



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA16/01314

Date and time of decision: 8 June 2017 15:02:00
Patricia Tyson, Reviewer

Decision

The IAA remits the decision for reconsideration with the direction that:

- the referred applicant is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*

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 an referred applicant, or their relative or other dependant.

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be Tamil Catholic from the Northern Province of Sri Lanka. [In] April 2016 he lodged an application for a Safe Haven Enterprise visa (SHEV). After conducting an interview with the applicant [in] October 2016 (the SHEV interview), a delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa. That decision was made [in] November 2016.

Information before the IAA

2. I have had regard to the material referred by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
3. The applicant's representative, who had also represented him in the application before the Department of Immigration and Border Protection (Department) provided submissions, country information and various letters and statutory declarations to the IAA in December 2016.
4. The submission makes legal argument and reiterates aspects of oral submissions made to the Department, but also contains descriptions of current circumstances in Sri Lanka more in the nature of (unreferenced) country information. The applicant was put on notice at the SHEV interview of country information regarding the current situation in Sri Lanka, and the representative made extensive oral submissions in response. To the extent the submission to the IAA contains new information I am not satisfied there are any exceptional circumstances to justify considering it.
5. Although in part reiterating some of the claims already before me, the other material post-dates the delegate's decision and I find it to be new information.
6. The applicant has submitted two media articles which post-date the delegate's decision. One is an opinion piece, does not relate specifically to the applicant's claims and contains only general information. The other pertains to findings of a UN Committee Against Torture inquiry into Sri Lanka, but does not set out detail from that report, and as noted below I have obtained a report of the UN Special Rapporteur on torture which contains similar but more complete information. I am not satisfied there are exceptional circumstances to justify considering the media articles submitted by the applicant.
7. The applicant has submitted the following documents which post-date the delegate's decision, but relate to pre-existing matters:
 - The applicant has provided a statutory declaration responding to the delegate's decision and matters raised at the interview. The applicant's factual claims were accepted by the delegate and the statutory declaration largely reiterates evidence already before me or otherwise relates to matters known to the applicant at the time of the SHEV interview. I am not satisfied there are exceptional circumstances to justify considering it.
 - A letter from [a] JP reiterates aspects of the applicant's claims which were accepted by the delegate and contains a general statement, without explanation, that it is not

suitable for him to return to the country. I am not satisfied there are any exceptional circumstances to justify considering this letter.

- Letters from [Mr A] and [another person] clarify the dates of previous correspondence they provided. This issue was raised at the SHEV interview. The applicant could have provided this clarification earlier, and I am not satisfied there are exceptional circumstances to justify considering this information.
 - A letter from [a priest] refers to the activities in Sri Lanka of the applicant and [Father B] (discussed below), consistent with claims already made by the applicant and accepted by the delegate. He also provides his opinion on the current situation in Sri Lanka, although states that he left that country in 2010. There is no explanation why the applicant could not have sourced this information earlier. I am not satisfied there are any exceptional circumstances to justify considering it.
8. The applicant has also provided a letter from [Father B], a Catholic priest, [in] December 2016. The applicant's claims for protection relate largely to his connection [Father B], who remains in Sri Lanka. The letter refers to [Father B's] views of the situation in Sri Lanka and concern for the applicant. The letter is fairly general in nature and states that [Father B] has requested his siblings to provide a more detailed response.
 9. Also submitted is a statutory declaration of [Ms C], dated [in] November 2016. [Ms C] states she is an Australian citizen and the sister of [Father B]. She states that her brother advised her it would not be prudent for him to provide a detailed letter about the dangers faced by the applicant because of monitoring by military intelligence but requested her to provide one from Australia based on what he has told her during visits and on the phone. The statutory declaration includes information regarding [Father B's] interactions with the Sri Lankan authorities, questioning of [Father B] about the applicant and his family, and information about them held by the authorities and disclosed to [Father B]. [Ms C] also sets out her concerns for the applicant and [Father B] himself if the applicant were to return to Sri Lanka. The information in the letter and statutory declaration is consistent with evidence given by the applicant to the Department, albeit more detailed, but also contains new information regarding the questioning of [Father B] about the applicant.
 10. The information provided in the statutory declaration is detailed and specific. Although it goes beyond what the applicant has said previously, I note that the applicant was not questioned in detail at the SHEV interview about claims made in his statement and supporting material, and at the interview regarding questioning of [Father B] by the Sri Lankan authorities and his advice to the applicant not to return. I also accept that the new information relates to matters not within the applicant's direct knowledge. It appears from the information, photographs, media articles and other reports provided by the applicant to the Department that [Father B] is a person of some profile in Sri Lanka. The statutory declaration is declared by an Australian citizen with no direct relationship to the applicant, acknowledges that provision of false information may attract penalties for perjury, and contains an offer to contact the declarant for further information. Considering all of these matters, I am satisfied that the information in the letter and statutory declaration regarding the experiences of [Father B] is credible personal information that was not previously known and, had it been known, may have affected consideration of the applicant's claims. While I consider that the applicant could have obtained and provided this information earlier, in light of all of these matters I am nonetheless satisfied that there are exceptional circumstances to justify considering the new information.

11. I have obtained a number of new country information reports which post-date the delegate's decision.¹ Two of these update earlier reports relied on by the delegate and the third is a report of the UN Special Rapporteur on torture which contains detailed information on a 2016 investigation in Sri Lanka, similar to matters referenced in the newspaper article submitted by the applicant. I consider these reports highly authoritative and am satisfied there are exceptional circumstances to justify considering the new information.

Applicant's claims for protection

12. The applicant's claims for protection centre around his Tamil ethnicity and area of origin, his association and work with [Father B] and through that, with the Liberation Tigers of Tamil Eelam (LTTE), and other family ties to the LTTE. Key elements of his claims are discussed below.

Work with [Father B] and interaction with LTTE

13. In 1994 the applicant was sent to live at [a welfare agency] in [location] after his father disappeared, presumed killed by the Sri Lankan [military]. This home was run by [Father B]. In 2002 after finishing his education, the applicant moved with [Father B] to [a town] near where his family lived. The applicant became an assistant to [Father B], driving him to various locations for his pastoral and humanitarian work. After the 2004 Boxing Day Tsunami [Father B] appointed the applicant as a field officer to implement humanitarian projects to assist families and children who had survived the tsunami. Most of these projects were in LTTE-controlled areas and the applicant had frequent interaction with the LTTE, requiring their project approval, working alongside them, providing them with his identification documents, conducting transactions with the LTTE-run bank and providing cash to them to buy supplies for orphaned children. Photographs of the projects, which included the applicant, were taken by the LTTE and used in propaganda material. The applicant would be indistinguishable from the civilian-clothed LTTE cadres present in those photos.
14. When hostilities resumed, the applicant would accompany [Father B] to tend to the injured or deceased, which would often also be filmed by the LTTE propaganda unit or Sri Lankan army. One such occasion, in November 2007, involved a targeted air attack on [a] leader of the LTTE political wing, where the applicant was photographed carrying bodies. [Father B] attended meetings with both the LTTE and the Sri Lankan authorities calling for an end to the conflict and access to food and medical supplies, and the applicant drove [Father B] to these meetings.
15. The applicant continued his work on projects and with [Father B] until his departure from Sri Lanka.
16. When the applicant travelled between LTTE and army controlled territory, his identity documents were checked by Sri Lankan authorities and he believed they suspected he was using the cover of [Father B] to spy for the LTTE. He was questioned about the LTTE on many occasions by the EPDP and PLOTE while travelling to army-controlled areas.
17. The LTTE leadership respected [Father B] but operational wings on the ground treated him as coming within their administration. [Father B] and the applicant had numerous issues and altercations with the LTTE, who would come to conscript boys from the home or church. On

¹ DFAT, "Country Information Report Sri Lanka", 24 January 2017, CISED50AD105; United Kingdom: Home Office, "Country Policy and Information Note - Sri Lanka: Tamil separatism", 28 March 2017, v 4.0, <http://www.refworld.org/docid/58e1f9f54.html>; UN Human Rights Council, "Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Sri Lanka", 22 December 2016, A/HRC/34/54/Add.2, : <http://www.refworld.org/docid/58aefcf34.html>;

one occasion the applicant was forcibly conscripted from the Church, kept by the LTTE for a week and assaulted for not wanting to fight. He was made to do [duties] but was released when a senior cadre who knew [Father B] arrived.

18. The LTTE insisted a member of the applicant's family join them. They did not recruit the applicant because of his existing NGO project work with their members. [A few of his siblings] went into hiding and so in February 2007 they recruited his sister. At [Father B's] intervention, his sister was placed [doing certain duties] rather than required to engage in combat. After [a number of months], [Father B] secured her release on the condition that the applicant's brother join instead. His brother was sent for training with [with a branch of the LTTE] in [location], where he [did certain duties].

Departure from Sri Lanka to India

19. The applicant's brother told him that some of the senior LTTE [cadres] were planning to desert and flee to India, and believed that joining them was the only way for the family to leave the area before it was surrounded by the army and they were forced to fight with the LTTE. [Father B] encouraged the applicant to go and take his family. In November 2008 the applicant and his family travelled to India on an LTTE boat which had been commandeered by the deserting cadres.
20. On arrival in India the applicant and his family were detained for a week and a half and interrogated, then released to a refugee camp. The applicant was frequently questioned by Q Branch, Indian Intelligence officers, and asked to identify LTTE cadres. The applicant feared that his repeated questioning by Indian intelligence would disclose his siblings' LTTE involvement. The applicant's [sister] was married and sent to [Country 1] for her safety. In an arrival interview conducted in January 2013 (arrival interview), the applicant stated that en route to [Country 1] she returned to Sri Lanka to obtain a passport and was detained for three days and questioned by the Criminal Investigation Division (CID) about the applicant and the family. The applicant decided to leave India for Australia, arriving in November 2012. His other family members remain in India.

[Father B's] interactions with Sri Lankan authorities

21. As noted above, [Father B] appears to have had some profile in Sri Lanka. The applicant indicates that [Father B] had a long history of humanitarian work with NGOs in Tamil areas which at times had brought him under the suspicion of the Sri Lankan authorities and prior to the applicant meeting him, he had asylum for a period of time in [Country 1] before eventually returning to Sri Lanka. News articles submitted by the applicant indicate that [Father B] was [an official] of [an organisation], [location], of the Roman Catholic Diocese of [town]. In 2008 he wrote a letter [criticising] the treatment of civilians in the [area] by the Sri Lankan authorities and alleging breaches of the laws of war. These comments were published in the media and refuted by the Sri Lankan government as inaccurate.² In 2009, [Father B] was injured and another priest killed in a targeted attack by the LTTE after criticising their conscription of children.
22. Information provided by the applicant, [Ms C] and a letter from [Mr D], former [official] of [Organisation 1] in Sri Lanka who knew the applicant through his work with [Father B], indicates that after the end of the war and again prior to the adopted of a resolution by the UN Human Rights Committee, [Father B] was interrogated at length by various Sri Lankan

² [Information deleted].

authorities regarding his work. He was accused of assisting the LTTE and of seeking the intervention of [external powers] to discredit the government's efforts to end terrorism, and of helping or having had knowledge of key figures and supporters of the LTTE fleeing the area towards the end of the war. [Father B] referred to atrocities committed by both sides. Edited versions of his statements, focusing on LTTE atrocities, were used by the [government]. [Ms C] states that [Father B] has been continually monitored and this has increased with resurfaced demands for investigations into war crimes.

23. During questioning the Sri Lankan authorities revealed to [Father B] detailed information they held regarding his meetings with the LTTE leadership, NGO funds provided to the LTTE for projects and the supervision of projects by senior LTTE cadres. They had surveillance notes about the applicant and his family, the applicant's movements and activities, and his interactions with and support given to LTTE cadres. They also knew how and with whom he left Sri Lanka, showed [Father B] photographs of the applicant's siblings who had been with the LTTE, and expressed beliefs about their activities, including that his brother had worked with the LTTE [branch] Commander.
24. The applicant left Sri Lanka illegally and fears he will be questioned about his departure and background, that the authorities will have intelligence on people from his area, and that his connection with [Father B] will lead to questioning about LTTE cadres and his association with and activities for them. The applicant fears that his humanitarian work for the LTTE will be misunderstood, and will lead to him being detained for further investigation and mistreated as an LTTE supporter.

Delegate's findings

25. The delegate accepted the credibility of the applicant's claims regarding his work and association with [Father B], interrogation by the EPDP, interaction with the LTTE, and recruitment of his siblings. The delegate did not expressly reject any aspects of the applicant's claims and appears to have accepted his overall credibility. The delegate concluded that the applicant would not be perceived as having any connection to the LTTE and that there was not a real chance or real risk of him being harmed for this or any of the other reasons he put forward. However, the delegate did not have before her the new information regarding the interrogation of [Father B] and information held by the authorities about the applicant. I also note that the delegate did not make any reference to the claim that the applicant departed Sri Lanka on an LTTE boat with senior LTTE [cadres].

Factual findings

Background and identity

26. The applicant's identity is not in issue. He has made consistent claims in this regard since his arrival in Australia and has provided documentary evidence in the form of a Sri Lankan national identity card and birth certificate and Indian Government Resident Identity Card. I accept that the applicant's identity is as claimed and that he is a national of Sri Lanka.
27. The Indian identity card states that it is valid until [2022]. It states that it does not confer any rights to Indian citizenship. According to DFAT, the majority of Sri Lankan Tamils resident in India reside in government-administered camps, have limited work and education rights, and no pathway to Indian citizenship.³ On the applicant's evidence, he was living in India as a

³ DFAT, "Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, 3.61.

refugee, and he has submitted documents from the refugee camp in which he lived. The applicant departed India unlawfully and there is no evidence before me that his status in India conferred any right to return and resume his residence, or that he otherwise has such a right. I am not satisfied that the applicant has a right to enter and reside in India, or any other country, within the meaning of s.36(3) of the Act and find that qualification does not apply.

Experiences in Sri Lanka and India

28. The applicant's claims have been generally consistent since his arrival in Australia. At his arrival interview in January 2013 he mentioned his work with [Father B] and as a field officer, travelling through checkpoints and being questioned by the army about whether he was transporting goods for the LTTE. He stated that the Sri Lankan authorities thought he had worked for the LTTE because he had given supplies to the LTTE in the context of his work. He also gave an example of having to work with and associate with the LTTE in the context of bodies following the tsunami. Although the delegate referred to the applicant having raised a claim to have been held by the EPDP for [a number of hours] on one occasion for the first time at the SHEV interview, I note that he referred in his SHEV statement to being questioned by the EPDP, and referred at the arrival interview to an incident in which he had been held at a checkpoint for [a number of hours]. The applicant also consistently referred at the arrival interview to being detained on his arrival in India, and questioned by Indian intelligence on other occasions.
29. The applicant did not mention at the arrival interview either his own brief period of forcible recruitment by the LTTE, or that of his siblings. When this was put to him by the delegate, he said that after his arrival in Australia, two people from the same boat was sent back to Sri Lanka and the applicant heard this was because they were LTTE members, and so because of that he was afraid to mention his LTTE connection. The applicant subsequently raised the LTTE recruitment in his SHEV application and his evidence on that issue at the SHEV interview was consistent with his statement (with the exception that at the interview he said he had been kept by the LTTE for two weeks rather than one, which I do not consider a significant discrepancy). The claims are consistent with country information regarding LTTE recruitment practices⁴.
30. The applicant has provided various letters in support from persons who claim to have known him through his work in Sri Lanka. These include [Mr A], [a politician] for the Tamil National Alliance and [Mr D], former [official] of [Organisation 1] and [a second organisation]. These letters, particularly that of [Mr D], set out in some detail the writer's background and knowledge of the applicant. The information in those letters is consistent with the applicant's claims and personalised to the writer and I have no reason to doubt that the veracity of those letters. The letters support his claimed work history and association with [Father B] and the LTTE, as do the letters from [Father B] and statutory declaration of [Ms C]. The applicant has also submitted various photographs showing priests at events with high profile LTTE [figures], and other events which are said to show LTTE cadres. In the recording of the SHEV interview he identifies himself and [Father B] in some of these photographs.
31. Considering the consistency in the applicant's evidence and the supporting evidence he has provided, I am satisfied of the credibility of his claims regarding his association and work with [Father B], interaction with the LTTE including attendance at events, cooperation on projects, provision of funds for projects, and transactions with the LTTE-run bank, driving [Father B] to meetings with senior LTTE and Sri Lankan government figures, attending at the scene of attacks

⁴ Eg, *Ibid*, 2.4.

and retrieving bodies, including an attack on a senior LTTE figure, and other claimed activities. I accept it is plausible that photographs were taken at some of these events for the purpose of LTTE or government propaganda. I am satisfied he was questioned by the authorities and paramilitary groups such as the EPDP while travelling between LTTE and government-controlled areas.

32. I am also satisfied that the LTTE briefly recruited him, and that two of his siblings were also forcibly recruited. Although he was not questioned about the circumstances of his departure from Sri Lanka at the SHEV interview, I am willing to accept this as credible considering his general credibility, because he has consistently claimed to have left Sri Lanka illegally by boat in late 2008, and as I have accepted his claim that his brother was recruited by [a branch of the LTTE]. Having accepted that he arrived in India on an LTTE boat with LTTE [cadres], and given his consistent evidence regarding his experiences in India, I accept he was interrogated and detained by Indian authorities and questioned by Indian Intelligence about LTTE members.

New claims submitted to IAA

33. The claim that [Father B] was questioned by the authorities about the applicant, and that they disclosed to him information held about the applicant, his activities, circumstances of his departure and family was raised for the first time to the IAA. I note that [Father B] earlier provided a letter of support for the applicant, dated December 2012.⁵ In that letter he stated that the applicant would attract the attention of the Sri Lankan forces, but placed this in the context of the applicant's departure to India, prominence performing services that attracted the attention of the public and the LTTE, and general questioning of young men who have returned from abroad. That letter did not indicate that [Father B] had been questioned about the applicant, or at all.
34. However, although I have some concern that it is not mentioned in [Father B's] earlier letter, I also note that it is not entirely clear when [Father B] was allegedly questioned by the authorities and whether it was before or after he wrote that letter. [Ms C] states this occurred following the end of the war, and just prior to the adoption of a resolution by the UN Human Rights Commission, and that it spanned weeks and months and took place in stages. While I am also concerned over the applicant's failure to raise this information earlier, it is not clear to what extent the applicant was aware of the precise detail provided by [Ms C].
35. Furthermore, I note that the claims that [Father B] had been questioned extensively by the authorities, and relating to their use of his [testimony], were made in the material before the delegate, including the applicant's written statement and the letter from [Mr D]. The applicant also made references at the SHEV interview to [Father B] being taken for interrogation and threatened by the authorities, and to the possibility that he and his siblings would have been identified to the Sri Lankan forces from information held by Sri Lankan intelligence. More specifically, [Mr D] states that the Sri Lankan authorities have information and intelligence about the applicant's contacts, interaction and association with LTTE leaders and cadres,

⁵ There was an issue raised by the delegate as to the date of [Father B's] first letter and how the applicant obtained it. The applicant states [Father B] gave it to him in person, yet it is dated at a time when the applicant was in immigration detention (and has said he had not seen [Father B]). However, the applicant indicated at the 2013 arrival interview (when he was in detention) that he had a letter from [Father B]. The issue is further confused by [Ms C]'s stating that she recalled [Father B] providing a letter of support for the applicant when visiting [Australia] in 2012, yet places that visit as occurring in September, prior to the applicant's departure from India. It may be that the letter was posted or emailed to the applicant. In any event I do not place adverse inference on the inability of the applicant or [Ms C] to accurately recall how the applicant obtained a letter some four years ago. I accept the letter was provided by [Father B].

particularly while they had undertaken intelligence about [Father B]. He does not say how he is aware of this, but does refer to [Father B] being questioned at length by the CID.

36. I accept that the information in [Ms C]'s declaration falls within the context of claims previously made. Its level of detail and specificity, both regarding [Father B's] questioning and also the information shown to him about the applicant, suggests to me that it is credible. I also consider it broadly supported by information from DFAT that the Sri Lankan authorities collect and maintain sophisticated intelligence on former LTTE members and supporters.⁶ Considering the material as a whole, I am willing to accept the information provided by [Ms C] is credible.

Refugee assessment

37. 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

38. 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.

39. Although the applicant was not previously detained or apparently questioned at any length by the Sri Lankan authorities other than on one occasion in 2006, I do not consider this lack of past harm determinative of the level of interest in him held by the Sri Lankan authorities. Following the resumption of conflict he remained in areas under the control of the LTTE rather than the authorities and left the country prior to the government taking control.

40. The applicant indicated at his arrival interview that his sister, who had been in the LTTE, was detained and questioned, including about him, when she returned to Sri Lanka. The timing of this is unclear. The applicant was not questioned about this and did not again mention it. It would seem that despite her LTTE involvement, the sister was not subject to arrest or rehabilitation. In assessing the risk to the applicant I am also mindful that [Father B] remains in

⁶ DFAT, "Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, 3.29.

Sri Lanka and has been questioned and monitored but does not appear to have been arrested or detained. However, [Father B] is a person of some profile, had a history of engaging with both the LTTE and the government, and has the protection of the church who, on the evidence, have taken steps to move him within Sri Lanka for his safety. His testimony has been used by the authorities [and], as put by [Mr D], he is of use to the Sri Lankan authorities but is nonetheless 'walking on a thin line'. I accept that while these factors give [Father B] a much higher profile than the applicant, they may also provide him protection and toleration.

41. I do not accept that the applicant would be considered a member of the LTTE simply by virtue of his brief period of recruitment or family relationships. However, on my findings the applicant had extensive interaction with the LTTE well beyond simply living in an LTTE-administered area. This extended to working on projects with them, providing money (albeit in conjunction with that work), attending at the scene of attacks on high profile leaders and retrieving bodies, and being present at various meetings and events with senior LTTE leaders. The applicant also left the country on an LTTE boat with [cadres]. I have accepted that the Sri Lankan authorities have intelligence on these activities and had sufficient suspicion over the applicant to raise this with [Father B]. As such, I accept that he may be imputed to have supported or been a part of the LTTE because of the combination of his past associations and mode of departure.
42. I note that following the end of the conflict, thousands of persons, including LTTE combatants and persons who had roles in the civil administration, along with persons who provided a high level of non-military support to the LTTE during the conflict, were sent to rehabilitation centres. Many civilians were questioned or monitored for any possible LTTE activity and any form of civil resistance or anti-Government sentiment.⁷ Having left Sri Lanka prior to the end of the conflict, the applicant has not undergone this process.
43. There is somewhat mixed information as to the extent to which past engagement with or perceived support for the LTTE will lead to repercussions on return to Sri Lanka. The information clearly indicates that having the daily interactions that arose from living in a formerly LTTE-controlled area does not create a risk warranting protection.⁸ The United Nations High Commissioner for Refugees had earlier identified various risk profiles which included family members of former LTTE combatants or cadres, former LTTE supporters who were involved in supplying or transporting goods for the LTTE, or LTTE fundraisers and propaganda activists and those perceived as having links to the Sri Lankan diaspora.⁹
44. However, this guidance is now considerably dated. More recent information indicates that there have been significant improvements in the security situation in Sri Lanka since the end of the conflict and the political environment has further changed since the election of the Sirisena government in 2015. The new government has prioritised human rights and reconciliation with the Tamil population and has made significant progress. This includes replacing military governors in the Northern and Eastern Provinces with civilians; returning some land held by the military; releasing some individuals held under the Prevention of Terrorism Act (PTA) and committing to its reform; engaging constructively with the UN; as well as a number of symbolic changes. Although security forces maintain a significant presence in the north and east and there are still reports of monitoring, monitoring and harassment of Tamils in daily life has

⁷ Ibid, 3.28, 3.34, 3.41.

⁸ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 1 December 2012, CIS29707, p.26.

⁹ Ibid, p.26-28.

decreased significantly and Tamils have described a positive shift in the nature of interactions with authorities.¹⁰

45. Specifically related to the treatment of persons with past links to the LTTE, the UK Home Office has assessed that the current focus of the Sri Lankan authorities is on identifying Tamil activists in the diaspora working towards separatism and preventing the resurgence of the LTTE or similar separatist organisations.¹¹ A UK Upper Tribunal case found that a person's past history will be relevant only to the extent that it is perceived by the authorities as indicating a present risk to the unitary Sri Lankan state or the government.¹² Generally, past connection to the LTTE would not of itself warrant protection unless the person is perceived to have had a significant role in that organisation, or if they are perceived to be active in post-conflict Tamil separatism.¹³ The UK Home Office has assessed that returnees who have a previous connection with the LTTE are able to return to their communities without suffering ill-treatment,¹⁴ but acknowledges there continue to be reports of arrests and detentions, although says the scale and extent is difficult to quantify.¹⁵
46. However, it is evident that the authorities nonetheless maintain a level of interest in former LTTE members and supporters. The information indicates that the authorities remain sensitive to the potential re-emergence of the LTTE.¹⁶ They are said to maintain sophisticated intelligence on former members and supporters, including 'stop' and 'watch' databases.¹⁷ While those on a 'stop' list are individuals with an extant court order or arrest warrant, the 'watch' lists include the names of those individuals that security services consider to be of interest. DFAT assesses that those on a 'watch' list are likely to be monitored but not detained, although says there have been some reports of Tamils travelling from the UK being detained.¹⁸ The UK Home Office suggests that a person whose name is on a 'stop' or 'watch' list may face a risk of arrest, detention and ill-treatment, depending on their circumstances.¹⁹ Former members who have undergone rehabilitation are subject to ongoing monitoring, which in some instances can be intimidating and harassing.²⁰ The UN Special Rapporteur has stated that persons 'deemed to have had any link to the LTTE during the conflict ... remain subject to extensive surveillance and intimidation by the military, intelligence and police forces'.²¹
47. There is also information that former LTTE members or supporters continue to be sent for rehabilitation. Although indicating that the focus of the Sri Lankan authorities has since shifted, DFAT nonetheless assesses that any low-profile former LTTE members who came to the attention of the authorities would be detained and may be sent to the remaining rehabilitation

¹⁰ DFAT, "Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, 2.3, 2.21 to 2.33, 2.37-2.39, 3.9, 3.23-3.26.

¹¹ United Kingdom: Home Office, "Country Policy and Information Note - Sri Lanka: Tamil separatism", 28 March 2017, v 4.0, 2.4.2.

¹² Ibid, 2.4.9, 2.4.10.

¹³ Ibid, 3.1.3.

¹⁴ Ibid, 2.4.9, 2.4.10.

¹⁵ United Kingdom: Home Office, "Country Policy and Information Note - Sri Lanka: Tamil separatism", 28 March 2017, v 4.0, 2.4.9, 2.4.10-2.4.11.

¹⁶ DFAT, "Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, 3.29.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ United Kingdom: Home Office, "Country Policy and Information Note - Sri Lanka: Tamil separatism", 28 March 2017, v 4.0, 2.4.34, 3.1.8.

²⁰ DFAT, "Country Information Report Sri Lanka", 24 January 2017, CISED50AD105 DFAT, "Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, 3.42.; United Kingdom: Home Office, "Country Policy and Information Note - Sri Lanka: Tamil separatism", 28 March 2017, v 4.0, 2.4.17.

²¹ UN Human Rights Council, "Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Sri Lanka", 22 December 2016, 42.

centre.²² In this context, I note that those sent to rehabilitation have included both LTTE combatants but also those who may have provided a high level of non-military support to the LTTE during the conflict.²³ Similarly, notwithstanding its above assessment, the UK Home Office has indicated that a former member who returned and had not undergone rehabilitation would be offered it.²⁴

48. The applicant departed Sri Lanka illegally and I accept he will be returning involuntarily, without a passport. Information from DFAT indicates that involuntary returnees undergo checks on arrival in Sri Lanka including by the State intelligence Service and the CID.²⁵ For those travelling on a temporary travel document, as would be the case for the applicant, police undertake an investigative process to confirm identity, which often includes an interview, containing authorities in their home area, and neighbours and family.²⁶ On this information, I am satisfied that the authorities will be alerted to the applicant's return and conduct checks into his background.
49. Considering the evidence as a whole, I find that although returning asylum seekers with past LTTE links may not routinely attract adverse attention beyond the usual return procedures and perhaps subsequent monitoring, this particular applicant will come under scrutiny. Putting him at particular risk is the combination of his close interactions with the LTTE for a number of years prior to his departure from Sri Lanka; having departed Sri Lanka on an LTTE boat with LTTE cadres; and his lengthy absence from Sri Lanka spent within two diaspora communities. Most critically, the Sri Lankan authorities have already identified him as a person of interest and collected intelligence on him, yet the applicant departed Sri Lanka at the height of the conflict and has never undergone the extensive screening process which took place after its conclusion. Because of the combination of his particular circumstances, I am satisfied that either on arrival or subsequently on return to his home area, the applicant will be subject to investigation whether into the extent of his past support for the LTTE, for the purpose of any intelligence he may be able to provide, to determine whether he represents a current separatist threat, or all of these matters.
50. Country information indicates that the risk of torture from military and intelligence forces has decreased since the end of the conflict and where it does occur, the methods used are less severe.²⁷ It may be that the applicant will experience no greater harm than questioning and monitoring. However, the UN Special Rapporteur concluded that a 'culture of torture' persists, with physical and mental coercion used against suspects interviewed by the CID and Terrorism Investigation Division in investigations under the PTA.²⁸ The UK Home Office has stated that although the number of torture complaints has greatly reduced, new cases of Tamil victims continue to emerge and police reportedly often continue to resort to violence and excessive force, particularly when extracting confessions. It has assessed that if a person is detained by the Sri Lankan security services there remains a real risk of ill-treatment or harm requiring

²² Ibid, 3.42.

²³ Ibid, 3.34, 3.41.

²⁴ United Kingdom: Home Office, "Country Policy and Information Note - Sri Lanka: Tamil separatism", 28 March 2017, v 4.0, 2.4.15.

²⁵ Ibid, 5.19.

²⁶ Ibid, 5.20.

²⁷ DFAT, "Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, 4.18; UN Human Rights Council, "Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Sri Lanka", 22 December 2016, 23-27.

²⁸ UN Human Rights Council, "Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Sri Lanka", 22 December 2016, 23-27.

international protection.²⁹ On this information, I am satisfied that although borderline, there is a small but nonetheless real chance that in the course of investigation, the applicant will be subjected to physical ill-treatment amounting to serious harm.

51. I am satisfied there is a small but real chance of the applicant being subject to ill-treatment amounting to serious harm in the process of investigation in the reasonably foreseeable future, whether upon arrival or subsequently after return to his home area. I find that this is persecution, involves serious harm, is for the essential and significant reason of an imputed political opinion in support of the LTTE or Tamil separatism, and involves systematic and discriminatory conduct: ss.5J(1)(a), (1)(b), (4) and (5). As the harm arises from past events and information already held about the applicant, I find there are no reasonable steps that the applicant can take to modify his behaviour so as to avoid a real chance of persecution: s.5J(3). The harm will be inflicted on the applicant by the Sri Lankan authorities and he will come to their attention immediately upon his return to Sri Lanka. As such, I am satisfied that effective protection measures are not available to the applicant, and that the harm relates to all areas of Sri Lanka: ss.5J(1)(c) and (2). The applicant has a well founded fear of persecution within the meaning of s.5J.

Refugee: conclusion

52. The applicant meets the requirements of the definition of refugee in s.5H(1).

Decision

The IAA remits the decision for reconsideration with the direction that:

- the referred applicant is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*

²⁹ United Kingdom: Home Office, "Country Policy and Information Note - Sri Lanka: Tamil separatism", 28 March 2017, v 4.0, 2.4.2, 2.4.35.

Applicable law

Migration Act 1958

5 (1) Interpretation

...

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.

91W Evidence of identity and bogus documents

- (1) The Minister or an officer may, either orally or in writing, request an applicant for a protection visa to produce, for inspection by the Minister or the officer, documentary evidence of the applicant's identity, nationality or citizenship.
- (2) The Minister must refuse to grant the protection visa to the applicant if:
- (a) the applicant has been given a request under subsection (1); and
 - (b) the applicant refuses or fails to comply with the request, or produces a bogus document in response to the request; and
 - (c) the applicant does not have a reasonable explanation for refusing or failing to comply with the request, or for producing the bogus document; and
 - (d) when the request was made, the applicant was given a warning, either orally or in writing, that the Minister cannot grant the protection visa to the applicant if the applicant:
 - (i) refuses or fails to comply with the request; or
 - (ii) produces a bogus document in response to the request.
- (3) Subsection (2) does not apply if the Minister is satisfied that the applicant:
- (a) has a reasonable explanation for refusing or failing to comply with the request or producing the bogus document; and
 - (b) either:
 - (i) produces documentary evidence of his or her identity, nationality or citizenship; or

- (ii) has taken reasonable steps to produce such evidence.
- (4) For the purposes of this section, a person produces a document if the person produces, gives, presents or provides the document or causes the document to be produced, given, presented or provided.

...

91WA Providing bogus documents or destroying identity documents

- (1) The Minister must refuse to grant a protection visa to an applicant for a protection visa if:
 - (a) the applicant provides a bogus document as evidence of the applicant's identity, nationality or citizenship; or
 - (b) the Minister is satisfied that the applicant:
 - (i) has destroyed or disposed of documentary evidence of the applicant's identity, nationality or citizenship; or
 - (ii) has caused such documentary evidence to be destroyed or disposed of.
- (2) Subsection (1) does not apply if the Minister is satisfied that the applicant:
 - (a) has a reasonable explanation for providing the bogus document or for the destruction or disposal of the documentary evidence; and
 - (b) either:
 - (i) provides documentary evidence of his or her identity, nationality or citizenship; or
 - (ii) has taken reasonable steps to provide such evidence.
- (3) For the purposes of this section, a person provides a document if the person provides, gives or presents the document or causes the document to be provided, given or presented.

...