



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA20/08772

Date and time of decision: 18 December 2020 15:47:00
M Wei, 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 national of Sri Lanka. He arrived in Australia in September 2012 and lodged an application for a Safe Haven Enterprise Visa (SHEV), Subclass 790 in June 2017. A delegate of the Minister for Immigration (the delegate) refused to grant the visa on 25 October 2020. The delegate found that the applicant did not have a well-founded fear of persecution and that there was not a real risk of significant harm upon his return to Sri Lanka.

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 was born in Jaffna, Northern Province of Sri Lanka in [year]. He is a Tamil and Christian.
 - He and his family were displaced on multiple occasions as Jaffna district was heavily affected by the civil war. In 2007, the government asked them to go to Kilinochchi because the war again started.
 - He worked as [an occupation 1] for the Tamil Rehabilitation Organisation (TRO) between 2003 and 2007 and [an occupation 2] for [Business 1] from 2007 to 2008 in Kilinochchi, which was under the control of the Liberation Tigers of Tamil Eelam (LTTE).
 - In December 2008 he moved to [Town 1] (which was then under the control of the government) to join his family.
 - On [a day in] January 2009, the Criminal Investigation Department (CID) arrested him because they suspected him to have worked for the LTTE. He was tortured in [Camp 1] and faced mistreatment while he was in [Prison 1]. He was released [in] April 2009 without being charged with any offence.
 - On [a day in] June 2009, he was arrested by the National Investigation Branch (NIB). He was taken to [Camp 3] in Colombo then [Prison 2], where he was subjected to physical and sexual mistreatment. He was released [in] January 2010 without being charged with any offence.
 - Following his release, he lived with his family and worked as a shopkeeper in [Town 1].
 - He applied for asylum with the [Country 1] Embassy in August 2010 and his application was not successful.
 - In January 2011, the Terrorist Investigation Division (TID) arrested him while he was working in the shop. The TID badly tortured him at their '4th floor' and [injured him]. He was in hospital for eight months until he escaped from the hospital in December 2011. He was in hiding until he left Sri Lanka for Australia in August 2012.
 - In March 2012 the TID arrested and tortured his brother 'M' for five days demanding to know the applicant's whereabouts. M was again arrested in October 2015 by armed

forces/authorities, who again asked about the applicant and threatened that they would deal with the applicant when he gets back from Australia.

- In 2019 the CID came to his mother's funeral enquiring about the applicant.
- The applicant was affected by the Department of Immigration's data breach in February 2014.
- He fears returning to Sri Lanka as an escapee. He fears returning to Sri Lanka because of his Tamil ethnicity, his originating from an LTTE-controlled area, his former employment with the TRO and [Business 1] and as a returning asylum seeker who departed Sri Lanka illegally.

Factual findings

Background

4. The applicant claims that he was born in Jaffna and that he is a Sri Lankan Tamil with Christian faith. The applicant provided copy of his Sri Lankan birth certificate (with translation), Sri Lankan passport and an untranslated National ID card. I accept that the applicant is a Tamil originating from the Northern Province of Sri Lanka. I am satisfied that he is a citizen of Sri Lanka and that Sri Lanka is the receiving country.
5. The applicant provided the following evidence about his family members: his mother passed away in 2019 and that his father and two [brothers] M and V have been living at the same family home in [Town 1]. M has been working in the same [agency] for some years and V works in a shop. He speaks to his father and brothers often. He and his family are Christians, belonging to the Jehovah's Witness. I note his birth certificate indicates that his father was [an occupation 3]. He said at the SHEV interview that his parents were heavily involved in church work and his father is now doing full time service in the church. I note the applicant stated in the visa application that his family faced religious discrimination and could no longer practise the Christian faith freely. However, at the SHEV interview, he referred to that there were some restrictions affecting his parent's church work for a period during the war, and apart from that, he confirmed at the SHEV interview that he and his family were able to practise their religion and he did not experience any difficulty or harassment because of his religion. He said his family members has had no involvement in the LTTE and had no interaction with the LTTE as they always lived in the government-controlled areas. The applicant also confirmed that his family face no problem in practising their religion now. I accept this evidence as to his and his family's background. I note that the applicant does not claim to fear harm because of his religion upon returning the Sri Lanka.

Employment with the TRO and [Business 1]

6. The applicant has claimed that he completed [school grade] in [year] and then studied [an occupation 1] course. He however withdrew from this course and moved to Kilinochchi in 2003 where he worked for the TRO as [an occupation 1] doing [specified tasks] from 2003 to 2007 on a [contract]. He then worked for [Business 1] as [an occupation 2] through his uncle who was working in [Business 1], also in Kilinochchi. I note that the applicant also stated in the visa application (at the very beginning of his 2013 statement) that in 2007 [a local authority] asked 'us' to go to [another location in] Kilinochchi 'because the war was again starting', which suggests that he only moved to Kilinochchi in 2007. No documentary evidence was provided in respect of his past employment with the TRO or [Business 1].

7. Nevertheless, the applicant was able to expand his evidence in this respect at the SHEV interview (conducted by phone on 21 October 2020). He told the delegate at the SHEV interview that the work he performed including [specified tasks] for the TRO, visiting people affected by natural disasters such as tsunami and by war. The applicant explained that in this role he had to interact with LTTE members because the area was under the control of the LTTE, for example, he needed permits or approvals when providing money grants to people or to entering some areas visiting affected people. He also claimed that his boss was a former high rank LTTE member, though he also told the delegate that he did not interact with this former LTTE boss outside work settings. The applicant stated that his role was not of high level in TRO. He also confirmed at the SHEV interview that, while he was required to interact with members or former members of the LTTE in his role, there were other people in the organisation who had no affiliation with the LTTE. He also confirmed that he was not involved in any political activities. The applicant's evidence was that he left TRO at the end of his [contract] and then worked as [an occupation 2] for [Business 1]. Country information reports from 2005 and 2006 indicates that the TRO was registered as a charity in 1985 and had assisted those displaced by war or affected by the tsunami and it had been accused to have funded LTTE, though TRO had denied this involvement.¹ Country information also indicates that [Business 1] was founded by the LTTE in [year] and that [Business 1] has its branch in [a named town]. [Business 1 conducted specified business.]. Many customers of [Business 1] were farmers or those worked in one of the many LTTE companies.² Having regard to the evidence before me, I consider it is plausible and I accept that the applicant worked for the TRO between 2003 and 2007 in Kilinochchi. While I am willing to accept that the applicant did [occupation 1] related work, noting he only did one year [of his occupation 1] course and did not complete the course, also noting he stated in the visa application he had a dual role of [specified tasks], I accept that his role in the TRO was not of high level. I am willing to accept he worked for a year as [an occupation 2] in [Business 1]. Country information indicates that the LTTE had an extensive administrative structure based in [the region] and that the majority Tamil civilian populations of the areas controlled by the LTTE were required to interact with the LTTE as a matter of course.³ I consider it is plausible that his boss was a former LTTE member in the TRO and that he was required to interact with members or former members of the LTTE while working in the TRO and in [Business 1], in Kilinochchi, an area controlled by the [LTTE].

Arrests and Detention

8. The applicant claimed in the visa application that shortly after he returned to his family in [Town 1], [in] January 2009, the CID arrested him because they suspected him to have worked for the LTTE because of his time in the LTTE controlled areas and his previous work for the TRO and [Business 1]. He claimed that he was taken to [Camp 1] and was tortured there and the was then transferred to [Prison 1]. With the assistances from [Agency 1], [Agency 2] and a government lawyer who took bribe from his family, he was transferred to [Police Station 1]. From there, the applicant was produced to a [named] court [in] April 2009 and was sentenced to stay one week in [Camp 2] and was then released without being charged with any offence. The applicant's 2013 statement suggests that he did not stay long at all in [Camp 1] given he stated that he was in [Prison 1] jail for three (3) months. However, he stated in the June 2017 statement that that he was being held in [Camp 1] for three (3) months and he was being held

¹ The academic.org, "Tamil relief group linked to terrorism", 15 January 2005, CX111797; Bloomberg.com, "Sri Lanka Accuses Tamil Aid Organization of Funding LTTE Rebels", 4 September 2006, CX160977; Colombopage.com, "Sri Lanka urges United States to ban TRO operations", 8 January 2006, CX144054

² [Source deleted.]

³ Department of Foreign Affairs and Trade (DFAT), "Country Information Report – Sri Lanka", 4 November 2019, 20191104135244

in [Prison 1] for 20 days. At the SHEV interview, the applicant told the delegate that he was held in [Camp 1] for one (1) month, then was transferred to another camp where he was held for another month before he was transferred to [Prison 1] where he was held for 20 days. I note that the applicant's evidence overtime has varied as to the period of time he spent in [Camp 1] or in [Prison 1] Jail. This is in contrast to that he was otherwise able to provide the exact date when he was arrested and the exact date when he was released. Given this was the very first time that the applicant was taken to [Camp 1] and the first time he was put in jail and given the nature of mistreatment he claimed to have been subjected to in [Camp 1] and the mistreatment he faced from Sinhalese and Muslim inmates in [Prison 1], his changing evidence casts doubt that this reflects a personal experience.

9. The [Agency 2] [Certificate] (issued on 17 March 2010) indicates that the applicant was visited by [Agency 2] on 9 April 2009 in [Police Station 1]. The two [Agency 1] registration cards indicate that two complaints were lodged being [specified numbers] by his father. The [Agency 1] letter dated 22 July 2010 appears to refer to [one specified complaint], which appears to advise the applicant (not his father) over a year later that the complaint made on 12 May 2009 'has been registered'. While a person can lodge a complaint to the [Agency 1] for a range of rights violations such as torture, arrest, detention, employment or land and property matters,⁴ the [Agency 1] registration cards and registration acknowledgment letter do not reveal the nature of the complaint. The applicant stated in the written statement that that he was sentenced to stay one week in [Camp 2] and was released after that. The court document of [a date in] April 2009 (appears to indicate that the applicant as one of the 4 'surrendee'(s)) indicates that the court directed the [Town 1] [official] to hand over the applicant and other surrendeeds to the refugees camp to reunite with their families and to send the report to court on or before the next date which appears to be [a day in] April 2009. The document titled 'Application for release of an elder/s, member/s of family from IDPP centre acknowledgement' dated [later in] April 2009 appears to address to the applicant's father to the family home address, acknowledging receipt of his father's application also dated [in] April 2009 'for the release of under mentioned IDPP who are presently being accommodated at the [named] welfare centre' and has the applicant's name listed as the name of the IDPP. This document would suggest that the applicant was still held in [this] welfare centre as at [that day in] April 2009. The applicant's oral evidence at the SHEV interview was that he was handed over to a regional government office and from there he was officially released and that he did not mention that his family was required to apply for his release from an IDP camp. Although the [Agency 2] [Certificate] states that the applicant was at [Centre 1] between [late] April 2009 and [a day in] December 2009, it states that this happened after he was arrested for the second time. I note this is inconsistent with the applicant's own consistent evidence that he was arrested for the second time [in] June 2009, see below (not [in late] April 2009 as stated on the [Agency 2] [Certificate]).
10. In respect of his claimed second arrest [in] June 2009, in his written statement, he stated that he was taken from his home to [Camp 3] in Colombo and after three (3) months he was sent to [Prison 2] where he stayed for about four (4) months and he was then transferred to [Police Station 2] in December 2009. He claimed to have been badly tortured in both camps. At the SHEV interview he told the delegate that he was taken to [Prison 2] in June 2009 and that he was there until January 2010. He said that the [Prison 2] was very popular for torture and again claimed that he was tortured physically, sexually and psychologically. In light of the extent of the physical and sexual torture he claimed to have been subject to when he was held in [Prison 2], I consider it is not insignificant that the applicant could not recall whether he was held up in [Camp 3] for three months and [Prison 2] for four months or that he spent almost the entire

⁴ [Source deleted.]

time in [Prison 2] during his second arrest and detention. Significantly, the [Agency 2] [Certificate], despite referring to a time span from [April] 2009 to [December] 2009 and referring to [Centre 1] and three differently named police stations in Galle District, makes no reference to a [Camp 3] or [Prison 2] for that period.

11. The applicant has claimed that he applied for asylum through [Country 1] Embassy for migrating to [Country 1] in August 2010 as he did not feel safe in Sri Lanka because of his past arrests. The applicant provided several documents relating to his application with the [Country 1] Embassy in Colombo. While I accept that the applicant made an asylum visa application with the [Country 1] Embassy in Colombo in 2010, the documents provided make no reference to the applicant's arrests and detention in 2009 or 2010 or his problems with the authorities, rather I note he pleaded the [Country 1] Embassy in September 2010 to process his application so as to save him from 'unknown people' and that he was receiving 'unknown calls' from those persons.
12. Despite claiming that he was arrested twice and despite the claimed prolonged period of time that he was subject to physical including sexual and psychological mistreatment in various facilities, on the applicant's evidence, he returned to [Town 1] after he was released the second time and later started to work as a shopkeeper for a [store] in [Town 1]. He did not apply for the asylum visa with the [Country 1] Embassy until August 2010 and he continued to work for the same store until his claimed third arrest in January 2011.
13. Country information indicates, during the war and for a period after the war, Tamils, in particular, those from the north or the former LTTE areas and those who have occupied positions in civil functions with the LTTE were viewed as suspects with imputed LTTE links and could face arrest and detention on those bases.⁵ I accept that the applicant's move from Kilinochchi to [Town 1] in late 2008 was likely to cause suspicion from the authorities. I accept the applicant's employment with the TRO and [Business 1] would have given him an additional profile. It is plausible and I accept that the applicant may have been arrested, detained and questioned about his time and work in Kilinochchi and might possibly have spent a period in detention or in a rehabilitation centre/refugee camp between 2009 and 2010. It is plausible and I also accept that he might have been subject to mistreatment while in detention and while being interrogated. However, in light of his differing accounts and various discrepancies in the evidence as noted above, I hold serious doubts that the applicant was held in [Camp 1] or in [Prison 1] or [Prison 2] and was badly tortured in these facilities as claimed. Given the applicant did not hold a high level position in the TRO or [Business 1], it seems to me meaningless that that the authorities would have invested such resources to arrested him for the second time acting on an order from a higher authority and to have continued to interrogate and torture the applicant after he was cleared from any affiliation with the LTTE for the first time in April 2009. I note the [named] Court document merely states that the applicant, among other four defendants, are not wanted suspects.
14. Even I were to accept that the applicant was arrested twice and detained in various facilities as claimed between 2009 and 2010, for the reasons below, I do not accept his claim that he was arrested for the third time in January 2011, he was hospitalised as a result of the tortured he was subjected to in detention or that he was in hiding after he escaped from the hospital.
15. The applicant has claimed that he was arrested by the TID in January 2011 at the shop where he was working as a shopkeeper. He was physically and sexually abused for about three months

⁵ Adrian Schuster, "Sri Lanka: Current situation update", 1 November 2012, CIS25579; DFAT, "Country Information Report – Sri Lanka", 4 November 2019, 20191104135244

while was being held on the '4th floor'. He has claimed that he was suspended in the air with a bar between his legs and his body arched backwards while being beaten [which] caused his [specified injury]. He has claimed that he was left in excruciating pain as he was not given any medical assistance or taken to the hospital for about two weeks. He has claimed that he was taken to [Town 1] hospital [in] March 2011 and stayed in the hospital for eight months until he escaped in December 2011. After that he went in hiding for another eight months before he departed Sri Lanka for Australia in August 2012.

16. The applicant stated in the written statements he believed that he was arrested for the third time because some Tamil people who knew that he worked for the TRO and [Business 1] and later joined the authorities dobbed him into the authorities. At the SHEV interview, when asked, he told the delegate that when he was arrested by the TID, they told him that they had been investigating him and that they had 'received an order' to arrest him. However, he also said that the TID did not tell him the reason for his arrest and only said that they had suspicions about him. Although the applicant had given evidence as to the methods of torture that he was subjected to, his evidence was less clear as to what suspicion the TID had about him this time. The applicant's past employment with the TRO and [Business 1] was well known to the authorities and the authorities had plenty of opportunities to question him previously. Yet, he was cleared of any affiliation with the LTTE or any other wrongdoing, not once, but twice. Although he sought to apply for refugee visa with the [Country 1] Embassy in August 2011, he continued to work as a shopkeeper for the same store until the claimed arrest in January 2011. I am not convinced that the authorities would have again invested such resources and resorted in such cruelty by holding him and interrogating him on the '4th floor' for a two month period and [inflicted a specified injury] and put him under constant surveillance for a further eight-nine months while he was being treated for the [specified injury] in the hospital.
17. The applicant provided two X-ray images about his [body part], one of which appears to have been taken on [a day in] April 2011 (a week after he was sent to hospital based on his claim that he was sent to hospital [in] March 2011, two weeks after his [specified injury]) before surgery and another one taken [later in] April 2011 after surgery. While the X-ray images indicates that the applicant had [the specified injury] and was likely in hospital in April 2011, they say nothing as to how the injury was sustained or who caused the injury. The applicant's letter to the [Country 1] Embassy dated [a date in] April 2011 (this date suggests that he wrote this letter while he was in hospital) states that he was attacked by 'some unknown people recently and injured seriously' and that his [body part] 'have been crashed'. The copy of passport provided shows the applicant's passport was issued [later in] 2011 in Colombo and bears the holder's signature. I am not convinced that the applicant would have been issued with a Sri Lanka passport which bears his signature by the authorities in Colombo at a time when he claims that he was under constant surveillance while he was still being hospitalised in a [Town 1] hospital and that the TID told him that they would take him again after his treatment.
18. I am not satisfied that the applicant was arrested in January 2011 or any other time after he was cleared of any of wrongdoing in January 2010 or he was tortured as claimed or that the [specified injury] was caused by the TID or authorities. I do not accept that he escaped from the hospital or that he went in hiding after he left the hospital before he left Sri Lanka. I am not satisfied that the applicant had ever gone into hiding after he was released by a court in January 2010. I am not satisfied that the applicant came to the adverse attention of the Sri Lankan authorities after he was last cleared of any wrongdoing in January 2010. While I am willing to accept that the applicant departed Sri Lanka by boat, I am not satisfied that the applicant was a person of ongoing interest to the authorities at the time he departed Sri Lanka. Consequently, I am not satisfied that his brother M was arrested and tortured in March 2012, or that M was

again arrested in 2015 because the authorities demanded him to tell the applicant's whereabouts. I am not satisfied that authorities showed up at his mother's funeral in 2019 or they have any continuing interest in the applicant because of his time spent in Kilinochchi or his past employment with the TRO or [Business 1].

Date Breach

19. I note that certain personal information of the applicant was inadvertently made available for a short time on the Department of Immigration's Website in February 2014 and that the applicant was advised of this breach in March 2014. The information potentially became accessible online did not include any information about protection claims or health information. The applicant has not raised any claims on this basis.

Refugee assessment

20. 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

21. 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.
22. It has been over ten years since the end of the war and about eight years since the applicant left Sri Lanka for Australia. The country situation for Tamils has improved significantly since the end of the conflict and in recent years. Although the Sri Lankan authorities remain sensitive to LTTE's potential re-emergence, those facing a real risk of adverse treatment has considerably diminished. Country information before me indicates that Tamil ethnicity and past membership or familial connection to the LTTE would not give rise to perceived links to the LTTE or any other anti-government or adverse profile, unless the person has, or is perceived to have had, a significant role in the LTTE in the past or considered to have engaged in post conflict

separatist activities or otherwise considered to have engaged in anti-government conduct, or otherwise viewed as activists or dissidents including some journalists.⁶

23. It is reported that Tamils maintain they suffered longstanding, systematic discrimination in university education, government employment, housing, health services, that especially in the north and east, Tamils reported security forces regularly monitored and harassed members of their community, especially activists and former or suspected former LTTE members. On the other hand, country information before me also note that the Sri Lanka has a variety of ministries and bodies set up designed to address the social and development needs of the Tamil minority and has implemented some confidence-building measures to address the grievances of the Tamil community. While Tamils accounts for 15.3 percent of the whole population as the second largest ethnic group in Sri Lanka, Tamils comprise 93.8 percent of the population in the Northern Province. DFAT considers that non-Muslim Sri Lankans, including Tamils, face a 'low risk' (i.e. 'DFAT is aware of incidents but has insufficient evidence to conclude they form a pattern') of official or societal discrimination based on ethnicity or caste, including in their ability to access education, employment or housing. DAFT assesses there is no official discrimination on the basis of ethnicity in public sector employment. Rather, Tamil's under representation is largely the result of language constraints and disrupted education because of the war. DFAT also considers that the risk of torture perpetrated by security forces has decreased since the end of the war and is no longer state-sponsored, and that Sri Lankans, irrespective of ethnicity, face a low risk of torture. I note that some progress in promoting reconciliation, accountability and human rights is also noted in the UNCHR's recent report, though it also raised concerns of the government's inability to deal comprehensively with impunity and to reform institutions. Country information overall indicates that the monitoring and harassment of Tamils in general has decreased since the end of the war. I note the concerns raised due to the election of the Rajapaksa government in late 2019 and reports of its crackdown targeting journalists, activists and dissidents. At the same time, I consider that the country information before me does not support that Tamils who do not have a profile of concern to the authorities are targeted.⁷
24. In respect of returnees, country information is that entry and exit from Sri Lanka is governed by the Immigrants and Emigrants Act (I&E Act). All returnees to Sri Lanka are processed at the airport on arrival by various governmental agencies, including the Department of Immigration and Emigration and the CID. These agencies check travel documents and identity information against the immigration databases, intelligence databases and records of outstanding criminal matters. For returnees travelling on temporary travel documents, police undertake an investigative process to confirm identity, which would identify someone trying to conceal a criminal or terrorist background, or trying to avoid court orders or arrest warrants. This often

⁶ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", May 2020, 20200527172009; UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928; OHCHR, "Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka", 18 February 2020, 20200221140652; INFORM Human Rights Documentation Centre, "Repression of Dissent in Sri Lanka: 1st - 31st May 2020", 29 June 2020, 20200702160949; DFAT, "Country Information Report –Sri Lanka", 4 November 2019, 20191104135244

⁷ DFAT, "Country Information Report –Sri Lanka", 4 November 2019, 20191104135244; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", May 2020, 20200527172009; UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928; US Department of State, "Country Reports on Human Rights Practices for 2019 - Sri Lanka", 13 March 2020, 20200312151418 ; International Truth and Justice Project, Journalists for Democracy in Sri Lanka, "SRI LANKA: AND THE CRACKDOWN BEGINS", January 2020, 20200114142534; INFORM Human Rights Documentation Centre, "Repression of Dissent in Sri Lanka: 1st - 31st May 2020", 29 June 2020, 20200702160949; OHCHR, "Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka", 18 February 2020, 20200221140652; Aljazeera, "Sri Lanka: Economy, human rights key challenges facing Rajapaksas", 18 August 2020, 20200819205836; The London school of economics and political science, "Sri Lanka's parliamentary election: Landslide win for the Rajapaksa puts democracy and pluralism at risk", 12 August 2020, 20200813141629; East Asia Forum, "Rajapaksa landslide victory spurs Sri Lanka's majoritarian shift", 18 August 2020, 20200819210531

involves interviewing the returning passenger, 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. DFAT understands detainees are not subject to mistreatment during processing at the airport.⁸

25. According to DFAT, between 2010-11 and 2018-19, 3,716 Sri Lankan nationals returned from the Australian community or were removed from Australian onshore immigration detention centres to their country or origin or a third country. Many others returned from the US, Canada, the UK and other European countries. Most returnees are Tamil. Although individual experiences vary, many Tamil returnees choose to return to the north, either because it is their place of origin and they have existing family links, or because of the relatively lower cost of living compared to the south. DFAT understands that some returnees, including returnees in the north and east with suspected LTTE links, have been the subject of monitoring by the authorities. DFAT also states that most returnees, including failed asylum seekers, are not actively monitored on an ongoing basis, and that, some Tamil returnees who had failed to secure asylum in Australia and since returned to the north had told DFAT they had not experienced harassment by the authorities or received monitoring visits.⁹ I also take note of the UK Home Office's most recent report which refers to the statement of a human right activist that certain Tamils returning from abroad may be monitored and this was not the case for all Tamils.¹⁰
26. DFAT also note that refugees and failed asylum seekers face practical challenges to successful return to Sri Lanka including difficulty in finding suitable employment and reliable housing on return and that failed asylum seekers receive limited reintegration assistance. 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. It also notes that Sri Lanka recognises the educational and professional qualifications acquired by refugee returnees outside Sri Lanka and that those who have skills that are in high demand in the labour market are best placed to find well-paid employment. Despite the challenges they may face, some Tamils who had failed to secure asylum in Australia and since returned to the Northern Province told DFAT they were able to reintegrate into their communities and find employment. DFAT reports that some returning failed asylum seekers reported social stigma from their communities including for being beneficiaries of financial reintegration assistance but understands that societal discrimination is not a major concern for returnees, including failed asylum seekers. Some Tamil failed asylum seekers returned to the north had told DFAT that they had not experienced societal discrimination following their return.¹¹
27. I consider there is a lack of recent reporting overall to support that Tamil returnees in general who have sought asylum abroad and have lived abroad such as Australia for some or extended time but who otherwise do not have a profile of concern are imputed with an adverse profile, or otherwise are of adverse interest to the authorities for this reason.
28. I accept some of the applicant's personal biodata information became briefly accessible on the website in February 2014. The information potentially disclosed does not reveal the applicant's protection claims or that he has applied for a protection visa. Even accepting that the Sri Lankan authorities may have accessed the leaked information, I consider, at most, the authorities may suspect the applicant has sought asylum in Australia and that authorities would not know his claims for protection. Similarly, I consider that the authorities may in any event likely to infer

⁸ DFAT, "Country Information Report – Sri Lanka", 4 November 2019, 20191104135244

⁹ Ibid.

¹⁰ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", May 2020, 20200527172009

¹¹ DFAT, "Country Information Report – Sri Lanka", 4 November 2019, 20191104135244

that the applicant has applied for asylum in Australia if he were to return to Sri Lanka on a temporary travel document.

29. In the applicant's case, despite his residence in a former LTTE controlled area and his past employment with the TRO and [Business 1] in Kilinochchi and despite the past arrests and mistreatment he claimed to have been subjected to, I found above that the applicant had been cleared of any affiliation with the LTTE and was not of any ongoing adverse interest to the authorities before he left Sri Lanka for Australia. The applicant has not been involved in any activities in Australia which would lead to him of being imputed with an adverse profile. I consider that the chance is remote that the applicant in his profile would face monitoring of some sort upon return. In light of the information discussed above and considering his profile as a whole including his history, I am not satisfied there is a real chance that the applicant would be subject to mistreatment during the process at the airport on arrival. I am not satisfied the disclosure of his personal information in Australia, his returning as a failed asylum seeker, his time abroad, or any process on arrival would lead to a real chance of him to be of adverse interest to the Sri Lanka authorities. I consider the chance is remote that the applicant would be imputed with an adverse profile in his situation. The applicant is from a Tamil majority Northern Province. His evidence at the SHEV interview was that his family in Sri Lanka are not facing any problems. His [family members are] working. His father is doing full-time service in the church. DFAT, having had regard to the 2019 Easter Sunday terrorist attacks on Christian churches, assesses that Christians in Sri Lanka face a low risk of official discrimination and mainstream Christian denominations face a low risk of societal discrimination.¹² I am not satisfied that the applicant faces a real chance of official or social discrimination on account of his Tamil ethnicity and/or his religion. Even I were to accept there might be some stigma attached to some returnees, the information before me does not support that the stigma, if any, the applicant might face, taking into account my consideration below, amounts to serious harm as defined in the Act. I am not satisfied the applicant otherwise faces a real chance of any harm from the Sri Lankan authorities, Sinhalese, Muslims or anyone else if he were to return to Sri Lanka, now or in the reasonably foreseeable future.
30. I accept that the applicant would likely face some challenges as a returnee. On the other hand, he worked as [several specified roles] when he was in Sri Lanka. The evidence does not indicate that he would be prevented from obtaining employment, accommodation and integrating. I am not satisfied that there is a real chance that the applicant's capacity to subsist will be threatened. I am not satisfied that the applicant faces a real chance of serious harm due to any difficulties or treatment or practical challenges (including social stigma, if any) of settling in a new environment in Sri Lanka.
31. Penalties for leaving Sri Lanka illegally can include imprisonment of up to five years and a fine. Sri Lankan authorities differentiate between fare-paying passengers and the facilitators or organisers of irregular migration. Unlike facilitators or organisers, fare-paying passengers are usually released on bail and generally receive only a fine for breaking the I&E Act, as a way of deterring future illegal departures. Bail conditions are discretionary. The Attorney-General's Department claims no mere passenger on a people smuggling venture has been given a custodial sentence for departing Sri Lanka illegally. A guilty plea will attract a fine, which can be paid by instalment, and the defendant is free to go. Fines vary from LKR 3,000 (approximately AUD 25) to LKR 200,000 (approximately AUD 1,633). Well-placed sources told DFAT this fine is usually between LKR15,000 and LKR20,000 (approximately AUD122 and AUD163). Where a passenger returnee pleads not guilty, the magistrate will usually grant bail

¹² Ibid.

on the basis of personal surety or guarantee by a family member. Where a guarantor is required, returnees may need to wait for the guarantor to come to court. ¹³

32. The applicant does not deny that he left Sri Lanka by boat in 2012. The country information is that he would be free to go if pleading guilty and the fine imposed can be paid by instalment. The information before me is also that the magistrate will usually grant bail. On the evidence provided and the country information before me, I am not satisfied there is a real chance the applicant would not be able to secure bail. I am not satisfied that he would be subject to a custodial sentence for departing Sri Lanka illegally. I am further not satisfied that penalties and processes, and the possible short-term detention at the airport will amount to serious harm for this applicant.
33. In any event, the country information does not suggest that the I&E Act is discriminatory on its face or that it is applied or enforced in a discriminatory manner. I am not satisfied that the questioning, temporary detention, imposition of a fine and possible associated costs and treatment the applicant may experience as a result of illegal departure would constitute persecution.
34. In light of my consideration of the above, I am not satisfied the applicant faces a real chance of persecution for any of the reasons claimed, if he were to return to Sri Lanka now or in the reasonably foreseeable future.

Refugee: conclusion

35. 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

36. 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

37. 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.

¹³ Ibid.

38. 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.
39. I accept that the applicant, as a returning asylum seeker, may face some challenges in resettling Sri Lanka. I am however not satisfied that the treatment or challenge (including social stigma, if any) would amount to significant harm. I am not satisfied that it amounts to the death penalty, arbitrary deprivation of life or torture as defined in the Act. I am also not satisfied that it amounts to pain or suffering that could be reasonably regarded as cruel or inhuman in nature, severe pain or suffering, or extreme humiliation for the purpose of the definition of cruel or inhuman treatment or punishment or degrading treatment or punishment.
40. I am also not satisfied the treatment and penalties the applicant may face as someone who left Sri Lanka unlawfully would amount to significant harm as defined. I am not satisfied the applicant faces a real risk of the death penalty, arbitrary deprivation of life or torture as defined in the Act. I am also not satisfied, having regard to the country information that such treatment would involve an intention to inflict severe pain or suffering, pain or suffering that could be reasonably regarded as cruel or inhuman in nature, or an intention to cause extreme humiliation for the purposes of the definition of torture, cruel or inhuman treatment or punishment or degrading treatment or punishment. Nor am I satisfied that this treatment, when combined with that he may face as a returning Tamil asylum seeker amounts to significant harm.
41. I have otherwise concluded that there is a not real chance the applicant would face any harm. As real chance and real risk involve the same threshold, I am not satisfied there are substantial grounds for believing that, as a necessary and foreseeable consequence of being returned from Australia to Sri Lanka, there is a real risk that the applicant will suffer harm, including significant harm.

Complementary protection: conclusion

42. 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.