



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA21/10105

Date and time of decision: 6 January 2022 14:36:00
J Jennings, 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 from the Eastern Province, Sri Lanka. On 28 December 2016 he lodged an application for a Safe Haven Enterprise Visa (SHEV), Subclass 790. He claims that he fears harm in Sri Lanka from the authorities as a Tamil and because of his brother's involvement with the Liberation Tigers of Tamil Eelam (LTTE).
2. A delegate of the Minister for Immigration (the delegate) refused to grant the visa on 21 June 2017. The delegate was not satisfied that the applicant had a profile that would indicate he would face a real chance of serious harm or a real risk of significant harm in Sri Lanka.
3. On 13 April 2018 the IAA affirmed the decision not to grant the applicant a protection visa. On 7 October 2021 the Federal Court of Australia quashed the decision of the IAA and directed the IAA to determine the matter according to law.

Information before the IAA

4. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).

Obtained own information

5. I have obtained new information as follows which updates general country information before the delegate.
 - UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928
 - UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil Separatism", May 2020, 20200527172009
 - Office of the High Commissioner for Human Rights, "Promotion reconciliation, accountability and human rights in Sri Lanka", 27 January 2021, 20210203162131
 - Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244
 - DFAT, "DFAT Country Information Report – Sri Lanka", 23 December 2021, 20211223094818
6. The delegate's decision was made more than four years ago, and I consider that there are exceptional circumstances to justify considering this new information. On 16 December 2021 the first four listed reports were provided to the applicant for consideration and comment highlighting potentially adverse information which may form part of my decision. The applicant was provided the opportunity to provide new information or comment in relation to this and was advised his response should be received by 30 December 2021; no response has been received.
7. The 2021 DFAT report was published after the IAA's letter. Updated information in this report relates, amongst other matters, to matters regarding reconciliation, that Tamils have been arrested in 2021 under the Prevention of Terrorism Act for commemoration of the war, lack of tolerance for those openly criticising the government and the proscription of some Tamil

groups. However, the applicant has made no claims to be involved in any Tamil groups or government criticism or war commemoration or to be outspoken about reconciliation issues. Otherwise, this report largely recounts information already before me in previous DFAT reports, and in the more recent UK Home Office and the Office of the High Commissioner for Human Rights reports which I have obtained and which, along with the 2019 DFAT report, the applicant was provided the opportunity to comment on.

2017 IAA submission

8. On 17 July 2017 the IAA received a submission on behalf of the applicant. This comprised a statement from his then representative, a medical letter, a letter from a Sri Lankan Member of Parliament, two documents regarding the citizenship/asylum seeker status of two of his brothers, and an article from the Daily Mail. As the email accompanying the submission acknowledged the documents submitted are new information.
9. The IAA submission complained that a number of issues before the delegate were not addressed by the delegate in the decision. These relate to ability to pay fine or bail amounts in regard to the delegate's findings under the matter of illegal departure, that the applicant belongs to a particular social group of [Occupation] and concerns regarding the release of his personal information in the data breach. I am satisfied this is essentially argument about matters that were before the delegate and not new information and I have had regard to these comments.
10. Under the heading "Voters List" the submission referred to a visit to the family home in which the applicant's mother was asked about his whereabouts. The submission takes issue with the delegate's failure to consider whether the applicant would be exposed to a risk of serious harm as result of this enquiry. The applicant advanced the claim regarding this visit at his protection visa interview and this claim is not new information. However, there is a distinction between the two accounts; the applicant referred to the people visiting having a 'boat list' whereas the representative referred to a 'voters list'. The words are similar in sound and this may be a simple mishearing by the representative of the applicant's account at the interview.¹ Either way the reference to a voters list is new information that was not before the delegate. I am not satisfied this information could not have been given to the delegate, but I am satisfied it is capable of being believed and that it is personal to the applicant. I have noted in my decision below that voter registration is maintained by local authorities and I have accepted that such a visit for this reason is plausible; as such I am satisfied that had this information been known it may have affected the consideration of the applicant's claims. For the same reasons I am satisfied that exceptional circumstances exist to justify the IAA considering this information.
11. The documents relating to the applicant's brothers are evidence of the grant of Australian citizenship to one and evidence that the other brother has applied for asylum and as part of that process has been recognised as a refugee in [Country 1]. The information that the applicant had one brother who was an Australian citizen and another who was applying for asylum in [Country 1] was information the applicant had previously given, but the documents themselves are new information. Both documents pre-date the delegate's decision and there is no information before me to indicate these documents could not have been given to the Minister. The provisions of s.473DD(b)(ii) allow the IAA to consider credible personal information which was not previously known and had it been known may have affected the

¹ The representative who made the submission to the IAA asked for and was provided a copy of the audio recording of the protection visa interview.

consideration of the applicant's claims. While the information may be characterised as credible personal information, I am not satisfied it may have affected the consideration of the applicant's claims. There is no indication the delegate did not accept the applicant's account of his brothers' circumstances, such that providing these documents may affect the consideration of these claims. Furthermore, as the applicant stated he had little to no knowledge of the personal circumstances of his brothers, or their reasons for leaving Sri Lanka, or their refugee claims, it is not apparent how their status may be relevant to his claims or corroborate his claims or how this information may have affected the consideration of his claims. Overall, I am not satisfied that the provisions of s.473DD(b) are met, nor am I satisfied that exceptional circumstances exist that justify the IAA considering this information.

12. The IAA submission advised the letter from [a] Hospital was provided to support claims the applicant received treatment as result of his arrest and detention by the Sri Lankan authorities in 2009, and that as it is dated 5 July 2017 it could not have been provided to the delegate and had this information been known by the delegate it may have affected the consideration of the applicant's claims. While the letter itself post-dates the delegate's decision the information contained therein does not and it is not apparent why the applicant could not have obtained a medical letter earlier, particularly noting he included information about this matter and being taken to hospital in his statement of claims and he was clearly advancing this part of his protection claims. In my assessment below I have considered the applicant's claims relating to the 2009 incident and I have accepted these, including that he was beaten and required treatment. I note the letter has been provided with the intention of supporting the applicant's claims, claims which as stated I have accepted, but I have concerns that this is a genuinely issued letter from the hospital.
13. On face value the letter was written by a [Dr A], Orthopedist; as an orthopedist [Dr A] is ostensibly a medical specialist. Yet the language in which the report is written is amateurish and lacks any semblance of medical terminology or expression as would be expected in a report from a medical professional and contains little to no clinical information. The report lacks any distinguishable diagnosis; the conditions are described as "developed wound" and "some destruction". Body parts are described as "bilateral legs" and "on the top ... right feet". The letter noted an "affect" to mobility with no clinical explanation of the mobility issue or the underlying causation. This is not evidently a matter of imperfect or poor-quality translation; the document before me is not a translation. The letter contains no dates of initial presentation or dates of the stated ongoing treatment or any description of treatment provided, or any clinical test results or examinations undertaken. Nor does the letter specify any further injuries sustained in, or the dates of the "in-between" times the applicant was treated by the doctor after being "threatened physically" on "several occasions" between 2009 and 2012; claims which I note the applicant has not advanced, the applicant only claimed the one attack in 2009.
14. I am not satisfied this letter was written by a medical professional and as such I am not satisfied that this is credible personal information. Furthermore, I am not satisfied that exceptional circumstances exist that justify the IAA considering this information.
15. Accompanying the submission was an article from the Sri Lankan Daily Mail dated 14 July 2017. As this article post-dates the delegate's decision it could not have been given to the delegate. It is not personal information; the article reports on the release of the International Truth & Justice Project Sri Lanka (ITJP) report "Unstopped". The article advised the ITJP report took testimony from persons tortured in 2016/2017 and is not the same ITJP report that the delegate had regard to in the decision; that was the ITJP report titled "Silenced: survivors of torture and sexual violence in 2015" and published on 7 January 2016. As this article provided

updated information to that before the delegate on the treatment of Tamils I am satisfied there are exceptional circumstances to justify the IAA considering this information.

16. The submission also included a letter dated 8 July 2017 from [Mr B], Member of Parliament. The IAA submission contended that as this letter post-dated the delegate's decision it could not have been provided to the delegate. However, the letter refers to past events and it is not evident why the applicant could not have obtained such a letter earlier, nor does the submission indicate any impediment to him doing so. The applicant has failed to satisfy me that the requirements of s.473DD(b)(i) are met.
17. Furthermore, I have concerns that this is credible personal information. While in part this letter recounts some of the applicant's family background, in this letter [Mr B] referred to a number of incidents not claimed by the applicant, including his father was taken into army custody in 2010 and died a few days later; the army and the Karuna group having evidence against him and his brothers because they supported the LTTE by "giving vehicle, sim-card etc"; and the Karuna group expecting him and his brother to join their group. The information in [Mr B]'s letter in very large part does not correlate with the applicant's protection claims. The very significant variation in the circumstances cited in [Mr B]'s letter to the protection claims put by the applicant is of substantial concern and leads me to doubt that [Mr B] "has a personal knowledge as regards the applicant's predicament" as was stated by the then representative in the IAA submission. The applicant was invited to provide comment in this regard in the IAA's letter to him dated 16 December 2021, however he has not responded. Considered overall the applicant has failed to satisfy me the provisions of s.473DD(b)(ii) are met. Moreover, I am not satisfied that [Mr B] has a "personal knowledge" of the applicant's circumstances and as such I am not satisfied as to the corroborative or probative value of this letter in supporting the applicant's claims and I am not satisfied that exceptional circumstances exist that justify the IAA considering this information.
18. In the IAA's letter dated 16 December 2021 the applicant was also invited to comment on the matter of his departures from Sri Lanka in 2008 and 2012 and that information before the IAA indicated he departed Sri Lanka legally on both occasions, despite the reference in his statement of claims to having previously departed illegally. The applicant did not respond.

Applicant's claims for protection

19. The applicant's claims can be summarised as follows:
 - The applicant is a Sri Lankan Tamil from the Batticaloa District, Eastern Province Sri Lanka.
 - Young Tamil males were regularly harassed by the authorities.
 - The applicant's oldest brother was forcibly recruited by the LTTE in 1996. One of the applicant's cousins was also with the LTTE and he stayed at the family home on occasion. Because of these connections with the LTTE the applicant's family were regularly visited by the authorities and two of his older brothers left home to avoid the authorities.
 - The family home was destroyed in the 2004 tsunami.
 - After finishing school the applicant worked as [an Occupation] in Batticaloa and Colombo. The IAA submission highlights that the applicant is a member of a particular social group of [Occupation].

- The applicant was concerned it was not safe in Colombo and he travelled to [Country 2] in 2008 where he worked for a period before returning to Sri Lanka.
- The applicant was fearful for his safety in Batticaloa and avoided spending time there and was generally resident in Colombo from 2008.
- On one occasion in 2009 when he was visiting Batticaloa he was in the vicinity of a bomb explosion. He and three other people were detained by the police. He was beaten whilst detained and required treatment for injuries sustained. His mother intervened and the applicant was released after having been detained for approximately one hour.
- The applicant was fearful for his safety in Sri Lanka and decided to leave. He travelled to [Country 3] in 2012 and from there came to Australia via [Country 4].
- In 2014 some people visited the family home and spoke to his mother about the applicant's absence from Sri Lanka.
- The applicant's details were released in the 2014 data breach. He fears that through the data breach the authorities will be aware of his asylum claim and will suspect he has spoken out against the country and will harm him as a result.
- The applicant fears that should he return to Sri Lanka he would be harmed as a Tamil and suspected of being a supporter of the LTTE.

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. The applicant has consistently claimed to be a Tamil from the Batticaloa area in the Eastern Province, Sri Lanka and has provided identity documents in support of his claimed identity. I

accept the applicant's identity and nationality as stated and that Sri Lanka is the receiving country for the purpose of this review.

23. I accept that the 2004 tsunami caused widespread damage in the Batticaloa area and as a result the applicant moved from his home village to the city for a period.
24. I accept that the applicant grew up in Sri Lanka during the civil war and that Tamils, particularly young Tamil men, were subject to ongoing harassment from the authorities and from the applicant's account he came to such attention in 2009, a claim discussed further below.
25. The applicant's account that the LTTE took one member from each Tamil family is supported by country information which advised this was LTTE policy at various times during the civil war.² To that extent his claim one brother was taken by the LTTE in 1996 is consistent with the country information and is credible. But I am concerned by his seeming little knowledge of his brother's circumstances, particularly as this forms the essential basis of his claim the family came to the attention of the authorities and that people came to the family home because of this LTTE connection.
26. The applicant would have been around [Number] years of age and was living in the family home at the time he claimed his brother was taken by the LTTE. In his statement of claims he stated his brother fought for the LTTE, but he did not know how many years he fought; even accounting for his relative youth at the time I am surprised by his lack of knowledge of how long his brother fought for the LTTE. At his protection visa interview the applicant was unable to give any information about his brother's involvement beyond stating he was taken by the LTTE in 1996. He did not know if his brother was required to undergo rehabilitation detention at the end of the civil war, which was a standard requirement for LTTE members/fighters at the end of the war³. In one part of the protection visa interview he referred to the policy at the end of the civil war which required those with LTTE associations to surrender themselves, but that the family was not in contact with his brother at the time. I am not satisfied this explanation accounts for his claimed lack of knowledge of whether his brother was detained in rehabilitation at the end of the civil war. I acknowledge the applicant's young age at the time it is claimed his brother was taken but at the end of the civil war in 2009 the applicant was no longer a child but an [adult man] and I have difficulty accepting that at this time, or in the ensuing years he has garnered no further information on this matter.
27. I have some difficulty accepting the applicant knows so little about the claimed LTTE association of his brother and I do not accept his explanation this is due to a cultural practice of not questioning older siblings. He claimed his mother and uncle have at various times spoken to him about his safety in Sri Lanka and told him of the visits to the family home related to the claimed familial LTTE connections, yet he seemingly has not obtained any more information about his brother's experience from these family sources, despite the claimed consequences for him and his other brothers and that these relatives have counselled him as to his safety. I also find it difficult to accept he has almost no knowledge of his brother's post-civil war experience and this leads me to question whether his inability to recount information in this regard is not because he does not know but rather because the claim is not genuine.

² UN High Commissioner for Refugees, (UNHCR), "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka", 21 December 2012, UNB0183EA8; Danish Immigration Service "Human Rights and Security Issues concerning Tamils in Sri Lanka", 1 October 2010, CIS19345

³ ibid

28. However, despite the claimed minimal knowledge of his brother's connections with the LTTE it remains plausible that the applicant had familial links to the LTTE via his brother and a cousin. I have already noted that at times during the civil war it was LTTE policy to recruit a member from each Tamil family. Also, the UN High Commissioner for Refugees (UNHCR) commented that "at the height of its influence in Sri Lanka in 2000-2001, the LTTE controlled and administered 76% of what are now the northern and eastern provinces of Sri Lanka. Therefore, all persons living in those areas, and at the outer fringes of the areas under LTTE control, necessarily had contact with the LTTE and its civilian administration in their daily lives."⁴
29. I note the complaint in the IAA submission that the delegate had failed to give weight to the UNHCR 2012 guidelines for Sri Lanka. The UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka released in 2012 provided guidance on the profiles of people at risk of harm and likely to be in need of protection and advised that family members of LTTE members may be at risk.⁵ I have considered whether his brother's and/or cousin's involvement would give rise to a real chance of persecution for the applicant, but considering his circumstances overall and taking into account more recent country information discussed further below I am not satisfied that the applicant was of any adverse interest to the authorities because of familial LTTE links, or that he would be now or in the reasonably foreseeable future should he return to Sri Lanka.
30. I have some concerns at his claim that he left the family village to move to Batticaloa because of fears for his safety. In his statement of claims he stated he left his village in 2000 because it was "not safe to stay there", but he essentially stayed in the general Batticaloa area. Despite concerns outlined in the statement of claims that the authorities would interrogate and torture the brothers of LTTE members to obtain information about LTTE operations this did not happen to the applicant, either at the time his brother was taken or in later years. His statement of claims account indicates his mother was concerned for his safety and arranged for him to stay in a hostel and with one of his brothers while he finished his schooling, but despite these moves he remained in the general Batticaloa area and I am satisfied the authorities would have been able to locate him if they had any interest in him.
31. I note the incident in 2009 and the applicant's concern that he was suspected of being an LTTE supporter and his ongoing fear of harm from this incident. From his account he was detained, along with others, because he was in the vicinity of a bomb explosion. It is plausible that in 2009, in the closing months of the civil war, the applicant was in the vicinity of such an attack and I accept that he was detained and questioned as a result. Noting the country information advising the authorities mistreated and abused Tamils with impunity I accept his claim he was beaten and that he required treatment for injuries sustained.⁶ I accept this may have been distressing for the applicant and that he has ongoing concerns for his safety, but I am not satisfied his fear is well-founded. It is important to note the applicant was released by the authorities after a brief period of detention and it is apparent that after their initial enquiries they did not have an ongoing interest in him. Had the authorities suspected he was involved with the bomb attack in anyway, or with the LTTE, I find he would have been detained under the wide ranging emergency powers then in place to detain people for extended periods on mere suspicion.⁷ That he was not so detained but released with no

⁴ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka", 21 December 2012, UNB0183EA8

⁵ *ibid*

⁶ Danish Immigration Service "Human Rights and Security Issues concerning Tamils in Sri Lanka", 1 October 2010, CIS19345

⁷ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka", 21 December 2012, UNB0183EA8

apparent follow up from the authorities indicates he was not considered to be a security concern.

32. I also note that despite the 2009 incident and his familial LTTE links he was able to move around Sri Lanka, reside and work in Colombo and travel overseas. Throughout the civil war the authorities maintained strict monitoring provisions designed to control the movement of Tamils and to detect persons of concern.⁸ Colombo in particular was heavily protected by security checkpoints, both on entry to the city and within the city, and Tamils were required to register their residence with the authorities.⁹ While the applicant may have had concerns about his safety and chose to stay mostly indoors in Colombo and to limit his visits to the family in Batticaloa, that he was able to enter and live and work in Colombo indicates the authorities did not have an adverse interest in him.
33. The authorities were also able to detect persons of concern through the application of security checking at the airport for departure and arrivals.¹⁰ That the applicant was able, unhindered, to leave Sri Lanka in 2008 to work in [Country 2] and later return that year, and then depart again in 2012 when he travelled to [Country 3] indicates he was not of concern to the authorities.
34. I also take into account that the UNHCR Guidelines were released in 2012 and in the passage time the security situation in Sri Lanka has eased and reporting more recently the UK Home Office noted that the Sri Lankan government's concern has changed since the civil war ended and the government's present objective is to identify Tamil activists who are working for Tamil separatism and to destabilise the unitary Sri Lankan state. The UK Home Office reported the Upper Tribunal in 2013 recognised four categories of persons at risk; those with a significant role in post-conflict Tamil separatism, journalists/human rights activists, people who gave evidence to the Reconciliation Commission implicating the Sri Lankan security forces and those whose name appears on a "stop" list of those against whom there is an extant court order or arrest warrant.¹¹
35. At the protection visa interview the applicant advanced the claim that in 2014 some people came to the family home with a list of missing people which included the applicant and asked about the applicant's whereabouts and his mother advised he had left the country. At the protection visa interview the applicant described this list as a boat list whereas in the IAA submission it was described as a voter list. It is possible the authorities came by this information via a 'boat list', noting the applicant's details were released in the 2014 data breach, although the country information before me does not indicate the authorities making such enquiries from 'boat lists'. However, country information advises that Sri Lankan citizens are required to register with the local civilian Grama Niladhari (Village Officer) to be eligible to vote and it is plausible that such authorities make enquiries about the whereabouts of absent people such as the applicant.¹² But I am not satisfied that such an enquiry is anything more than part of the general bureaucratic process in Sri Lanka relating to the registration of citizens, and in particular their presence in the country and thereby their eligibility to vote.

⁸ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka", 21 December 2012, UNB0183EA8; Danish Immigration Service "Human Rights and Security Issues concerning Tamils in Sri Lanka", 1 October 2010, CIS19345

⁹ Landinfo, "Sri Lanka: Human rights and security issues concerning the Tamil population in Colombo and the Northern Province", 1 December 2012, CIS25286

¹⁰ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

¹¹ UK Home Office, "Country Policy and Information Note. Sri Lanka: Tamil separatism. Version 4.0", 31 March 2017, OG6E7028822

¹² DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

There is no indication the people who visited his mother in 2014 with either a boat or voter list made any threats or that there has been any follow up over this matter or that this visit indicates an adverse interest in the applicant beyond knowing his whereabouts for administrative purposes. I am not satisfied that this visit is indicative of a real chance of harm to the applicant on return.

36. I am not satisfied that the applicant has a profile of concern on the basis of his brother's and/or cousin's LTTE involvement or from the 2009 incident. I do not accept that the applicant has a real or imputed LTTE profile. Nor am I satisfied that he would face harm or be imputed with a profile of concern on the basis of his Tamil ethnicity or for being from a former LTTE area; country information, including the UNHCR guidelines, indicates being of Tamil ethnicity alone or from a former LTTE area does not give rise to protection needs.¹³ I accept that during the civil war and in the oppressive security environment in place in the aftermath of the civil war Tamils were subject to harassment. However there has been a significant change in the security situation since the end of the civil war in 2009 and when the applicant left Sri Lanka in 2012.
37. The improvement in the security situation has resulted in a decrease in Tamils held in detention and the election of the Sirisena government in 2015 led to greater political cooperation. The Sirisena government adopted a more proactive approach to human rights and reconciliation and engaged constructively with the Tamil political parties. However, since the 2018 local elections the Sri Lanka Podujana Peramuna party (SLPP), dominated by Gotabaya Rajapaksa and his family, has been increasingly gaining power and in 2019 Rajapaksa was elected as President and his party was overwhelmingly successful in the 2020 general elections. I accept there is credible reporting of the brutality of the government of past President Mahinda Rajapaksa, the brother of the current President, in which human rights abuses were committed both during the civil war and in the immediate aftermath and that many agencies and the general Tamil community have expressed concern as to the return of the Rajapaksas to power.¹⁴
38. However, the election of the coalition Sirisena government in 2015 saw a significant shift in respect for human rights for Tamils and the general population in Sri Lanka and provided the country a chance to break from the repressive policies of the past which largely targeted the Tamil population. I note the concern about the incoming Rajapaksa government in the light of the past but Gotabaya and Mahinda Rajapaksa are returning to government in a very different environment from that in place when they were implicated in human rights violations. It is important to note the context of the repressive actions of the former Rajapaksa government being at the end of the civil war and in the aftermath of the war. It was in this environment that the excesses of human rights abuse were committed and continued to be committed in the aftermath of the war in attempts to quash any resurgence of the LTTE.¹⁵
39. The Sri Lankan government remains concerned as to the rise of Tamil separatism but the indications are being of Tamil ethnicity in itself would not warrant international protection and that generally a person would not be regarded as a concern unless they have or are

¹³ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka", 21 December 2012, UNB0183EA8; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil Separatism", May 2020, 20200527172009

¹⁴ UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928; DFAT, "DFAT Country Information Report – Sri Lanka", 23 December 2021, 20211223094818

¹⁵ DFAT, "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

perceived to have had a significant role in the LTTE or to have been active in post-conflict Tamil separatism. Since the civil war ended the Sri Lankan government's focus has changed and the government's ongoing objective is to identify Tamil activists who are working for Tamil separatism and to destabilise the unitary Sri Lankan state. Specifically, the UK Home Office report identified the profile of LTTE supporter of interest to the authorities and indicates that this is "individuals who are, or are perceived to be, a threat to the integrity of Sri Lanka as a single state because they are or are perceived to have a significant role in relation to post-conflict Tamil separatism within the diaspora and/or a renewal of hostilities within Sri Lanka".¹⁶

40. I note the reporting from the ITJP regarding ongoing abuse of Tamils in particular throughout 2016/2017 and following the election of the Sirisena government.¹⁷ The applicant also provided a copy of the 2017 report published by the Office of the United High Commissioner for Human Rights in Sri Lanka which among other matters expressed concern over a number of human rights issues and reports of abuse.¹⁸
41. The Daily Mirror article advised the ITJP report identified cases of torture in 2016 and 2017 and DFAT noted that an Associated Press investigation, published in November 2017, claimed 52 incidents of torture. DFAT has also noted the ITJP cited 76 alleged cases of torture between 2015 and 2017 involving individuals suspected of LTTE involvement and that in September 2019 the ITJP identified alleged torturers in the Terrorism Investigation Division of the Sri Lanka Police based on the testimony of 73 individuals, both Tamil and Sinhalese, who claimed to have experienced torture between 2008 and 2017. Other reporting cited by DFAT is the Freedom From Torture report released in February 2019 which documented alleged cases of torture of Tamils in the period 2015 to 2017 to extract information or confessions about alleged LTTE or anti-government activities.¹⁹ Overall reporting shows that there continue to be reports of abuse by the authorities of Tamils based on actual or suspected links to the LTTE, however DFAT is unable to verify allegations of torture since 2016 and local sources told DFAT they were not aware of recent cases of former LTTE members being subjected to torture.²⁰
42. I have noted reports of incidents since the election of the Rajapaksa government. The Office of the United Nations High Commissioner for Human Rights reports monitoring of Tamils following the election of President Gotabaya Rajapaksa but that those of interest are Tamils with certain profiles such as political activists and journalists, particularly those critical of alleged war crimes.²¹ The report of the Office of the High Commissioner for Human Rights highlights concerns relating to the militarisation of civilian government functions, reversal of constitution safeguards and threats to reconciliation and accountability, and the report particularly noted the appointment to senior posts of former military personnel accused of war crimes. But despite these concerns the human rights concerns highlighted in this report

¹⁶ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil Separatism", May 2020, 20200527172009

¹⁷ IAA submission: Sri Lankan Daily Mirror, "Abduction, torture of Tamils remain systematic: ITJP", 14 July 2017

¹⁸ Provided by applicant post-interview: Office of the United High Commissioner for Human Rights in Sri Lanka, "Report of the Office of the United High Commissioner for Human Rights in Sri Lanka", 10 February 2017

¹⁹ DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244

²⁰ *ibid*

²¹ Office of the High Commissioner for Human Rights, "Promotion reconciliation, accountability and human rights in Sri Lanka", 27 January 2021, 20210203162131

relate largely to the Muslim population following the 2019 Easter bombings, journalists and human rights activists.²²

43. DFAT assesses that the risk of torture perpetrated by either military, intelligence or police forces has decreased since the end of the civil conflict and is no longer state-sponsored.²³ The UK Home Office spoke with a range of agencies and informed sources about conditions and the security situation in Sri Lanka, particularly for Tamils, in its fact-finding mission in September and October 2019. These agencies included the UNHCR, the International Organization for Migration, the Human Rights Commission of Sri Lanka and journalists, human right activists and non-government organisations and importantly Tamil politicians, including from the Tamil National Alliance. In regard to the treatment of Tamils the report comments that “most sources noted that Tamils are not specifically targeted and do not suffer persecution just for being a Tamil”. The report noted most sources noted that Tamils are not specifically targeted and do not suffer persecution just for being Tamil but that “certain Tamils may be subject to closer scrutiny” indicating that these would be political activists and journalists.²⁴
44. Noting the circumstances and profiles of those who have come to attention in these reports I am not satisfied that they give rise to a real chance the applicant would be harmed should he return to Sri Lanka or detained. The indications from various international agencies are that the Sri Lankan government has moved away from the systematic program which operated after the civil war of targeting of Tamils and identification and detention and rehabilitation of LTTE members.²⁵
45. The IAA submission contends that as [an Occupation] the applicant belongs to a particular social group and that the delegate failed to consider whether the applicant would be exposed to a risk of serious harm amounting to persecution as result of his membership of this group. I accept that the applicant was [an Occupation], but there is no indication that he came to any harm on the basis of this, or that other family members who were also [in that occupation] have been harmed on this basis. The country information before me does not indicate that [people in that occupation] are persecuted or harmed in Sri Lanka, nor does the IAA submission point to any information that would support a finding that [Occupation] are harmed.
46. Despite references in the statement of claims and the IAA submission to ‘illegal departure’ from Sri Lanka and the delegate’s assessment of this matter in the decision record, the indications from his protection visa application, statement of claims and the Arrival Entry interview conducted in 2013 are that the applicant departed Sri Lanka legally on both occasions he travelled overseas. While the delegate stated he accepted the applicant “left Sri Lanka illegally by boat in 2012” the applicant’s account is that he flew from Sri Lanka to [Country 3] in 2012 using his genuine Sri Lankan passport which was issued in 2007. Similarly, he entered [Country 2] for work in 2008 and there is no indication he travelled illegally to do so or did not use the passport issued to him in the previous year. Furthermore, had he departed illegally in 2008 I conclude that this would have been detected on his return and dealt with by the authorities at the time. The indications are that the applicant departed Sri

²² Office of the High Commissioner for Human Rights, “Promotion reconciliation, accountability and human rights in Sri Lanka”, 27 January 2021, 20210203162131; DFAT, “DFAT Country Information Report – Sri Lanka”, 23 December 2021, 20211223094818

²³ DFAT, “DFAT Country Information Report – Sri Lanka”, 4 November 2019, 20191104135244

²⁴ UK Home Office, “Report of a Home Office fact-finding mission to Sri Lanka”, 20 January 2020, 20200123162928

²⁵ UK Home Office, “Report of a Home Office fact-finding mission to Sri Lanka”, 20 January 2020, 20200123162928; UK Home Office, “Country Policy and Information Note Sri Lanka: Tamil Separatism”, May 2020, 20200527172009

Lanka legally on both departures and I do not accept he departed illegally. I note the comments in the IAA submission regarding assessment of the applicant's capacity to pay penalties related to illegal departure but I do not accept he departed illegally and I find he would not be subject to any fine or bail requirements that relate to illegal departure.

47. I accept the applicant no longer has a passport and would need to be issued a travel document to return to Sri Lanka. Returnees travelling on temporary travel documents, such as the applicant would, are subject to an investigative process to confirm identity on arrival and checks are made to identify those suspected of concealing a criminal or terrorist background. This may involve interviewing the returnee or checking with local police in the returnee's home area. These checks may take several hours to complete and as involuntary returnees are processed in groups further delays may occur until all returnees are processed. DFAT assesses that returnees are treated according to standard procedures, regardless of their ethnicity and religion, and are not subjected to mistreatment during their processing at the airport.²⁶ I do not consider any likely questioning of the applicant by the authorities at the airport on arrival or any brief period held by the authorities to conduct such investigations would amount to serious harm.
48. A further claim is that as a returning failed asylum seeker whose details were released in the data breach the authorities will suspect he has spoken out against the country and will try and find him and harm him as a result. I accept that there are past reports of mistreatment of returned asylum seekers who have come to attention on return to Sri Lanka, but the indications are that those who have had an actual or imputed profile of concern to the authorities, but I do not accept that the applicant was so imputed or that he would be now or in the foreseeable future as a returning asylum seeker.²⁷
49. I am not satisfied that the applicant would face any harm as a returning failed asylum seeker, even considered with familial LTTE links and the 2009 incident. Considering the totality of the material before me, I am not satisfied that there is a real chance that the applicant would be persecuted on return to Sri Lanka or in the reasonably foreseeable future on the bases claimed, either individually or considered cumulatively.

Refugee: conclusion

50. 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

51. 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.

²⁶ DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244

²⁷ Freedom From Torture, "Sri Lanka – Update on torture since 2009", 6 May 2016, CIS38A8012881; Sri Lankan Mirror, "Another Tamil returnee arrested", 1 July 2015, CXBD6A0DE16698; Tamils Against Genocide, "Returnees at Risk: Detention and Torture in Sri Lanka", 1 September 2012, CIS24086; DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105; UK Home Office, "Country Policy and Information Note. Sri Lanka: Tamil separatism. Version 4.0", 31 March 2017, OG6E7028822

Real risk of significant harm

52. 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.
53. 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.
54. As noted above I have accepted that the applicant would be subject to an investigative process to confirm identity on arrival but that this would not amount to serious harm. Nor do I accept it would amount to significant harm. This process does not amount to the death penalty, arbitrary deprivation of life or torture and the evidence does not indicate there is an intention to inflict pain or suffering or severe pain or suffering or cause extreme humiliation.
55. I have otherwise found there is not a real chance that the applicant faces harm on any of the bases claimed. Noting that the "real risk" test for complementary protection is the same standard as the "real chance" test,²⁸ and based on the same information, and for the reasons set out above, I am also satisfied that there is not a real risk that he would face significant harm for these reasons.

Complementary protection: conclusion

56. 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.

²⁸ *MIAC v SZQRB* (2013) 210 FCR 505

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

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

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

...

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

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature;

but does not include an act or omission:

- (c) that is not inconsistent with Article 7 of the Covenant; or
- (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

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

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

...

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

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

...

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

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant;

but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

5H Meaning of refugee

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

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

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

...

5J Meaning of well-founded fear of persecution

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

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

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

5K Membership of a particular social group consisting of family

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

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

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

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

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

5L Membership of a particular social group other than family

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

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

5LA Effective protection measures

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

...

36 Protection visas – criteria provided for by this Act

...

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

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

...

Protection obligations

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

Determining nationality

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