² DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

and asked the delegate to 'pardon him' if he had 'missed some details or given a wrong month', and also suggested he did not want to recollect those past memories. Given the applicant's young age at the time of his father's involvement, the traumatic nature of some of the memories surrounding that issue, and that it has been a number of years since the events occurred, I accept he may have some difficulty providing a detailed account, and accurately recalling dates. Nevertheless, I can accept the incidents involving the SLA occurred, including the applicant's father being arrested, interrogated and assaulted, on one or more occasions. I also accept in about 2003 the applicant was injured when his father was beaten, and that he has [an injury] as a result. During his Arrival interview the applicant said the SLA were giving problems to everyone, which accords with the country information referred to above, that harassment and monitoring of Tamils was common.

13. Taking into account that the interest in the applicant's father did not start until after he left the EPRLF, and I consider if Sri Lankan authorities had been aware of his father's involvement with the EPRLF or similar group they would not have released him when he was arrested or interrogated, but rather detained and prosecuted him, I am not satisfied Sri Lankan authorities were aware of that involvement, or that the interest in the applicant's father resulted because of that involvement, but rather that it resulted from the routine but troubling treatment of Tamils generally at the time.
14. The applicant claims his parents separated sometime after the incident when he was injured. In his statement of claims he indicates they separated in about 2005, and he has not had contact with his father since that time. At the SHEV interview he said his parents separated about a year or two after the incident, he last had contact with his father when he was about [age], and neither he or his family members are in contact with him. I accept the applicant's broadly consistent evidence on these issues.
15. The applicant's evidence about whether the SLA or Sri Lankan authorities visited the applicant's house after his parents separated is not consistent. In his statement of claims he refers to the army coming to the house a few times to inquire about his father, but they left because his mother told them she does not know where he is. However, at the SHEV interview when asked if authorities or the SLA came back after his parents separated he answered 'No'. Despite the inconsistency, I have accepted authorities visited the home to question the applicant's father, and I consider it is not implausible they may have returned to do so again, being unaware of the separation. Notably, the applicant's statement of claims refers to the SLA coming to the house a 'few times', and there is no suggestion such visits were frequent or ongoing, or that he or any family member was harmed during the enquiries. I consider the interest in the applicant's father was for the same reason as previously, that is part of the routine treatment of Tamils at that time.
16. Even if I am wrong and Sri Lankan authorities were aware of the applicant's father's involvement with the EPRLF, and that was the reason for their interest in him, the involvement with the EPRLF ended over 15 years ago, and the interest in the applicant's father ceased shortly after he separated from his wife and left the family home. The applicant has not indicated he or any other family member were questioned about his father's involvement with the EPRLF while they were in Sri Lanka. During the SHEV interview when asked if anything significant had happened to his mother or sister since they moved back to Sri Lanka, and he said they have not had any problems, and there is no evidence before me indicating they have been of interest or questioned about his father's whereabouts or involvement with the EPRLF. I am not satisfied the applicant would be of interest on return to Sri Lanka because of his father's involvement with the EPRLF, or that he would be imputed with an anti-government opinion for that reason.

17. I accept the applicant's broadly consistent evidence that in about 2005, when he was about [age range], he received self-defence training from the LTTE, which almost everyone in the village underwent. During the SHEV interview he said he attended the training because he was the only male in the family and it was his responsibility to protect the family, but that he stopped the training half-way through. He said the training was given so Tamil people knew how to protect themselves and the village if someone came to attack or there was an air raid, it did not involve using weapons, but a 'baton pole' was used, pretending it was a weapon. He also suggested his mother was worried the LTTE would try to take him because he had participated in basic self-defence exercises, and this was the reason she decided he should leave Sri Lanka. During the SHEV interview the applicant was asked if the training he received from the LTTE would make him of interest to Sri Lankan authorities, and he said there is 'no chance the army knows about this', but that all Tamils were suspected of supporting the LTTE, and especially in the war areas people were given basic training to protect themselves.
18. Country information reports the majority-Tamil civilian populations of the areas controlled by the LTTE, including areas in the east, were required to interact with the LTTE as a matter of course, and there was voluntary and forced recruitment to the LTTE, including of children.³ The applicant has consistently claimed that the LTTE attempted to recruit him, and because his mother did not want that to happen she enrolled him in a different school in Trincomalee, and from 2005 he lived at a boarding house or hostel, near the school, which was under the care of the 'Fathers', who were principals at various schools. Taking the country information and the applicant's broadly consistent evidence into account, I can accept there were concerns the applicant may be recruited by the LTTE, and this was the reason he changed schools, and formed at least part of the reason for the applicant later leaving Sri Lanka. However, I consider the training the applicant attended was basic in nature, and of a type routinely provided by the LTTE to villagers, and even if Sri Lankan authorities assumed he had attended such training, I am not satisfied this would heighten his profile, or that he would be of interest on return for having participated in the training, even when considered in the context of his return after having been in India and Australia for a period of time.
19. The applicant has provided broadly consistent evidence about an incident in about 2006, when the LTTE bombed an SLA bus near the hostel, and many SLA personnel were killed. At the SHEV interview he described the SLA opening fire on everyone after the blast, the hostel warden telling them to lie down on the floor, and the SLA searching the building and surrounding houses, and threatening them not to stay in the area. When he told his mother about this she was worried for his safety and decided the family should go to India. The applicant travelled to India with his [specified family members], and his mother followed later after attending to some financial matters. I accept the applicant's evidence on these issues, including that the incident occurred, and it formed at least part of the reason for the applicant departing Sri Lanka with his family.
20. The delegate questioned the applicant about his statement of claims referring to experiencing discrimination and harassment in Sri Lanka. He said when he and other students were travelling to school they needed to pass through Sinhalese areas and were harassed by Sinhalese people, who called them LTTE or 'Tigers', and sometimes they were pushed off their bikes. He claims they were harassed because they are Tamil. He went on to say that the people who harassed him wore civilian or casual clothing, so he did not know if they were members of government forces or civilians. Country information supports that LTTE support was imputed on the basis

³ DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

of ethnicity, and I can accept the applicant experienced the claimed harassment from people in civilian clothes.

21. The applicant has consistently claimed that he has never held a Sri Lankan passport, and that he left Sri Lanka illegally by boat in 2006 and went to India with his [specified family members], and his mother followed them later. Sri Lankan Refugee Identity Cards from two refugee camps, issued by the Government of Tamil Nadu (and English translations), have been provided to support this claim. The document shows the applicant's grandmother as the head of the family, and includes the applicant and his [specified] family members. I accept the applicant's evidence on these issues.
22. The applicant has also been consistent in describing the difficulties he encountered in India. This includes not having citizenship or employment opportunities there, poor conditions in the three refugee camps he lived in from 2006 until 2013, lack of basic facilities such as water or sanitation, no education opportunities, and tight control of entry to and exit from the camps. He claims it was also difficult to find work as a refugee, and when he got jobs he made the most of the opportunity, working late in the night. Refugees living in camps had to return to the camp by 6 PM, and he had problems with the Police and Q Branch when he returned to the camp late at night, including being harassed. On a number of occasions he was detained by authorities overnight, during which he was assaulted and interrogated, and released without charge the next morning. In his statement of claims he said this occurred because 'lots of thieves and murderers are around at night'. During the SHEV interview the applicant said the Indian government had recognised them as refugees, and given them a refugee card.
23. I can accept the applicant and his family were recognised as refugees in India, however I consider that has no material bearing on the current decision, which must be made taking into account the material before me, and in reference to return to Sri Lanka. I can also accept that conditions in the refugee camps the applicant lived in were difficult and there were restrictions on movement, that he was harassed, detained and mistreated on a number of occasions, and that these factors were at least part of the reason he decided to leave India by boat and travel to Australia.
24. The applicant provided broadly consistent evidence regarding the present location of the family members who travelled to India. He said his [specified family members] remain in India, and that [one] sister had married and returned to Sri Lanka in about 2012 or 2013. I accept that evidence. With regard to his mother, in his statement of claims, dated 22 June 2017, he said his mother returned to Sri Lanka and lives in Trincomalee, but did not specify when that occurred. During the SHEV interview, in October 2020, he said his mother returned to Sri Lanka about a year ago, and she lives with his sister and his sister's husband in his brother-in-law's house in Trincomalee. I accept the applicant's mother currently lives in Sri Lanka with her daughter. Given the applicant reported his mother had returned to Sri Lanka in his June 2017 statement, and that the applicant suggested during the SHEV interview he had difficulty recalling dates, I consider it most likely she returned at an earlier date than noted during the SHEV interview. I find that the applicant's mother returned to Sri Lanka prior to [June] 2017.
25. Considering the above findings, and noting that other than his father being questioned, the applicant has not indicated he or any other family member were ever questioned about, or of interest to authorities because of, his father's involvement in the EPRLF, or that he or any family member were ever questioned about whether he had any involvement himself with any group, including the EPRLF or the LTTE, or about having attended self-defence training, that his family members who have returned to Sri Lanka have not had any problems, which I consider supports that neither the applicant or his father are presently persons of interest, and that I

consider the harassment and threats the applicant was subject to were part of the then routine treatment of Tamils in the north and east, I am not satisfied the applicant was of adverse interest to Sri Lankan authorities or any other group or person at the time he departed Sri Lanka in 2006.

Tamil ethnicity and imputed political opinion

26. The applicant claims to fear harm from Sri Lankan authorities, such as the SLA and CID, if returned to Sri Lanka, including arrest, detention, and abuse while detained, because of his Tamil ethnicity, his imputed political opinion as an LTTE supporter, and as a person against the Sri Lankan government due to his father's involvement in the EPRLF, and his own participation in self-defence training.
27. During the civil conflict in Sri Lanka, and for several years after it ended in May 2009, more Tamils were targeted by Sri Lankan authorities than any other ethnic group. While LTTE members and supporters were targeted, there was also widespread, systematic, and discriminatory harm and mistreatment of Tamils with no connection to the LTTE, but who lived in areas formerly controlled by the LTTE during the civil war, in the north and east of the country, with LTTE support at times imputed on the basis of ethnicity.⁴
28. The LTTE were comprehensively defeated in 2009, however both DFAT and the UK Home Office confirm the Sri Lankan government remains sensitive to the potential re-emergence of the LTTE, and maintains sophisticated intelligence on former LTTE members and supporters. In contrast to their prior focus on identifying anyone with real or perceived LTTE links, the Sri Lankan government's present objective is to identify those who pose a threat to the government or a unified Sri Lanka, through involvement with Tamil separatist activities in the country or through links to the Tamil Diaspora.⁵
29. The situation has improved generally for Tamils since the end of the conflict. The UK Home Office and DFAT have confirmed the UNHCR position that simply being of Tamil ethnicity, or a Tamil from an area formerly under LTTE control, no longer gives rise to a need for international protection, the rationale being that almost every Tamil who resided in those areas during the conflict had some sort of connection with the LTTE.⁶ The country information does not indicate 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, marital status, or place of origin.
30. DFAT reports official and societal discrimination on the basis of Tamil ethnicity in Sri Lanka is low. There are no official laws or policies that discriminate on the basis of ethnicity or language, which includes education, employment or access to housing, and laws and policies are generally implemented without discrimination. Although some monitoring still occurs, particularly for those associated with politically sensitive issues, country information indicates that monitoring and harassment of Tamils in the north and east decreased significantly under the Sirisena government, and the situation for Tamils generally has substantially improved since the applicant left Sri Lanka in 2006.⁷ The applicant has not indicated he intends to participate in any politically-sensitive activities on return to Sri Lanka, and I am not satisfied he

⁴ DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

⁵ 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', 04 November 2019, 20191104135244

⁶ 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', 04 November 2019, 20191104135244

⁷ DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

would not do so. There is nothing in the information before me to suggest the applicant's family members presently residing in Sri Lanka are experiencing official or societal discrimination. I consider it highly likely he will return to live with his family in the Eastern Province, and I find that he will. I accept it is possible, as a Tamil returning to the Eastern Province, he may experience monitoring, and some societal or official discrimination, albeit a low risk. I am not satisfied this would constitute serious harm for this applicant, whether considered individually or cumulatively.⁸

31. DFAT reports the security situation in Sri Lanka, particularly in the north and east, has improved significantly since the end of the war in 2009. There was an increase in security activity, including the use of roadblocks, security checkpoints and increased detention powers for the police and military, following the Easter 2019 bombings. However, such checkpoints have since been removed, the emergency regulations which gave increased detention powers have lapsed, and the heightened security posture in the north has subsequently eased.⁹
32. During the SHEV interview the applicant asserted that anything could happen if he returned to Sri Lanka, that the 'current situation is quite worse and we do not know how the government is reacting to those people who are returning' and that he does not have 'much updates about the current situation' but he still fears returning. Although the applicant does not explicitly state the source of his fear, it appears he was alluding to the return of a Rajapaksa government. Gotabaya Rajapaksa was elected president on 16 November 2019.¹⁰ Gotabaya is a former Defence Secretary, and brother of ex-President Mahinda Rajapaksa, who served as president from 2005 to 2015. Prior to the election, local sources, Tamil and non-Tamil, expressed concern to DFAT that the human rights improvements achieved since 2015, including in relation to freedom of expression, could be reversed if Rajapaksa or an individual close to him returned to power.¹¹ Notwithstanding those concerns, on the information before me it is speculative to suggest the change in government, has or will result in a changed attitude by the government towards the Tamil population, that it has or will lead to a deterioration of conditions for Tamils in Sri Lanka, or that the risk for people with the applicant's profile is increased. Although the DFAT report was prepared just prior to the Presidential election, I am satisfied the assessments and conclusions in the DFAT report published on 4 November 2019 remain valid, including in relation to the general country conditions, and the improvements in conditions for Tamils.
33. I acknowledge there have been reports of previous and continuing human rights violations in Sri Lanka, including torture against suspects, some which occurred since the change of government in 2015.¹² Although the number of torture complaints has greatly reduced since 2015, new cases of Tamil victims continue to emerge and the police reportedly often continue to resort to violence and excessive force.¹³ DFAT assesses that the risk of torture perpetrated by either military, intelligence or police forces has decreased since the end of the war and is no longer state-sponsored, Sri Lankans face a low risk of mistreatment on a day-to-day basis, and Sri Lankans face a low risk of torture overall.¹⁴

⁸ DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

⁹ DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

¹⁰ US Department of State, 'Country Reports on Human Rights Practices for 2019 - Sri Lanka', 11 March 2020, 20200312151418

¹¹ DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

¹² ITJP, 'Silenced: survivors of torture and sexual violence in 2015', 7 January 2016, CIS38A801275; Freedom from Torture, 'Sri Lanka - Update on torture since 2009', 6 May 2016, CIS38A8012881; ITJP, 'Unstopped: 2016/17 Torture In Sri Lanka', 14 July 2017, CISED50AD4849; DFAT, 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244

¹³ UK Home Office, 'Country Policy and Information Note. Sri Lanka: Tamil separatism. Version 5.0', 15 June 2017, OG6E7028826

¹⁴DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

34. I am satisfied conditions in Sri Lanka for Tamils has significantly improved since the applicant departed, and the risk of mistreatment from security forces has also decreased since the end of the conflict. I accept that serious mistreatment of some Tamils is an ongoing issue in Sri Lanka, however the weight of evidence indicates that such risk is significantly reduced, and the chance of such treatment for merely being a Tamil, or a young Tamil male from the Eastern Province, and for a person with the applicant's experiences and profile, is remote.
35. I have found that the applicant was not of interest to Sri Lankan authorities whilst he was in Sri Lanka. The delegate asked the applicant if he had done anything that would bring him to the negative attention of Sri Lankan authorities, and he said he was not involved in any such activities. He was also specifically asked if he had done anything to bring himself to the attention of Sri Lankan authorities since being in Australia, and he said 'No'. I am not satisfied the applicant has engaged in Tamil separatist activities or publicly expressed any anti-government opinion, either in Sri Lanka or overseas, such that he would be imputed with a political opinion against the government, or in support of the LTTE or any other paramilitary group, including the EPRLF, or be of interest to Sri Lankan authorities or any other group for that reason on return. I am similarly not satisfied he would be suspected of involvement with anti-government activities, or be imputed with a pro-LTTE opinion, simply because he is a young Tamil male who originates from the Eastern Province, or because of his father's involvement with the EPRLF that ended many years ago, or that he would be harmed for those reasons. Other than attending self-defence training with the LTTE, and his father's involvement with the EPRLF, the applicant did not indicate he or any family member had any involvement with the LTTE or any other militia group, and I am not satisfied Sri Lankan authorities would suspect him of trying to revive the LTTE or another Tamil rebel group, even considering that he travelled to India after receiving self-defence training in Sri Lanka, and that he resided in India for six years before going to Australia. I am not satisfied the applicant has a profile such that he would be arrested and detained on return to Sri Lanka, such that he would be subject to mistreatment or torture during detention.
36. I am not satisfied the applicant faces a real chance of harm, now or in the reasonably foreseeable future, for any of the reasons claimed, whether these factors are considered separately or together.

Returning asylum seeker, illegal departure from Sri Lanka, and data breach

37. The applicant claims to fear harm on return to Sri Lanka as a failed asylum seeker who left Sri Lanka illegally and lived in India for a number of years. I have accepted the applicant left Sri Lanka illegally by boat in 2006, without using a passport. Sri Lankans without passports can re-enter the country on temporary travel documents.¹⁵ I consider it highly likely as a result of the manner of his return, using such documents, the applicants will be identified as asylum seekers returning or arriving from Australia.
38. During the SHEV interview the applicant also suggested he may face problems from Sri Lankan authorities on return because his information was released in 2014, and Sri Lankan authorities would have gathered that information. The delegate's decision notes the applicant was affected by the inadvertent departmental data breach in which certain personal details, including his name, date of birth, nationality, gender, and details of when and where he was detained, and the reason for that detention, were publicly available for short time on the Department's website in February 2014. The applicant was notified in March 2014 of the

¹⁵ DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

possibility that his personal data may have been accessed by unauthorised parties via the department's website.

39. I accept the applicant was subject to the data breach, and it is possible his information was accessed, including by Sri Lankan authorities. That information would have revealed no more than that he had been in immigration detention in Australia, and by inference that he sought asylum in Australia, which will be apparent in any case as a result of the manner of his return to Sri Lanka using temporary travel documents, and which, for reasons discussed below, I do not accept will give rise to a real chance of serious harm. I am not satisfied the applicant faces a real chance of any harm on return to Sri Lanka as a result of the data breach.
40. DFAT reports that for persons arriving in Sri Lanka travelling on temporary travel documents, as would be the case for the applicant, police undertake an investigative process to confirm identity. This would identify someone trying to conceal a criminal or terrorist background, or trying to avoid court orders or arrest warrants. I do not consider the applicant holds one of these profiles of interest. The process often involves interviewing returning passengers, contacting police in their claimed hometown, contacting claimed neighbours and family, and checking criminal and court records. All returnees are subject to these standard procedures, regardless of ethnicity and religion.¹⁶
41. Where an illegal departure is suspected returnees can be charged under the Immigrants and Emigrants Act (I&E Act). As part of this process, most returnees will be fingerprinted, photographed, and have a statement taken by the police. At the earliest available opportunity after investigations are completed, police transport individuals charged with departing Sri Lanka illegally to the closest Magistrate's Court. The Court then makes a determination as to the next steps for each individual. Should a magistrate not be available, for example because of a weekend or public holiday, those charged may be detained for up to two days in an airport holding cell. The information before me does not indicate returnees are subject to mistreatment at the airport, and all returnees are treated according to standard procedures irrespective of ethnicity or religion. Returnees who plead guilty to the offence receive a fine, which may be paid by instalments, and they are free to go.¹⁷
42. The applicant's evidence is that he departed Sri Lanka illegally, and there is nothing in the information before me to suggest he would plead not guilty, and I find that he will plead guilty. I accept it is highly likely on return to Sri Lanka the applicant will be subject to questioning and a relatively brief period of detention in an airport holding cell, and it is likely he will receive a fine which can be paid by instalments. I am not satisfied the processes the applicant will experience on return, including a brief period of detention and a fine, amounts to serious harm. In addition, I am satisfied the I&E Act provisions relating to illegal departure are not discriminatory on their face, and they are not discriminatory in intent or implemented in a discriminatory manner. I find that the investigation, prosecution and punishment of the applicant under the I&E Act for his illegal departure would not be the result of systematic and discriminatory conduct, and does not amount to persecution within the meaning of s.5J(4).
43. I have accepted Sri Lankan authorities are likely to conclude the applicant sought asylum in Australia, and have considered whether they are at risk of harm as a result of having sought asylum in Australia, or for having spent an extended period of time residing outside Sri Lanka, in either India or Australia. DFAT does not suggest there is no risk of harm for returnees, and provides examples of some incidents of mistreatment,¹⁸ however overwhelmingly it is

¹⁶ DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

¹⁷ DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

¹⁸ DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

returnees with significant actual or perceived links to the LTTE that are at risk of harm, including torture, during processing at the airport, or on return to their homes.¹⁹ On my findings I am not satisfied the applicant is such a person. There is no information before me to support that failed Tamil asylum seekers are targeted merely for seeking protection or being failed asylum seekers, or for having spent an extended period of time abroad, including in India or Australia.

44. DFAT understands that some returnees have been the subject of monitoring by the authorities, involving visits to the returnees' homes and telephone calls by the CID. However, most returnees, including failed asylum seekers, are not actively monitored on an ongoing basis, and DFAT is not aware of such people being treated in a way that endangers their safety and security. DFAT also reports that refugees and failed asylum seekers can face practical challenges to successful return to Sri Lanka, including difficulty finding suitable employment and reliable housing. Some refugees and returnees have also reported social stigma upon return to their communities. However, DFAT understands societal discrimination is not a major concern for returnees, including failed asylum seekers.²⁰
45. I have found the applicant will return to the Eastern Province, where he previously lived in Sri Lanka, and where his mother and sister have returned to live. Although the applicant did not previously work when in Sri Lanka, he worked for various employers whilst living in refugee camps in India, including as a labourer, and doing [specified occupations]. His SHEV application also refers to him working since his arrival in Australia, in [a named industry] during June to August 2015. The applicant has shown himself to be able to obtain employment under very difficult circumstance in India, and with the support of his family members, I am satisfied he will be able to re-establish himself in the Eastern Province and find employment and accommodation.
46. Considering my finding above, that the applicant would not be of interest to Sri Lankan authorities on return, and the country information before me, I accept there is a low chance the applicant may be subject to a degree of monitoring by authorities, such as a visit or phone call. I am not satisfied the applicant has a profile such that he would be subject to ongoing monitoring on return, including taking into account his illegal departure and return as a failed asylum seeker. I also accept he may encounter some challenges re-integrating to society, and may experience some social stigma. I am not satisfied any monitoring, social stigma or reintegration difficulties the applicant may experience, rises to the level of serious harm for this applicant, whether considered separately or together.
47. I am not satisfied the applicant faces a real chance of persecution on the basis of being a returning Tamil asylum seeker who departed Sri Lanka illegally, or as a result of the data breach, now or in the reasonably foreseeable future.
48. Having considered the applicant's circumstances and profile, in the context of the country information, I am not satisfied the applicant faces a real chance of persecution, now or in the reasonably foreseeable future, for any of the reasons claimed, whether considered individually

¹⁹ Freedom From Torture, 'Tainted Peace: Torture in Sri Lanka since May 2009', August 2015, CISEC96CF13070; Freedom From Torture, 'Sri Lanka – Update on torture since 2009', 6 May 2016, CIS38A8012881; Immigration and Refugee Board of Canada, 'LKA106007.E Sri Lanka: entry and exit procedures at international airports, including security screening and documents required for citizens to enter and leave the country; treatment of returnees upon arrival at international airports, including failed asylum seekers and people who exited the country illegally; factors affecting the treatment, including ethnicity and religion (2015-November 2017)', 10 November 2017, OG020B81694

²⁰ DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

or together. I am not satisfied the applicant has a well-founded fear of persecution within the meaning of s.5J.

Refugee: conclusion

49. 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

50. 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

51. 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.
52. The expressions 'torture', 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' are in turn defined in s.5(1) of the Act.
53. I accept it is likely on return to Sri Lanka the applicant will be subject to a series of administrative processes at the airport, he may be detained for a short period of time, questioned, and receive a small fine. I have not accepted the applicant was of interest or considered a security concern at the time he departed Sri Lanka, or that he would be a person of interest to Sri Lankan authorities, or any other group or person, on return for any reason, or that there is a real risk he would be mistreated during processing at the airport or any associated brief period of detention. I accept the applicant may face some challenges re-integrating to society in Sri Lanka, and he may face some social stigma as an asylum seeker and a person who has not lived in Sri Lanka for a long time. It is also possible he may be subject to a brief period of monitoring as a returning asylum seeker, and as a returnee to the Eastern Province, and a level of discrimination as a Tamil. Although experiencing social stigma and discrimination may be hurtful, and the processes associated with arriving in and re-establishing himself in Sri Lanka, and experiencing monitoring, may be stressful, I am not satisfied such treatment would amount to significant harm, as defined in the Act, for this applicant.
54. I have otherwise found there is not a real chance the applicant will face any harm on return to Sri Lanka for the reasons claimed, now or in the reasonably foreseeable future. For the same reasons, I am also not satisfied there is a real risk of any harm on return, including significant harm.

Complementary protection: conclusion

55. 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.