



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA21/10183

Date and time of decision: 25 February 2022 16:24:00
M Oakman, 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 of the Hindu faith from the Northern Province, Sri Lanka. He arrived in Australia [in] October 2012 and lodged an application for a Safe Haven Enterprise visa (SHEV) (XE-790) on 9 March 2016. On 24 October 2016 a delegate of the Minister for Immigration (the delegate) refused to grant the visa. On 17 May 2017 the IAA affirmed the delegate's decision not to grant the applicant a protection visa.
2. The applicant sought judicial review of the IAA's decision. [In] November 2021 the Federal Circuit and Family Court of Australia, by consent, quashed the IAA's decision and remitted the matter to the IAA for the review to be determined according to law. The basis for that decision was the IAA's failure to exercise its discretion under s.473DC of the *Migration Act 1958* (the Act) was unreasonable as the factual circumstances surrounding that decision were indistinguishable from *Minister for Home Affairs v DUA16*; *Minister for Home Affairs v CHK16 (2020) 385 ALR 212* at [28].

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the Act.
4. I have obtained four country information reports on Sri Lanka which were not in the review material and are new information. These are a report of the Department of Foreign Affairs and Trade (DFAT) from December 2021 about country conditions in Sri Lanka; reports of the UK Home Office (UKHO) from May 2020 and June 2021 about Sri Lanka and Tamil separatism; and a report of the US Department of State (USDOS) about human rights practices in Sri Lanka from March 2021.¹ The country information the delegate considered in relation to conditions in Sri Lanka is now more than five years old. The reports are the most recent available from DFAT, USDOS and UKHO, I consider those agencies to be generally reliable and authoritative sources of country information, and the DFAT and UKHO reports were prepared to assist in protection status determinations. As such, I am satisfied there are exceptional circumstances to justify considering this new country information.
5. On 9 February 2022 the IAA wrote to the applicant and invited him to comment on information from the DFAT, USDOS and UKHO reports which may be the reason, or part of the reason for affirming the decision of the delegate to refuse him a protection visa. The relevant information from the reports was summarised for the applicant, and a full copy of each report was also sent to him. The invitation specified that he should respond by 23 February 2022. The IAA also provided the applicant with copies of the submissions and material sent by his former representatives in 2016 and, given the circumstances of the court remittal, indicated that if he wished to make submissions to the IAA he should do so by 23 February 2022. As at the date of this decision, the IAA has not received any response from the applicant. Previously, on 9 December 2021 the applicant telephoned the IAA in response to an email from the IAA on 8 December 2021, asking him to make contact. The IAA's correspondence of 9 February 2022 was sent to this email address. That correspondence has

¹ DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818; UKHO, "Country Policy and Information Note. Sri Lanka - Tamil Separatism", Version 7.0, 17 June 2021, 20210624114752; UKHO, "Country Policy and Information Note Sri Lanka: Tamil Separatism", May 2020, 20200527172009; and USDOS, "Country Reports on Human Rights Practices for 2020 - Sri Lanka", 29 March 2021, 20210401122412.

not “bounced back”. In the circumstances, I have decided to proceed on the information before me without taking any further action to obtain a response.

Applicant’s claims for protection

6. The applicant’s claims can be summarised as follows:
 - In June 2012 the Criminal Investigation Department (CID) kidnapped him and took him to a named location. They picked him up at 9 am and left him at 8.30pm at night. They stripped him naked and hit him with an iron [rod], he still has scars on his [body]. They were suspicious that he involved with the Liberation Tigers of Tamil Eelam (LTTE). They said that he could not leave the area. He subsequently fled Sri Lanka for Australia.
 - If returned, he fears he will be accused of leaving Sri Lanka because he was involved with the LTTE. He is assumed to be a LTTE sympathiser because he is Tamil. He fears they will detain him, kidnap him in a white van or even kill him.
 - He fears he will be interrogated and harmed by the Sri Lankan Army (SLA) if he returns to Sri Lanka. While in Australia he has kept a low profile and the SLA has enquired about his whereabouts. He fears that they will interrogate him, they will suspect him of LTTE involvement and harm him as a result.
 - He also fears he will be harmed because he left the country illegally. He has heard that people have been jailed and he fears he will be mistreated and degraded in jail - asked to clean the toilets of the Police and/or perform sexual acts on the Police. This has happened to a lot of people. He will also be returning as a failed asylum seeker.

Factual findings

Receiving country

7. Based on the documents and oral evidence given by the applicant, I accept that the applicant is a national of Sri Lanka. I find that the applicant’s receiving country is Sri Lanka.

Background

8. The applicant was born in [Year] in [City], Northern Province, Sri Lanka. He and his family were displaced at times during the war. He has never married and has no children. His parents are deceased. He has a sister and [brothers] living in Sri Lanka and another sister and brother living in [Country]. He attended school in Sri Lanka up to Year [Number] ([year]-1998). In Sri Lanka he worked as a farmer on the family farm (1996-2012) and he also worked for six months as [an Occupation] (2010). He reads, writes, and speaks Tamil. He is Tamil and Hindu.

Problems in Sri Lanka

9. In summary, the applicant claims that in June 2012 he was kidnapped, questioned, and mistreated by the CID. He said:

- The CID came to his house in a Jeep pick up. He was not home, but at his uncle's shop. The CID went to the shop and took him. He knew it was the CID because they had identified themselves as such to his uncle.
 - He was first taken home to collect his ID and documents and then they took him to their camp at a named location. He was held from about 9 am until 8.30pm that night. He was stripped naked, and intermittently beaten with an iron rod [throughout] his detention and questioning. He has scars on his [Body] as a result. The CID were suspicious that he was involved with the LTTE. He kept denying that he was LTTE. He told them the LTTE had wanted to recruit him but didn't because of his bad knees. The CID didn't believe him and kept beating him. He also had scars on his legs from a plane attack during the war while he was in Kilinochchi and the CID believed he got it fighting for the LTTE.
 - When he was released the CID told him not to tell anyone they had mistreated him and said that he cannot leave his village without permission. His aunt and brother came for him. He was unable to walk or very sick for about four days. Afterwards he stayed in the village and then went to a hospital where his aunt worked. When asked who beat him, he told the hospital it was unknown persons.
 - He left Sri Lanka in about September 2012.
10. The applicant claimed that prior to this June 2012 incident he had only been questioned for an hour or two when he was in the internally displaced persons' (IDP) camp and that he had never been kidnapped before. His brother had also been questioned in the IDP camp. When released from the IDP camp the SLA registered him and gave him an ID card, which he had to show everywhere he went. For most of his time in Sri Lanka he lived in Kilinochchi in LTTE controlled areas. The applicant was not involved with the LTTE but the LTTE had approached him to pay money, and he did so, on two occasions. The applicant obtained a Sri Lankan passport in 2010 and the same year he travelled to India for a cousin's wedding. He did not encounter any issues with the authorities leaving or returning to Sri Lanka on that trip.
 11. The applicant says that after he left for Australia the authorities went to his house and enquired about him. When the SLA went to enquire about him at his sister-in-law's place, she said she didn't know his whereabouts. One of his brothers left their home in the village and moved in with one of his sisters, also in [City], because of the authorities coming and asking about the applicant's whereabouts on two occasions. His brother told them the applicant had left, and they asked for his phone number. He cannot recall the dates, but it was after he left Sri Lanka. He said his family in Sri Lanka are okay and they are living alright, but if he returned, he would cause trouble for his sister and brother because of the authorities' interest in him.
 12. The applicant fears he will be harmed if he returns to Sri Lanka (see Applicant's claims for protection above).
 13. He provided supporting documents including identity documents; birth and death certificates; registration cards in relation to his displacement and resettlement because of the war; and country information.
 14. DFAT reported that incidents of extra-judicial killings, disappearances and kidnapping occurred frequently in Sri Lanka during the war, particularly in the north and east, and assesses that there are credible reports of torture carried out by Sri Lankan security forces both during the war and in its immediate aftermath. Many Tamils, particularly in the north and east, reported being monitored, harassed, arrested or detained by security forces during

the war.² The UN High Commissioner for Refugees (UNHCR) and other country information indicated that post-war, arbitrary detentions were widely reported, as well as reports of detainees being interrogated, including incidences of torture, with the detainees usually civilians suspected of LTTE links, particularly in the north and east.³ The Sri Lankan authorities possessed extensive powers to arbitrarily detain and arrest people under the *Emergency Regulations* (Sri Lanka) and under the *Prevention of Terrorism Act 1979* (Sri Lanka) (PTA), including permitting extended administrative detention of up to 18 months, and those powers were in wide use by the authorities during the war and in its aftermath.⁴ In areas they controlled, the LTTE had an extensive administrative structure and people were required to interact with the LTTE's military and civil administration as a matter of course.⁵ Country information⁶ confirms that hundreds of thousands of IDPs were detained by the security forces in the final stages of the war and kept in IDP camps, where there were restrictions on their movement. They were screened for any possible links to the LTTE, and some 12,000 individuals were arrested by the authorities as LTTE suspects. DFAT noted that in a 2013 UNHCR survey of Tamil IDPs who returned to the north and east, 87% said they had been registered by the military and 71% said they had been visited by the SLA or CID and interviewed.⁷

15. In assessing the applicant's evidence, I have taken into account difficulties of recall over time, the scope for misunderstanding in interpreted material, cross cultural communication issues, and the problems people who have lived through trauma may experience in presenting their story in a cohesive narrative. The applicant has been generally consistent about his background, history, and the June 2012 incident since his initial dealings with the Department and throughout the visa application process. His claims are also generally consistent with the country information. I accept his family, address, education, and employment histories as set out in his SHEV application and at the SHEV interview, and his claims in relation to the adverse attention he received from the authorities in Sri Lanka, including that he was detained, questioned, and mistreated by the CID in the June 2012 incident, except as discussed below.
16. Although I generally accept the applicant's claims, I am not satisfied that his evidence is without some exaggeration or embellishment. In particular:
 - The applicant described the June 2012 incident as a kidnapping. However, the CID identified themselves to his uncle, they took the applicant home to collect his ID documents before taking him to their camp, and his family collected him when he was released later that same day. The details the applicant provided about the CID's actions in the June 2012 incident clearly suggest he was openly detained by the CID, questioned etc, and then released all on the same day, rather than being the subject of a kidnapping. Given his description of the incident itself, I am not satisfied that the

² DFAT, "DFAT Country Information Report Sri Lanka" 18 December 2015, CISEC96CF14143.

³ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012, UNB0183EA8; "Tainted Peace: Torture in Sri Lanka since May 2009", Freedom From Torture, August 2015, CISEC96CF13070; and "Silenced: survivors of torture and sexual violence in 2015", International Truth & Justice Project Sri Lanka (ITJP), 7 January 2016, CIS38A801275.

⁴ UKHO, "Sri Lanka March 2012", 7 March 2012, 3523; UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012, UNB0183EA8; and USDOS, "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320.

⁵ DFAT, "DFAT Country Information Report Sri Lanka" 18 December 2015, CISEC96CF14143.

⁶ UKHO, "Sri Lanka March 2012", 7 March 2012, 3523; and UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012, UNB0183EA8.

⁷ DFAT, "DFAT Country Information Report Sri Lanka" 18 December 2015, CISEC96CF14143.

applicant was kidnapped, rather than openly detained, by the CID in the June 2012 incident.

- The applicant claimed at his SHEV interview that for most of his time in Sri Lanka he lived in the LTTE controlled Kilinochchi District, which he attributed as one of the reasons for the CID's adverse interest in him. However, the address history he provided in his arrival interview and SHEV application suggests he lived in [City], except when he was displaced. The camp and family registration documents indicate that he was displaced from 2007 to 2010, and that the IDP camp he was in for part of that time was in any event located in [City]. Contrary to his claim at the SHEV interview, the other information and documentation he provided suggests he has spent most of his time in Sri Lanka in [City]. Based on the address histories he provided prior to the SHEV interview, and his supporting documents, I am not satisfied that the applicant spent most of his life in Sri Lanka in [Town], rather than in [City].
 - The applicant said in his SHEV statement that, after he left Sri Lanka, the authorities had enquired about his whereabouts at his sister-in-law's place, and she said she didn't know where he was. In his SHEV interview he claimed that after he left Sri Lanka, the authorities questioned his brother twice in relation to his whereabouts, they were told he had left Sri Lanka and they asked for the applicant's phone number. As a result of these visits, his brother left their home village and moved in with one of his sisters elsewhere in [City]. His SHEV statement was signed in March 2016 and his SHEV interview was held in August 2016. I do not consider it credible that he gave substantially different accounts of enquiries he claims were made by the authorities in relation to his whereabouts after he left Sri Lanka in the relatively short period of time between his SHEV statement and SHEV interview and, therefore, I am not satisfied that the authorities made enquiries about the applicant's whereabouts after he left Sri Lanka or that his brother moved in with his sister for the reasons claimed.
17. The applicant said at his SHEV interview (August 2016) that he had suffered bad dreams and nightmares because of the torture he suffered, calling out in the night things like "don't beat me". He had mentioned it to his case manager and went for some trauma counselling; he attended about seven times; and he had not been in the last six months. I accept that the applicant received several sessions of trauma counselling prior to February 2016. However, I am not satisfied on the material before me that the applicant currently suffers from any mental health disorder, illness or condition, or other medical conditions, for which he requires any medical treatment now or in the reasonably foreseeable future.

Asylum Seeker and return to Sri Lanka

18. The applicant claims to have left Sri Lanka in about September 2012 to travel to Australia in a boat organised by a smuggler. I find that, if he were to return to Sri Lanka, he may be considered a failed asylum seeker who departed illegally by the Sri Lankan authorities. He had a passport, which he left in Sri Lanka, and it expired some time ago. If returned, he may do so on temporary travel documents.
19. The applicant lived in [City] District throughout most of his life in Sri Lanka. One of his brothers and one of his sisters continues to live in [City] and his family has farmland in [City]. Given those factors, I am satisfied that the applicant will return to [City] District, Northern Province, if he returns to Sri Lanka.

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. Country information indicates that Tamils maintained they were subject to longstanding, systematic discrimination in university education, government employment, housing, health services, language laws and naturalisation procedures.⁸ As discussed above, incidences of extra-judicial killings, disappearances and kidnapping occurred frequently in Sri Lanka during the war, particularly in the north and east, there are credible reports of torture carried out by Sri Lankan security forces both during the war and in its immediate aftermath, and many Tamils, in the north and east in particular, reported being monitored, harassed, arrested or detained by security forces during the war and under the previous Rajapaksa government.
23. The previous Rajapaksa government ended in 2015 with the election of (now former) President Sirisena.⁹ The UKHO indicates that under the Sirisena government there were positive developments including: the curtailment of executive power; attempts at the reestablishment of independent commissions, including the Human Rights Commission of Sri Lanka (HRCSL); de-proscription of a number of international diaspora organisations; and review of cases held under the PTA and the release of some detainees. However, progress was slow and little improvement was reported in 2018 and 2019.¹⁰
24. In its most recent report,¹¹ DFAT said that the Sirisena government promised a new era of corruption free government and embarked upon a path of reconciliation with the Tamil

⁸ USDOS, “Country Reports on Human Rights Practices for 2020 - Sri Lanka”, 29 March 2021, 20210401122412.

⁹ DFAT, “DFAT Country Information Report Sri Lanka” 18 December 2015, CISEC96CF14143.

¹⁰ UKHO, “Country Policy and Information Note Sri Lanka: Tamil Separatism”, May 2020, 20200527172009.

¹¹ DFAT, “DFAT Country Information Report - Sri Lanka”, 23 December 2021, 20211223094818.

minority that appeared to make some progress. However, In November 2019, Gotabaya Rajapaksa was sworn in as Sri Lanka's President, choosing his elder brother Mahinda Rajapaksa (the former President until 2015), as his Prime Minister. DFAT notes that the UN Office of the High Commissioner for Human Rights (OHCHR) in a January 2021 report expressed concern that while Sri Lanka seemed to be on a new path towards advancing reconciliation, accountability and human rights, the developments since November 2019, have reversed that direction and, instead, threaten a return to patterns of discrimination and widespread violations of human rights experienced in past decades.

25. Notwithstanding the OHCHR's concerns about the possible future direction, the report from DFAT, overall, suggests that conditions for Tamils in Sri Lanka have substantially improved since the applicant was last in Sri Lanka. In particular, DFAT assesses that non-Muslim Sri Lankans, including Tamils, face a low risk of official or societal discrimination based on ethnicity or caste, including in their ability to access employment or housing. There is no official discrimination based on ethnicity in public sector employment. DFAT indicates the security situation, particularly in the north and east, has improved significantly since the end of the war. The Government no longer restricts travel to the north and the east. Military involvement in civilian life has decreased overall since the end of the war. The number of incidents of extrajudicial killings, disappearances, and abductions for ransom, including incidents of violence involving former LTTE members, has reduced since the end of the war. The risk of torture perpetrated by either military, intelligence or police forces has decreased since the end of the war. DFAT assesses that Sri Lankans face a low risk of torture overall. DFAT assesses that surveillance of Tamils in the north and east continues, however, physical violence against those being monitored by the authorities is not common and ordinary Tamils living in the north and the east of Sri Lanka are at low risk of official harassment. DFAT also assesses that, while they may be monitored, Tamils with former links to the LTTE are generally able to lead their lives without concern for their security as a result of their past association with the LTTE.
26. UKHO indicates that not all Tamils are at risk on return to Sri Lanka. There is no evidence to suggest that all returning Tamils are at risk of being perceived to have links to the LTTE, or if they do have links that this is a problem for them on return. UKHO considers it unlikely that the Government would have an interest in a person purely because they were once a member of the LTTE. Returnees with a previous connection to the LTTE are generally able to return to their communities without suffering ill-treatment. UKHO states Tamils are unlikely to face persecution based on their ethnicity alone. Abductions are also no longer common.¹² UKHO indicates the Sri Lankan Government does not regard the entire cohort of Tamil diaspora as either holding separatist views or being politically active in any meaningful way. Returnees who have no entry on the general security database, or whose entry is not such as to have placed them on either a stop list or the watch list, will in general be able to pass through the airport unhindered and return to their home area without being subject to any further action by the authorities.¹³
27. The USDOS notes, as discussed above, that Tamils in Sri Lanka maintained they were subject to longstanding, systematic discrimination in a number of areas. However, the USDOS also indicates that there were no reports of disappearances by or on behalf of government authorities in 2020; and civilian officials maintain control over the security forces. USDOS indicates the HRCSL, which has jurisdiction to investigate human rights violations, generally

¹² UKHO, 'Country Policy and Information Note Sri Lanka: Tamil Separatism ', May 2020, 20200527172009.

¹³ UKHO, "Country Policy and Information Note. Sri Lanka - Tamil Separatism", Version 7.0, 17 June 2021, 20210624114752.

operated independent of and with lack of interference from the Sri Lankan government.¹⁴ DFAT however noted that the OHCHR had also expressed concern about recent constitutional amendments in Sri Lanka eroding the independence of institutions including the HRCSL.¹⁵

28. The applicant is Hindu, but he has not claimed that he experienced any discrimination or harm in Sri Lanka, and makes no protection claims, on that account.
29. I am not satisfied that the applicant's fear of harm in Sri Lanka, whether on account of his Tamil ethnicity and background, because of imputed LTTE links, or for any other reasons, is well-founded.
30. I accept that the applicant is a Tamil male from the Northern Province and that he lived at times during the war in LTTE controlled areas. I accept that he was questioned for an hour or two while he was in an IDP camp at the end of the war. I accept that the applicant was taken detained, questioned, and beaten with an iron rod, by the CID in the June 2012 incident; and he was told not to leave his village without permission and not to disclose he was mistreated when released. I also accept that the applicant has scarring from a plane attack during the war and because of his June 2021 beating. However, having regard to the information before me, I am not satisfied the applicant faces a real chance of harm in relation to those matters now or in the reasonably foreseeable future.
31. First, as the UKHO report notes, being of Tamil ethnicity would not give rise to a need for protection; and, as the now dated UNHCR report¹⁶ noted in 2012, being from an area that was previously controlled by the LTTE did not in itself result in a need for protection. All those who lived or worked in LTTE controlled areas had to interact daily with the LTTE, and the Sri Lankan authorities would be well aware that was the case. The applicant was not involved with the LTTE and it is not claimed that any of his immediate or extended family were in the LTTE. He paid money to the LTTE on two occasions when they demanded it, but that would not be unusual in an LTTE area during the war. The applicant, and some of his family, were placed in an IDP camp, and questioned for an hour or two by the SLA, at the end of the war. However, many thousands of people who were in LTTE controlled areas in the last period of the war were interred and questioned by the authorities in IDP camps. The applicant and his family were released from the camp in late 2009 and were resettled in their home village in 2010. Until the June 2012 incident, the applicant had no other adverse attention from the Sri Lankan authorities, including when he travelled through the airport to and from his trip to India in 2010.
32. Secondly, although the applicant was detained, questioned, and mistreated by the CID during the June 2012 incident, he was released the same day, albeit with warnings about not disclosing his mistreatment and to not leave the area without permission. The applicant was not charged, taken to court, imprisoned, subject to any formal detention under the PTA or sent to rehabilitation, at that or any other time by the authorities. The country information indicates that such incidents were, unfortunately, not uncommon at that time as part of the widespread monitoring and harassment of Tamils. Similarly, as discussed above, a 2013 UNHCR survey suggests that a very large majority of Tamils released from the IDP camps were, when they returned to the north and east, subject to registration requirements and were subsequently visited and interviewed by the authorities. In short, the applicant's experiences at the time were similar to those experienced by many other Tamils in the north

¹⁴ USDOS, "Country Reports on Human Rights Practices for 2020 - Sri Lanka", 29 March 2021, 20210401122412.

¹⁵ DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818.

¹⁶ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012, UNB0183EA8.

and east, and I am not satisfied that they indicate the authorities held any interest in the applicant beyond the general harassment and monitoring of Tamils that was occurring at the time. Nor, on my findings have the Sri Lankan authorities made any enquiries about the applicant since he left Sri Lanka in about September 2012. In relation to the applicant's scars, DFAT does not identify scarring as an issue or concern in its latest report, indeed, it makes no mention of it.¹⁷ UKHO suggests that scarring is not generally an issue; it may show that a person was involved in the war, but that alone will not be enough to indicate that they would be at risk on return as previous LTTE connections are not perceived by the authorities as a destabilising threat in post-conflict Sri Lanka.¹⁸

33. Thirdly, it is now more than nine years since the applicant was in Sri Lanka and during that time the general situation and country conditions for Tamils in Sri Lanka have substantially improved. Further, as the UKHO 2020 report notes, a person's past LTTE connections are not generally seen by the Sri Lankan authorities as posing a risk. The Sri Lankan authorities do remain sensitive to the potential re-emergence of the LTTE and to separatist tendencies in general.¹⁹ UKHO indicates that a significant role in the current Tamil separatist activities is likely to be of adverse interest to the Sri Lankan authorities, and a number of factors need to be considered in determining what may be viewed as significant.²⁰ DFAT assesses the authorities may monitor members of the Tamil diaspora returning to Sri Lanka depending on their security risk profile and assesses that those with leadership positions in Tamil diaspora groups, among others, would be of particular interest to the authorities. DFAT understands from multiple sources that some returnees have been subject to monitoring, especially those in the north and the east with suspected LTTE links, but DFAT understands that most returnees, including failed asylum seekers, are not actively monitored on an ongoing or long-term basis. Some Tamils who had failed to secure asylum in Australia and since returned to the Northern Province told DFAT that they had no protection concerns, had not experienced harassment by the authorities nor received monitoring visits.²¹
34. The applicant was not of any adverse interest to the Sri Lankan authorities at the time of his departure from Sri Lanka in September 2012, other than as part of the general monitoring and harassment of Tamils that was occurring at the time. No one has shown any adverse interest in, or otherwise made enquiries about, him since his departure. The applicant has not been involved in any pro-Tamil separatist or pro-LTTE diaspora activities in Australia. I am not satisfied that the applicant's profile is one that places him at a real chance of harm. Nor am I satisfied that it will be increased by the fact that the applicant has spent more than nine years outside of Sri Lanka in Australia. Nor am I satisfied, given his profile, there is a real chance that he will be monitored because of his time living outside Sri Lanka and/or as a Tamil asylum seeker, if returned.
35. The applicant does not have a profile that country information suggests would lead to a real chance of harm, now or in the reasonably foreseeable future, for imputed LTTE links, for his Tamil ethnicity, his background, his scarring and/or for any other reason. I do not consider that at the time of his departure the Sri Lankan authorities had any adverse interest in the applicant, except as part of the general monitoring and harassment of Tamils that was occurring at the time. Nor that he would be of any adverse interest to the Sri Lankan

¹⁷ DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818.

¹⁸ UKHO, "Country Policy and Information Note Sri Lanka: Tamil Separatism", May 2020, 20200527172009; and UKHO, "Country Policy and Information Note. Sri Lanka - Tamil Separatism", Version 7.0, 17 June 2021, 20210624114752.

¹⁹ DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818.

²⁰ UKHO, "Country Policy and Information Note Sri Lanka: Tamil Separatism", May 2020, 20200527172009; and UKHO, "Country Policy and Information Note. Sri Lanka - Tamil Separatism", Version 7.0, 17 June 2021, 20210624114752.

²¹ DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818.

authorities, or that he faces a real chance of suffering harm for that reason, if he returned to Sri Lanka. I am not satisfied he faces a real chance of harm for reason of his ethnicity, background, for any imputed links to the LTTE, because of his scarring or for any other reasons.

36. I accept that, on his return to Sri Lanka, the applicant may be identified by the authorities as a failed Tamil asylum seeker who departed Sri Lanka illegally.
37. Entry and exit from Sri Lanka is governed by the *Immigrants and Emigrants Act 1949* (Sri Lanka) (IE Act). People who have departed irregularly by boat are considered to have committed an offence under the IE Act. Penalties for leaving Sri Lanka illegally include imprisonment of up to five years and a fine. DFAT is not aware of a prison sentence being given for an illegal departure by itself, and sources suggest a fine of LKR 50,000-200,000 is typically imposed. Those charged are required to appear in court where the matter was first heard and DFAT understand, regardless of plea, individuals so charged appear every 3-6 months for bail hearings. The cases may take years to resolve, requiring ongoing court appearances. DFAT is not aware of returnees from Australia being charged under the under the PTA.²²
38. Advice from DFAT is that upon arrival in Sri Lanka, unsuccessful asylum seekers are interviewed by the Chief Immigration Officer. They may also be interview by other agencies, including the CID, the State Intelligence Service, and Sri Lankan Navy Intelligence, depending on the circumstances of their departure and personal histories. These agencies check returnees' travel documents and identity information against immigration databases, intelligence databases and the records of outstanding criminal matters. Those who departed illegally will be referred to the CID and taken to court in Negombo where they are bailed and released. For returnees travelling on temporary travel documents, police undertake an investigation to confirm the person's identity, to see whether someone was trying to conceal their identity due to a criminal or terrorist background or trying to avoid court orders or arrest warrants. This often involves interviewing the returning passenger and contacting their claimed home suburb or town.²³
39. I accept that the applicant may be considered a failed Tamil asylum seeker on his return. DFAT is not aware of mistreatment of returnees during processing at the airport.²⁴ The UKHO identifies a not dissimilar process for returnees at the airport, notes the various facilities available, including that medical facilities are available at the airport if required, and also makes no mention of mistreatment allegations.²⁵
40. Taking into account my findings about his profile, and the country information, I am not satisfied that the applicant will be at risk of adverse attention or that he faces a real chance of harm from the Sri Lankan authorities when scrutinised on his return to Sri Lanka, whether when processed at the airport or on his return home.
41. DFAT advises that, once a person is found to have departed illegally, they will be referred to the CID who take them to court at Negombo where they are bailed and released. While bailed the applicant may have to attend court on numerous occasions over time. A fine may be imposed. DFAT does not mention any differential treatment for returnees, whether based on their ethnicity, religion or otherwise, it is not aware of returnees being mistreated during

²² Ibid.

²³ Ibid.

²⁴ Ibid.

²⁵ UKHO, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928.

processing at the airport and assesses that Sri Lankans face a low risk of mistreatment that can amount to torture overall.²⁶

42. I am not satisfied that there is a real chance that the applicant would face persecution in these circumstances. I accept that the applicant may be processed under the IE Act at the airport and may face court action and a fine under the IE Act as well. The country information states that all persons who depart Sri Lanka illegally are subject to the IE Act on return. That law is not discriminatory on its terms. In this case, the evidence also does not support a conclusion that the law is selectively enforced or that it is applied in a discriminatory manner. I find that the processing, investigation, prosecution and punishment of the applicant under the IE Act is not systematic and discriminatory treatment and does not amount to persecution for the purpose of ss.5H(1) and 5J(1) of the Act.
43. The Sri Lankan authorities may monitor members of the Tamil diaspora returning to Sri Lanka depending on their security risk profile. I have found that the applicant's profile is not one that places him at a real chance of suffering harm. As discussed above, I am also not satisfied that with his profile there is a real chance that the applicant will be monitored because of his background, his more than nine-year absence from Sri Lanka, or as a failed Tamil asylum seeker, if returned.
44. DFAT indicates that bureaucratic inefficiencies present a significant challenge to reintegration for returnees. Limited job opportunities in the north and the east further contribute to difficulties in securing jobs and housing. DFAT assesses that reintegration issues are not due to failure to obtain asylum, but rather due to the employment and accommodation difficulties returnees may face. Some Tamils who had failed to secure asylum in Australia and returned to the Northern Province told DFAT they were able to reintegrate into their communities and find employment. DFAT understands that returnees may face financial difficulties reintegrating into their communities, including due to sale of their belongings to fund irregular ventures overseas, but do not experience societal discrimination for seeking asylum elsewhere. Overall, DFAT understands that societal discrimination is not a major concern for returnees, including failed asylum seekers. Some Tamils who had failed to secure asylum in Australia and since returned to the Northern Province told DFAT they had not experienced significant societal discrimination following their return. DFAT assesses that returnees face a low risk of societal discrimination upon return to their communities.²⁷
45. As discussed above, if returned to Sri Lanka, the applicant will be returning to the [City] area. He may not have any of the original documents but based on the supporting documents he provided with his visa application, he has copies of his National Identity card and birth certificate, as well as other identity documents. The availability of these copies should minimise any delays in obtaining the re-issue of his Sri Lankan documentation. He has a brother and sister living in the area and it is where the family have a farm. He said at the SHEV interview his family in Sri Lanka were okay and were living alright. He previously worked on the family farm, and there is no information before me to suggest that he would be unable to do so again, if returned. He has shown himself to be resilient and resourceful by adapting to life in Australia. Given those factors, I am not satisfied that the applicant would be unable to re-establish and re-integrate himself in the [City] area. As discussed above, DFAT assesses that returnees face a low risk of societal discrimination upon return to their communities. I am not satisfied he faces a real chance of harm as a failed Tamil asylum seeker, if returned to Sri Lanka.

²⁶ DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818.

²⁷ Ibid.

46. Having considered the applicant's circumstances and profile as a whole, in the context of the country conditions in Sri Lanka I am not satisfied that the applicant faces a real chance of persecution now or in the reasonably foreseeable future. The applicant does not have a well-founded fear of persecution within the meaning of s.5J.

Refugee: conclusion

47. 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

48. 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

49. 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.
50. 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.
51. I accept that the applicant may be subject to investigation and processing under the IE Act at the airport and may also face action under the IE Act for his illegal departure. I am not satisfied the applicant will suffer the death penalty, arbitrary deprivation of life, or torture in consequence of his illegal departure. The evidence does not suggest that the treatment and penalties the applicant may be subject to because of his illegal departure is intended to inflict pain or suffering that can reasonably be regarded as cruel or inhuman in nature, severe pain or suffering, or that it is intended to cause extreme humiliation, as required in the definitions of cruel or inhuman treatment or punishment or degrading treatment or punishment. There is no suggestion that the applicant faces the death penalty for any reason. I do not accept that there is a real risk that the applicant would face being arbitrarily deprived of life or tortured for any reason. I am not satisfied there is a real risk of significant harm on this basis, or when considered in combination with any issues he may experience as a failed Tamil asylum seeker.
52. Otherwise, I have found that there is not a real chance of harm to the applicant, now or in the reasonably foreseeable future, based on his profile and history, if he is returned to Sri

Lanka. As 'real chance' and 'real risk' involve the same standard,²⁸ it follows that I am also satisfied that there is no real risk of significant harm if he is returned to Sri Lanka.

53. Having considered the applicant's circumstances individually and cumulatively, I am not satisfied that he faces a real risk of significant harm.

Complementary protection: conclusion

54. 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.