



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA

IAA reference: IAA16/01401

Date and time of decision: 12 September 2017 18:02:00
Mark 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 an 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 Colombo, Sri Lanka. He arrived in Australia [in] November 2012 and lodged an application for a Temporary Protection visa (TPV) (XD-785) [in] April 2016. [In] November 2016 a delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa.

Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
3. On 7 December 2016 the applicant provided a submission to the IAA in the form of a statement dated 6 December 2016 together with further information in the form of two news articles and a copy of two pages from his passport. To the extent the submission discusses evidence, including country information, which was before the delegate and responds to the delegate's decision based on that material, I consider this does not constitute new information. The two pages from his passport were attached to his TPV application and is not new information
4. The applicant's statement contains, under the heading 'clarifications' evidence that he already provided to the delegate together with some new evidence such as his mother being question when she went to obtain a copy of his birth certificate. The two articles are dated 5 and 21 October 2016 and date from before the delegate's decision. The applicant claims that if he had provided the information in his statement to the delegate it would have had a positive effect on the decision about his protection visa. However, at the TPV interview the applicant and the delegate, among other things, discussed all the matters the applicant raises in his statement. The delegate explained to the applicant the importance of providing the Department with information as early as possible and that if his application is refused he may not have another opportunity to put forward the information. Near the end of his interview, the delegate confirmed with the applicant that he had provided all his protection claims, asked him if there was anything further he wished to add and said if he provides further information to the Department it would be considered prior to the decision being made. The applicant was represented throughout the visa application process and his agent was present at the TPV interview. The applicant's representative subsequently provided documents to the delegate after the TPV interview and also indicated that it would take 20 days to obtain a copy of his birth certificate without mentioning any issues encountered by his mother. I am not satisfied that there are exceptional circumstances to justify considering the new information.
5. In accordance with s.473DC(1) of the Act I obtained new information in the form of country information regarding conditions in Sri Lanka from the most recent Department of Foreign Affairs and Trade (DFAT) country report¹ for Sri Lanka. This report is dated 24 January 2017 (DFAT 2017 report) and was not available at the date of the delegate's decision. The delegate relied on information contained in DFAT reports for Sri Lanka dated up to 18 December 2015 which the latest report has updated. Given that I consider DFAT an authoritative source of country information, the DFAT information relied on by the delegate is now more than a year and a half old and the DFAT 2017 report is DFAT's most recent assessment regarding the

¹ DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED850AD105.

situation in Sri Lanka and was prepared for the specific purpose of protection status determination, I am satisfied that there are exceptional circumstances to justify considering this new information.

6. On 20 June 2017 the IAA invited the applicant to comment by 4 July 2017 on the new information contained in that report in relation to the political environment in Sri Lanka, the security situation in Sri Lanka, incidents of extra-judicial killing, disappearances and abduction for ransom, torture, prison conditions and the processing at the airport on return and shortly thereafter. Extracts from the DFAT 2017 report of the relevant paragraphs were attached to the invitation.
7. On 4 July 2017 the IAA received a submission, including references to country information that was not before the delegate, from the applicant's representative in response. Given that the submission and country information was provided in response to the IAA's request for comment, and appears related to that request, I am satisfied that the information was not and could not have been provided before the delegate's decision and that there are exceptional circumstances to justify considering the new information.

Applicant's claims for protection

8. The applicant's claims can be summarised as follows:
 - If returned to Sri Lanka he would come to the adverse attention of the Sri Lankan authorities and face persecution due to his imputed political opinion and particular social group – Liberation Tigers of Tamil Eelam (LTTE) association – and as a former LTTE supporter on the basis of:
 - Tamil ethnicity;
 - Young male;
 - Suspected LTTE supporter;
 - Friends' LTTE association;
 - He and his family were harassed by the authorities in the past (due to his above profile); and
 - The authorities see him as a contributor to the re-emergence of the LTTE.

Factual findings

Receiving country

9. On the basis of the documents and oral evidence given by the applicant, I accept that the applicant is a national of Sri Lanka from Colombo. I find that the applicant's receiving country is Sri Lanka. The applicant has consistently claimed, and I accept, he is Tamil and Hindu.

Problems in Sri Lanka

10. The applicant says that he was born in [year] in Colombo, Sri Lanka. He is single. His father died in 1998. His mother currently resides in Sri Lanka. He has [sibling A] who resides in [Country 1] and [sibling B] who resides in [country 2]. He attended school up to [grade]. When he was

studying in [school] his father died of a [medical condition] as a result of the torture his father received in Sri Lankan Army (SLA) detention.

11. The applicant claims that in 1996 there was a bomb blast in the World Trade Centre. His father was at the [centre] at the time and the Sri Lankan authorities suspected him of having links to the bomb blast. His father was arrested by the SLA in [year] and only released from detention in 1998. After his father died he discontinued his studies and started working in a [shop] in [a location in] Colombo. He worked there for six months. In 1999 there was a bomb blast which targeted former President Bandaranayke. The SLA started a round up and came into the [shop] and arrested him along with [number of] other people. They were interrogated and suspected of having LTTE links. He spent six months inside [a prison]. His family bribed some officials to bring the matter to court and he was released by the court after six months. After his release he was scared to go out. He did not leave his house and was unemployed until the end of 2001.
12. The applicant says his family were trying to send him overseas to protect his life and in December 2001 his family contacted an agent who promised to send him to [country 3]. He travelled from Sri Lanka to [country 4] for a month, then [country 5] for three weeks, then [country 6] for two months, then back to [country 4] for approximately seven months before going to [country 7] in October 2002. In [country 7] he registered as a refugee with the UN High Commissioner for Refugees (UNHCR) and stayed there for two years before returning to Sri Lanka in 2004. As there was a ceasefire in Sri Lanka in 2004 he thought it was safe to return home and his mother was very ill.
13. The applicant states that in Sri Lanka he started working at the [named shop], Colombo. The owner was his friend's father. His duties included loading, unloading and driving. If truck drivers were not available he would drive the truck to get [products] and was sent on the job because he could speak Sinhala at the SLA check points. In April 2006 his named [relative A] was killed by unidentified men. His [relative A] was suspected of having LTTE links. Meanwhile he applied for a visa to work in [Country 8] because the ceasefire was broken. His application was successful and he went to work in [Country 8] in 2007, he thinks in early 2007, and stayed there until 2009.
14. The applicant claims that while he was in [Country 8] the owner of the shop disappeared and his friend, the owner's son, was under house arrest. [In] May 2009 his friend was shot by unidentified men. His friend was immediately admitted to hospital for treatment. A week later, his friend died in hospital. It was believed the authorities killed him in order to bring his father out. The Sri Lankan police said his friend's father was closely associated with the LTTE. His mother told him about these details and asked him not to return home. The Criminal Investigation Department (CID) had also gone to his mother's place and searched for the applicant, going through the whole house and destroying everything. They arrested his [relative B]. When the applicant left Sri Lanka for [Country 8] he asked the shop owner to employ two of his friends, [Mr A] and [Mr B]. They were also arrested under suspicion, following a bomb blast, in April or May 2008. The SLA said they found weapons at [Mr A]'s house. [Mr A] remains missing.
15. The applicant states at this time there was the global financial crisis and he was one of many who lost his job. He had no choice but to return to Sri Lanka. In December 2009 he went back to Sri Lanka. Due to fear of being killed by the CID he didn't go to his mother's place but went to his [relative C's] place in Kandy. While he was there the SLA were searching all the houses including his [relative C's] and told him he had to register with the police. He couldn't continue to stay there due to the police reporting requirements and spent the next [number] days there while his family looked for a way to send him away. His family found an agent who sent him to

[country 6]. He registered himself as a refugee with the UNHCR in [country 6] and he attended many interviews before he was accepted as a refugee in May 2012. Although found to be a refugee he was still at risk of being detained by the police and there was no proper resettlement program. Meanwhile he heard about boats leaving [Country 9] to Australia, so he went to [Country 9] in September 2012. He left [there] by boat on [date] November 2012 and arrived in Australia [several days later].

16. The applicant claims that since he left Sri Lanka the CID came to his mother's house in around February 2012. The men were in civilian clothes and asked the occupants of the house whether this was his house and whether they knew where the family was now living. The occupants told his mother about it when they saw her at temple. His [sibling B] left Sri Lanka in 2010 to avoid CID harassments. His [sibling A] left Sri Lanka in 2010 to avoid CID harassments.
17. At the TPV interview the applicant confirmed that on the three occasions he left Sri Lanka to travel overseas and on the two occasions he returned to Sri Lanka, he used his own passport, travelled legally and didn't encounter any issues at the airport. He said that he paid money to an agent to avoid problems.
18. The applicant provided a number of supporting documents including identity documents and copies of news articles (together with English translations).
19. DFAT assesses² that there are credible reports of torture carried out by Sri Lankan security forces both during the war and in its aftermath. The UNHCR confirms that post-war, arbitrary detentions were widely reported, as well as reports of detainees being interrogated, with the detainees usually civilians suspected of LTTE links, albeit particularly in the north and east.³ Many Tamils reported being monitored, harassed, arrested and/or detained by security forces under the Rajapaksa government.⁴ Country information confirms that Sri Lankan airport checks include an alert list containing information relating to court orders, warrants of arrest, jumping bail, escaping detention and information from the intelligence service.⁵
20. In assessing the applicant's evidence I have taken into account the 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. Nevertheless, having considered his overall evidence, I have serious concerns about the credibility of the applicant and the truthfulness of some of his evidence.
21. The applicant was, based on the recording, an unimpressive witness at the TPV interview. On a number of occasions he had to be asked a question several times before he would respond directly to the question. When parts of his evidence were challenged he frequently changed parts of his answer.
22. He claimed that his birth certificate was lost in Sri Lanka while he was in [Country 8] (written statement) and it was stolen in [country 6] in 2011 (TPV interview). He said variously that in 1999 he was in [prison] for six months (written statement), that he spent the first three months in a police station and the last three months in [a named prison] (TPV interview) or

² Ibid 4.12 and 4.13.

³ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012, UNB0183EA8, pp17 and 18.

⁴ DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105, 3.8.

⁵ UK Home office (UKHO), "Country Information and Guidance. Sri Lanka: Tamil separatism. Version 2.0", 19 May 2016, OGD7C848D17, 6.10.2.

that he wasn't held at the police station for three months, he spend the 6 months in [the prison] but was taken to the police station occasionally for questioning (TPV interview). He said at the TPV interview that since 2007 no one lived at the old family home, where he had lived all his life until he left for [Country 8], but later claimed the police arrested his [relative B], while his [sibling A] and mother was present, at that home while he was in [Country 8].

23. He said in his written statement that the CID went to his mother's house in February 2012. At the TPV interview he said men dressed in civilian clothes went to his old house and asked the occupants if his family lived there, the occupants said his family moved years ago and when asked if they had an address for the family said no and that the occupants told his mother about it when they saw her at temple. He was asked how they knew the men were from the CID if not in uniform and he said, implausibly, that they looked like the CID. Additionally, I do not consider it credible that, if the occupants suspected the men were from the CID they would not reveal they knew his mother when asked about an address for the family.
24. The applicant was questioned numerous times about his travelling through the airport when he left Sri Lanka in 2001, 2007 and 2010 and returned in 2004 and 2009. He confirmed each time that he travelled legally using his own passport, didn't encounter any problems at the airport and said arrangements for the travel were made through an agent. After further discussion of the incidents that occurred in Sri Lanka while he was in [Country 8], such as the arrests of [Mr A], [Mr B] and his [relative B], he was asked again if he had any problems at the airport when he returned from [Country 8] and he mentioned for the first time that when he cleared Immigration there were four men with masks in the arrival hall who looked at him and he was scared and left. Later in the TPV interview after further discussion of his passing through the airport several times without difficulty he suggested for the first time that he paid money through the agent to avoid problems. When asked why he didn't mention it before he said he didn't think it was important. When it was put to him that they had just spent some time going back and forth on the issue he said he didn't think it important because that is just how things are done in Sri Lanka.
25. The applicant stated in both his written statement and at the TPV interview that the shop owner, the shop owner's son, [Mr A] and [Mr B] had issues with the authorities and his house was searched and his [relative B] arrested while the applicant was in [Country 8]. However, his written statement suggests the CID came to their house looking for him and arrested his [relative B] in connection to the issues with the shop owner and his son and then adds that [Mr A] and [Mr B] were suspected and weapons were found at [Mr A]'s home. At the TPV interview he said the military, being the SLA and CID together, came to the house asked for him, asked about his connection to [Mr A], disclosed that [Mr A] had told them that he and the applicant were good friends and arrested the [relative B]. The applicant has not been consistent on who the authorities were or why they came to his house looking for him. He also suggested at the TPV interview that the article he provided showed, among other things, the [shop] arrest, [Mr A]'s arrest, weapons were found in [Mr A]'s house and [Mr A] was involved with the LTTE. The translation provided mentions weapons were found and that there was a LTTE connection to the suicide bomber, but makes no mention of the [named shop], that the weapons were found at a particular person's house and a [similar name to Mr A] is mentioned as one of those arrested but no [Mr A]. Additionally, I do not consider it plausible that the authorities would come to the family's home looking for the applicant and, for no apparent reason other than he was there, arrest his [relative B]. Nor do I consider it plausible that the authorities would volunteer to his family the information disclosed to them by [Mr A]. The news article and death notice the applicant provided in relation to the shop owner's son do not make any mention of the [named shop] and in the death notice he is referred to as the proprietor of [another company name].

26. In light of the significant changes, inconsistencies and implausibility in the applicant's evidence, I am satisfied that he has exaggerated, embellished and fabricated aspects of his evidence in order to boost his claims for protection. I am prepared to accept that, as a Tamil male, the applicant was questioned as part of a round up following the bomb blast [in Colombo] in 1999, but I reject the applicant's claim that he was subsequently imprisoned for six months. I do not accept that the authorities visited his home looking for him while he was in [Country 8] or that they arrested his [relative B]. I am prepared to accept that he worked in the [named shop] from 2004 to 2007 but I reject his claims that people associated with the shop had problems with the authorities or that any of the persons named in the articles he provided are connected to the shop or known to the applicant. I do not accept that there were four masked men at the airport when he returned from [Country 8] or that he paid money through his agent to avoid problems at the airport when he travelled to and from overseas. I do not accept the applicant's claim that the CID visited his former family home in February 2012 asking after either him or his family.
27. Based on the country information and other aspects of the applicant's evidence that I consider to be generally consistent and free of fabrication or embellishment, I accept that the applicant's father was arrested by the SLA in [year] following a bomb blast, his father was detained until 1998 and was subject to mistreatment during his detention. I accept that the applicant's [relative A] was killed by unidentified men in April 2006 and the [relative A] was suspected of LTTE links. I also accept the applicant's general work and travel history as outlined in his TPV application.
28. The applicant claimed his [sibling A] and [sibling B] both left Sri Lanka in 2010 due to CID harassment. As the applicant provided no details of the harassment, and given my concerns as to his general credibility discussed above, I am prepared to accept his [sibling B] and [sibling A] left Sri Lanka in 2010 but I am not satisfied that it was due to CID harassment.

Failed Asylum Seeker

29. The applicant claims to have left Sri Lanka by plane through Colombo airport in early 2010 (he was last in Sri Lanka for some [number] days from December 2009) to travel to [country 6] using his passport. He travelled from [country 6] to [Country 9] in September 2012. He left [Country 9] by boat organised by a smuggler on [a date in] November 2012 and arrived in Australia on [Date] November 2012. I accept that, if he were to return to Sri Lanka, he may be considered a failed asylum seeker by the Sri Lankan authorities.

Refugee assessment

30. 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

31. 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.

Young Tamil male from Colombo, LTTE links and imputed political opinion

32. There have been a number of significant changes since the election of the Sirisena government in 2015. The new government quickly abolished surveillance and censorship of media and civil society groups, embarked on constitutional reforms to restrict executive powers, and took steps to restore the independence of the judiciary. In contrast to the approach of the Rajapaksa government, it also initiated a new, more open dialogue with the international community, including human rights organisations.⁶
33. The Tamil National Alliance leader, R Sampanthan, was appointed the leader of the opposition and is the first ethnic minority opposition leader since 1983.⁷ The United Nations High Commissioner for Human Rights observed in February 2016 that one of the most important long-term achievements over the past year had been the restoration of the legitimacy and independence of Sri Lanka's Human Rights Commission.⁸
34. DFAT also states the Sirisena government has made significant progress in relation to human rights and reconciliation. It has replaced military governors in the Northern and Eastern Provinces with civilians, returned some land held by the military, released some individuals held under the *Prevention of Terrorism Act 1979 (Sri Lanka) (PTA)*, committed to reforming the PTA, engaged constructively with the UN and established the Office of National Unity and Reconciliation to develop national policy on reconciliation.⁹ In 2015 the Government changed the name of Victory Day, which commemorates the end of the war, to War Heroes Remembrance Day and for the first time gave official approval for memorials in the north and east. The 2015 Independence Day ceremony was attended by the TNA leaders for the first time in many years, a Declaration for Peace was delivered in Sinhala, Tamil and English, and at the 2016 ceremony the national anthem was sung in Tamil as well as Sinhala. The Government has also committed to implementing a range of transitional justice mechanisms and reconciliation projects following the September 2015 release of the report of the UN's Office of the High Commissioner for Human Rights investigation into grave human rights violations committed during the war. A Consultation Task Force on Reconciliation Mechanisms was appointed in

⁶ UK Home Office (UKHO), "Country Information and Guidance. Sri Lanka: Tamil separatism. Version 3.0", 1 August 2016, OGD7C848D77, 6.1.4.

⁷ Ibid 5.1.5.

⁸ Ibid 6.1.1

⁹ Ibid 2.29.

January 2016 and the Sri Lankan parliament passed a bill establishing an Office of Missing Persons in August 2016.¹⁰

35. DFAT assesses in 2017 that Sri Lankans of all backgrounds generally have a low risk of experiencing official discrimination as there are no current laws or policies that discriminate on the basis of ethnicity including in relation to access to education, employment or access to housing. DFAT states that Tamil inclusion in the political dialogue in Sri Lanka has increased under the Sirisena government and they have a substantial level of political influence.¹¹
36. During the war, more Tamils were detained under emergency regulations and the PTA than any other ethnic group. This was primarily due to LTTE members and supporters being almost entirely Tamil, but DFAT notes that there were also likely instances of discrimination in the application of these laws, with LTTE support at times imputed on the basis of ethnicity. Since 2015 the Sirisena government has reviewed and released some PTA detainees, including Tamils, and DFAT assesses that there are currently fewer individuals detained under the PTA than during the war.¹²
37. DFAT assesses¹³ that monitoring and harassment of Tamils has decreased significantly under the Sirisena government; the police are now responsible for civil affairs across Sri Lanka; although there is still a sizable military presence in the north and east, it is largely idle and generally restricted to their barracks; and members of the Tamil community have described a positive shift in the nature of interactions with the authorities and they feel able to question the motives of, or object to, monitoring or observation activities. DFAT assesses that some societal discrimination on the basis of ethnicity can occur but does not identify any such specific issues in relation to Tamils. DFAT notes that monolingual Tamil speakers can have difficulties communicating with the police, military and other government officials but assesses that these practical difficulties are as a result of a lack of qualified language teachers, the disruption of civilian life caused by the war and historical discriminatory language policies rather than official discrimination.¹⁴ The applicant does not claim he suffered any incidents of societal discrimination while in Sri Lanka. He attended school up to [grade], lived in the same house in Colombo up to 2007, except when overseas, and worked in two different stores in Colombo. He speaks Sinhala as well as Tamil and some other languages. The country information discussed above indicates the monitoring and harassment of Tamils has significantly decreased, there have been significant positive developments for Tamils in the country's politics and the situation has generally improved.
38. The applicant's representative submitted that as he has no formal qualifications and work experience he will suffer significant economic hardship that threatens his ability to subsist and will be denied access to basic services that will threaten his capacity to subsist. As discussed above, the applicant has work experience in shops in Colombo and, as noted in his TPV application, he worked in a shop in [Country 8] from 2007 to 2009, he started his own company in 2015 and he has completed some training in Australia. He has shown himself to be resourceful through travelling to and settling in a number of different countries, as well as establishing a company. The country information discussed above does not suggest that there is currently discrimination based on ethnicity in Sri Lanka including in relation to access education, employment or housing. I am not satisfied that the applicant will suffer economic

¹⁰ Ibid 2.30-2.33.

¹¹ DFAT "Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, 3.4 and 3.6.

¹² Ibid 3.8.

¹³ Ibid 3.9.

¹⁴ Ibid 3.4 and 3.7.

hardship, lack access to basic service or be unable to subsist, if he returns to Sri Lanka, now or in the foreseeable future.

39. The UNHCR's 2012 Eligibility Guidelines for Sri Lanka¹⁵ note that a person's real or perceived links with the LTTE may give rise to a need for international refugee protection. However, originating from an area that was previously controlled by the LTTE does not in itself do so. Although the nature of these links can vary, this may include:

- Persons who held senior positions with considerable authority in the LTTE civilian administration, when the LTTE was in control of large parts of what are now the northern and eastern provinces of Sri Lanka;
- Former LTTE combatants or "cadres";
- Former LTTE combatants or "cadres" who, due to injury or other reason, were employed by the LTTE in functions within the administration, intelligence, "computer branch" or media (newspaper and radio);
- Former LTTE supporters who may never have undergone military training, but were involved in sheltering or transporting LTTE personnel, or the supply and transport of goods for the LTTE;
- LTTE fundraisers and propaganda activists and those with, or perceived as having had, links to the Sri Lankan diaspora that provided funding and other support to the LTTE; or
- Persons with family links or who are dependent on or otherwise closely related to persons with the above profiles.

40. DFAT refers to the UNHCR's guidelines and notes¹⁶ that accurately identifying people according to those categories may be difficult and the UNHCR recognises that each case depends on its individual circumstances.¹⁷ DFAT also confirms¹⁸ that the Sri Lankan authorities remain sensitive to the potential re-emergence of the LTTE and collect and maintain sophisticated intelligence, including electronic stop and watch databases, on former members and supporters of the LTTE.

41. DFAT assesses¹⁹ the number of incidents of extra-judicial killings, disappearances and kidnappings for ransom, including incidents of violence involving former LTTE members, as significantly reduced since the end of the war. There are credible reports of torture carried out by the security forces during the war and its immediate aftermath although DFAT states that Tamils faced a higher risk of torture during the war.²⁰ DFAT is aware of reports of torture carried out by the police including from the UN Special Rapporteur and the HRC of Sri Lanka but assesses that torture in Sri Lanka, whether perpetrated by the military, intelligence or police forces, is not presently systemic or state sponsored and that the risk of torture from military and intelligence forces has decreased since the end of the war.²¹ DFAT also assesses²² that cases where the police are alleged to have tortured or mistreated an individual generally reflect low capacity, lack of training and due process in arrest and detention procedures,

¹⁵ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012, UNB0183EA8, pp26 and 27.

¹⁶ DFAT "Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, 3.32 and 3.33.

¹⁷ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012, UNB0183EA8, p25.

¹⁸ DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105, 3.29.

¹⁹ Ibid 4.1.

²⁰ Ibid 4.12- 4.14.

²¹ Ibid 4.15, 4.16 and 4.18.

²² Ibid 4.19.

together with poor policing methods that focus on extracting confessions rather than conducting a thorough investigation. DFAT states that as few reports of torture are proved or disproved it is difficult to determine the prevalence of torture. However, it considers²³ that Sri Lankans face a low risk of mistreatment that can amount to torture, mostly perpetrated by the police, irrespective of their religion, ethnicity, geographical location or other identity; that the incidence of torture has reduced in recent years; and that the allegations of torture pertain to a relatively small number of cases compared to the total population.

42. The UK Home Office (UKHO) 2016 report discusses protection claims as based on a person's actual or perceived political opinion of support for or involvement in the LTTE or other Tamil separatist groups, including membership of, or participation with, such groups overseas. The report notes that in the UKHO view simply being a Tamil does not give rise to protection claims.²⁴ The UKHO notes there have been positive developments in Sri Lanka since President Sirisena came to power in January 2015. White van abductions are now seldom reported, and the number of torture complaints has reduced, although new cases of Tamil victims continue to emerge, both of torture and occasional white van abductions.²⁵ The authorities continue to monitor people, particularly in the north and east and persons perceived to sympathise with the LTTE continue to be intimidated, harassed, arrested, detained and tortured.²⁶ UKHO notes that, despite improvements, there continue to be reports, but at much lower numbers, of abductions, torture complaints and police use of excessive force against Tamils perceived to support the LTTE.²⁷
43. I accept that following a bomb blast in 1996 the applicant's father was detained and mistreated by the SLA until he was released in 1998. I accept that following a bomb blast in 1999 the applicant was taken in a round up and questioned by the SLA before he was released. I accept that the applicant's [relative A] was killed by unidentified men in April 2006 because of suspected LTTE links.
44. Having regard to the UNHCR guidelines and the other information before me, I do not consider the applicant to be at risk of harm for reason of any links to the LTTE, or any imputed political opinion, now or in the reasonably foreseeable future, for a number of reasons.
45. First, other than his questioning during a round up following a bomb blast in 1999, the applicant, on my findings, was not otherwise of any adverse interest to the Sri Lanka authorities at any other time. Secondly, the applicant does not claim that his family were subsequently questioned, arrested or detained in relation to his father's involvement in the bombing incident. Thirdly, the applicant does not claim that he or his family were subsequently questioned, arrested or detained in relation to his [relative A] death in April 2006 or his suspected LTTE links. Furthermore, country information discussed above indicates that the monitoring and harassment of Tamils was routine during the war and under the Rajapaksa government, but has significantly reduced under the current government. On my findings, the applicant was able to depart legally from Sri Lanka three times, and return twice, travelling on his own passport and without being questioned or encountering any problems with the Sri Lankan authorities. Additionally, on my findings, the Sri Lankan authorities have not made any enquiries about the applicant since he left Sri Lanka in early 2010.

²³ Ibid 4.20.

²⁴ UKHO, "Country Information and Guidance. Sri Lanka: Tamil separatism. Version 3.0", 1 August 2016, OGD7C848D77, 1.1.1 and 2.3.1.

²⁵ Ibid 2.3.6, 2.3.7, 6.6.2, 6.6.6, 6.6.7 and 6.6.11.

²⁶ Ibid 2.3.8.

²⁷ Ibid 2.3.10.

46. The applicant does not have a profile that country information suggests he is at risk of harm from the Sri Lanka authorities, now or in the foreseeable future, for any links to the LTTE or for any imputed political views. I do not consider that the Sri Lankan authorities would have had any adverse interest in the applicant had he remained in Sri Lanka or that he would be of any adverse interest to the Sri Lankan authorities on return.
47. The applicant representative provided submissions and country information in response to the IAA's invitation to comment on 4 July 2017. The applicant, among other things, argues that the IAA should have regard to an International Truth and Justice Project (ITJP) report.²⁸ I consider the submissions and country information referred to by the applicant to be broadly consistent with the DFAT 2017 report which does not suggest that such incidents do not occur at all, but overall assesses the situation in relation to such incidents, as well as the general political and security situation in Sri Lanka, as improved as discussed above. The UKHO 2016 report also suggests that while such incidents still occur they are not occurring to the same extent as they were and there has been an improvement since the change of government.
48. I am satisfied that the applicant will not face a real chance of persecution from the Sri Lankan authorities due to any links to the LTTE, for any imputed political opinion and/or as a young Tamil male from Colombo, if returned to Sri Lanka, now or in the reasonably foreseeable future.

Returning asylum seeker

49. I accept that, on his return to Sri Lanka, the applicant would be considered by the authorities to be a failed asylum seeker.
50. Entry and exit from Sri Lanka is governed by the *Immigrants and Emigrants Act 1949* (Sri Lanka) (IE Act). Under the IE Act it is an offence to depart other than from an approved port of departure. The applicant departed Sri Lanka legally by air to [country 6] in early 2010, using his passport, and I am not satisfied that he is at risk of prosecution under the IE Act.
51. Advice from DFAT is that upon arrival in Sri Lanka, involuntary returnees are processed by the Department of Immigration and Emigration, the State Intelligence Service and a unit of the CID based at the airport who check returnees' travel documents and identity information against immigration databases, intelligence databases and the records of outstanding criminal matters. Returnees are processed en masse and processing can take several hours.²⁹
52. 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. DFAT assesses that returnees are treated according to these standard procedures, regardless of their ethnicity and religion, and are not subject to mistreatment during their processing at the airport.³⁰
53. I accept that the applicant will be identified as an asylum seeker on his return. DFAT assesses the risk of mistreatment or torture for the majority of returnees is low and continues to

²⁸ ITJP, "A Still Unfinished War: Sri Lanka's Survivors of Torture and Sexual Violence 2009-2015", 1 July 2015, CISEC96CF129455;

²⁹ DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105, 5.19.

³⁰ Ibid 5.20.

reduce.³¹ Country information containing reports of some returnees being tortured was before the delegate and the IAA.³² DFAT does not suggest that there is no risk and those other reports provide some examples of incidents of mistreatment. I accept that an asylum seeker with actual or perceived links to the LTTE may be at risk of harm when processed at the airport. However, as discussed above, notwithstanding his father's detention and mistreatment by the SLA, his 1999 questioning by the SLA in a round up and his [relative A]'s death in April 2006, the applicant was not of interest to the Sri Lankan authorities at the time he left Sri Lanka and the authorities have shown no interest in him since. I am satisfied that the applicant's profile is such that he will not be of interest to the Sri Lankan authorities if returned to Sri Lanka. The UKHO 2016 report indicates that although the Sri Lankan authorities will routinely question returnees about their activities abroad, they are only interested in significant involvement in pro-Tamil separatist diaspora activities and that attending demonstrations overseas is not in itself evidence that a person will attract interest from the Sri Lankan authorities.³³ The applicant does not claim he has taken part in any pro-Tamil diaspora activities in his previous trips outside Sri Lanka or since he left Sri Lanka in 2010. I am not satisfied that the applicant's profile, which as discussed above is not one that places him at risk of harm, will be increased by the fact that the applicant was out of the country from 2001 to 2004, from 2007 to 2009 and from 2010 onwards, including as an asylum seeker.

54. Taking into account those findings and the country information, I do not accept that the applicant will be at risk of adverse attention from the Sri Lankan authorities when scrutinised on arrival in Sri Lanka.
55. I am not satisfied that there is a real chance that the applicant would face harm on his return to Sri Lanka as a failed Tamil asylum seeker, now or in the reasonably foreseeable future.
56. Considering 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

57. 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

58. 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.

³¹ Ibid 4.21 and 4.22.

³² Including DFAT, "RRT Country Information Request, LKA41452 - Treatment and monitoring of Tamils returning to the North and East including returning LTTE cadres; Tamils from abroad; failed asylum seekers and refugees from India", 27 February, 2013, CX304258; Immigration and Refugee Board of Canada, "LKA103815.E: Information on the treatment of Tamil returnees to Sri Lanka", 22 August 2011, CIS29896; and ITJP, "A Still Unfinished War: Sri Lanka's Survivors of Torture and Sexual Violence 2009-2015", 1 July 2015, CISEC96CF12945.

³³ UKHO, "Country Information and Guidance. Sri Lanka: Tamil separatism. Version 3.0", 1 August 2016, OGD7C848D77, 2.3.3, 2.3.4, 2.3.5, 3.1.3, 3.1.4, 6.5.7, 6.6.8 and 6.10.3.

Real risk of significant harm

59. 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.

60. I have found that there is not a real chance of harm to the applicant, now or in the reasonably foreseeable future, for any LTTE links, for any imputed political opinion, as a young Tamil male from Colombo, as a returned Tamil failed asylum seeker or a combination of these. As 'real chance' and 'real risk' involve the same standard,³⁴ it follows that I am also satisfied that there is no real risk of significant harm if he is returned to Sri Lanka.

61. As discussed above, the applicant faces processing at the airport on his return as a failed asylum seeker. DFAT states that processing occurs en masse and may take several hours, returnees are treated according to standard procedures and the risk of mistreatment is low. I am not satisfied, on the evidence, that there is an intention to inflict pain or suffering, severe pain or suffering or extreme humiliation in any processing of returnees at the airport. These circumstances do not amount to the death penalty, an arbitrary deprivation of life or torture. I am not satisfied that the airport processing constitutes significant harm as defined under s.36(2A) of the Act. For these reasons, I am not satisfied the applicant will face a real risk of significant harm during any processing at the airport.

62. 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 as a returned Tamil failed asylum seeker, for any links to the LTTE, for any imputed political opinion, as a young Tamil male from Colombo or any combination of these. Nor do I accept that there is a real risk that he would be subjected to pain or suffering, severe pain or suffering or extreme humiliation intentionally inflicted, or caused. I am not satisfied that there is a real risk that the applicant will suffer significant harm.

63. 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

64. 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.

³⁴ *MIAC v SZQRB* (2013) 210 FCR 505.

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.