



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA17/02163

Date and time of decision: 8 January 2018 15:22:00
Fiona Kerr, Reviewer

Decision

The IAA affirms the decision not to grant the referred applicant a protection visa.

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 473EC(2) of the Migration Act 1958 and replaced with generic information which does not allow the identification of a referred applicant, or their relative or other dependant.

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Hindu Tamil from Sri Lanka. [In] January 2016 he lodged an application for a Safe Haven Enterprise Visa (SHEV). [In] March 2017 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. No further information has been obtained or received.

Applicant's claims for protection

4. The applicant's claims can be summarised as follows:
 - He and his family experienced multiple displacements due to the war. From 1990 he and his family moved around to various places and slept in temples, schools or under trees.
 - On 16 May 2009 when the Sri Lankan government declared victory over the Liberation Tigers of Tamil Eelam (LTTE) and all LTTE members should surrender for rehabilitation, he acted on his mother's direction and surrendered himself to the camp at [Camp 1] in [Town 1]. He was shot in [body part] when Sri Lankan army (SLA) officers randomly fired at the Tamils surrendering themselves.
 - He was moved from [Camp 1] to [Camp 2] in [Town 1] where he suffered physical harm and was denied water.
 - After [a number of] months, he was moved to [Camp 3] where he was questioned by CID officers about his involvement with the LTTE. He was frequently beaten by CID officers and forced to engage in practices contrary to his religion.
 - In [2010] he moved to [Camp 4] for [a number of] months.
 - From [2010] to [2011] he was in [Camp 5] where he was treated like a slave and forced to build a farm.
 - [Later in] 2011 he moved to [another location] where he remained until [later in] 2011. He was taken to [a named school] where he was told he had served his time and was released. He returned to [Town 2] in October 2011.
 - After being released, he was required to sign a form and report weekly. He reported weekly from [a date in 2011] to [a date in] 2012. He was subject to a number of reporting conditions.
 - Tamil men who had been suspected of LTTE links and detained previously were disappearing and the applicant was afraid this would also happen to him.
 - Since fleeing Sri Lanka, the CID have gone to his house regularly and now a different group of men are going to his house.

- He fears he will be arrested, detained, abducted, tortured and/or killed by the CID officers and/or the men who repeatedly harassed his parents because of his identity as a suspected LTTE.

Refugee assessment

5. 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

6. 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.
7. The applicant claimed to be of the Tamil ethnicity and the Hindu religion. He provided a number of documents in support of his claimed identity. I am satisfied the applicant is a Hindu Tamil, originally from the Jaffna district in the Northern Province of Sri Lanka and that Sri Lanka is his receiving country.

Displacement and detention

8. The applicant claims that in 1990, when the war between the Sri Lankan government and the LTTE began, he and his family were forced to leave their village as it was declared a security zone; after that they were forced to move around various places and for the following 19 years slept in temples, schools, or under the trees. The applicant provided a detailed address, education and work history in his SHEV application. Information provided there indicates that the applicant and his family lived in the village of [Village 1] in [District 1] from 1995 until January 2009. The applicant also provided a copy of a letter from the principal of [a Village 1 School] which certifies that the applicant attended [between certain grades]. His SHEV application indicates that after completing school in 2005, he worked with his father on the family farm until May 2009.

9. Information submitted by the applicant's representative in post-interview submissions indicates that repeated displacement was a tragically common occurrence during the war, particularly in the northern province.¹ I accept that the family was displaced early in his life from their village of [home village] because it was declared a security zone and that they lived elsewhere until around 1995. I have formed the view, however, that the applicant has exaggerated the frequency of, and periods for which, he and his family were displaced and I find that the family lived at [Village 1] in [District 1] from 1995 until May 2009.
10. The applicant's claims for protection rest on his extended detention by the Sri Lankan government in a series of rehabilitation camps. His evidence, however, about how he came to be detained in 2009 at the end of the war was very unsatisfactory.
11. He has claimed variously that:
- his mother made him surrender for rehabilitation at [Camp 1] in [Town 1]. He was shot in [body part] when army officers there randomly fired at them (2016 statement);
 - when the SLA captured the area he was living in he was separated from his family and taken away (2013 statement); and
 - he was taken from his house (entry interview [in] February 2013).
12. At his SHEV interview, the applicant denied saying his mother told him to surrender to the camp and that wasn't what happened. He stated that he was shot in [body part] and he has wounds to show it and he was captured. Later in his SHEV interview, he said that when his interview was taking place (I take this to be a reference to the interview during which his 2016 statement was taken) he had no official interpreter and took someone he knows but didn't know how good that person's English was.
13. Unlike his 2013 statement, there is no indication on his 2016 statement that an accredited interpreter was used. I accept that this may account for some discrepancies in details and that his mother did not urge him to surrender for rehabilitation. However, there is no indication in either his 2013 statement or his entry interview that he was shot by the authorities nor in the detailed history he has provided of his detention over the following two and a half years is there any mention of his requiring or undergoing medical treatment for something as serious as a gunshot wound. I consider this a significant omission in the context of his claims. In view of the significant differences between the versions he has given over the course of the protection application process of what happened in May 2009 when he came to be detained, I am not satisfied that he was shot by the Sri Lankan authorities or that army officers at [Camp 1] randomly fired at surrendering Tamils in May 2009.
14. There remains the discrepancy between whether he was taken from his house by the SLA or separated from his family when they were surrendering to the SLA. Ultimately, I place no weight on the different versions he has given of how he came to be detained. Country information confirms that 300,000 civilians crossed into Government territory in the final weeks of the conflict.² The so-called "surrendees" (the term used in Emergency Regulations) were selected at various checkpoints and screening points including [Camp 1], and taken into the custody of military and police forces for "rehabilitation" and/or for further investigation because of their real or suspected links with the LTTE.³ The Office of the United Nations High

¹ Office of the United Nations High Commissioner for Human Rights (OHCHR), "Report of the OHCHR Investigation on Sri Lanka (OISL)", 16 September 2015, CISEC96CF13358

² *ibid*

³ *Ibid*

Commissioner for Human Rights (OHCHR) in its September 2015 report on Sri Lanka noted that the military authorities made no distinction at the screening points between LTTE military cadres who had been taking part in hostilities and others who were not military cadres.⁴

15. In view of the applicant's retraction of the information in his 2016 statement about how he came to be captured, I prefer the evidence set out in his 2013 statement and I accept that he and his family surrendered to the SLA after it captured [District 2], and that in that process he was separated from his family and detained.
16. The applicant stated in his SHEV interview that neither he nor any member of his family was involved with the LTTE and that he was not a member of the LTTE but was suspected of involvement and that was the reason for his detention. Like the delegate I have some concern about his claimed extended detention given his evidence that he was never involved with the LTTE, either as a member or in any other capacity. Country information indicates that a rigorous screening program was in place to identify those who had been involved with the LTTE. Young men were warned during questioning that if they did not admit involvement with the LTTE they would suffer severe consequences.⁵ I have taken into consideration that the applicant lived from 1995 until May 2009 in an LTTE controlled area, that he was of fighting age and that the LTTE had a one-person-per-family policy of recruitment in areas they controlled. Given this, I consider it surprising that the applicant's family would not have been required to contribute in some way to the LTTE and I consider it is possible that the applicant has not been entirely truthful about the reasons for his detention. It is unfortunate that this issue was not further explored with him by the delegate in his SHEV interview. Leaving that issue aside, the applicant has provided a number of documents attesting to his detention from May 2009 to [2011] including an International Committee of the Red Cross (ICRC) Detention Attestation, an International Organisation for Migration (IOM) 'Information Counselling and Referral Service' (ICRS) photo ID card issued in the applicant's name [2011], and a Reintegration Certificate certifying that the applicant was reintegrated from [Camp 4] [in] 2011.
17. I note that the date on the Reintegration Certificate corresponds with the date on the ICRC Detention Attestation and information provided by the applicant in the 2016 statement. Information published by DFAT and referred to by the applicant's representative in post-interview submissions confirms the widespread use by the Sri Lankan authorities of administrative detention in Government-run rehabilitation centres for up to two years without judicial review or access to legal representation.⁶ In total, thousands of former LTTE members were arrested and detained by the Sri Lanka security forces; in many cases, civilians (that is, those who were not LTTE military cadres) were detained alongside admitted or alleged combatants in the rehabilitation centres.⁷
18. The applicant claimed that he was detained in five separate camps over that period. The ICRC detention attestation confirms only three, [three specified camps]. I do not place much weight on this difference. The detention attestation indicates that the applicant was visited twice only by the ICRC early in the period during which he was detained ([in] 2009) and was released "according to the authorities" [in] 2011 from [Camp 4]. There was therefore a period of over two years during which he was not visited by the ICRC and there is no independent verification of the centres to which he was taken in the intervening period. The applicant has otherwise been consistent in this claim and given the passage of time and the conditions to which he

⁴ Ibid

⁵ OHCHR "Report of the OHCHR Investigation on Sri Lanka (OISL)", 16 September 2015, CISEC96CF13358

⁶ Department of Foreign Affairs and Trade (DFAT), "DFAT Thematic Report – People with Links to the Liberation Tigers of Tamil Eelam", 3 October 2014, CIS2F827D91259 at 3.8

⁷ Ibid at 3.11 and OHCHR "Report of the OHCHR Investigation on Sri Lanka (OISL)", 16 September 2015, CISEC96CF13358

claims he was subject, I consider it possible that the applicant was mistaken about the sequence of camps to which he was taken. I accept that he was detained in five youth rehabilitation camps from [May] 2009 on suspicion of LTTE involvement and on the basis of the detention attestation and the Certificate of Reintegration, that the last of these was the [Camp 4] from which he was released [in] 2011. I also accept that during his detention he was permitted only one visit from his mother for 10 minutes while he was at [Camp 3].

19. The applicant's evidence about what he experienced during his detention was emotionally given and largely consistent with his written claims. Country information confirms that many detainees experienced "horrible" treatment during their time in rehabilitation centres including rape, torture and other mistreatment.⁸ Even if detainees were not tortured or subject to other mistreatment, living conditions were harsh – the Sri Lankan rehabilitation program failed to meet international standards.⁹ In centres such as [Camp 4] where the applicant was held, conditions were crowded and detainees slept in tents; CID and Terrorist Investigation Division (TID) officers were reportedly present and carried out interrogations.¹⁰ I accept the applicant's claims that he was subject to harsh conditions and physical deprivation and mistreatment during his detention, and that he was forced to engage in practices contrary to his religion.
20. The applicant claims that after his release, he was required to report weekly to the CID in [Town 2] and sign a form. In his SHEV interview he confirmed that he had to do this every week. However, he also claimed for the first time that each time he went to [a location] to sign, he was beaten up.
21. DFAT confirms that while there are no formal parole arrangements for those released from rehabilitation, many may be subject to ongoing monitoring and reporting requirements, the level of which can vary from district to district, but generally depends on the background of the individual; low-profile members may be required to report every week.¹¹ It also understands that if a released detainee leaves their area of origin they may be expected to provide information about their destination, who they will visit and how long they will be away.¹² Families may be questioned if the released detainee fails to register or is found to have left the village when officials visit to check on them.¹³
22. I accept that on his release from detention, the applicant was subject to ongoing monitoring and reporting requirements and that he was required to report weekly to the army camp closest to his home and that if he did not report, as happened on one occasion, the authorities came to his home looking for him. I also accept that he had to seek permission to move, that he had to report to them whenever he moved, and that he was told not to leave the country. All these claims are consistent with the country information referred to above. I do not, however, accept his claim that the authorities had a list of young Tamil males who were detained and kept under surveillance within Sri Lanka (the List) and that his name was on the List. It is the case that the Sri Lankan authorities collect and maintain sophisticated intelligence on former members and supporters of the LTTE.¹⁴ However, country information before me

⁸ Immigration and Refugee Board of Canada "Sri Lanka: Treatment of suspected members or supporters of the Liberation Tigers of Tamil Eelam (LTTE), including information about how many are in detention; whether the government continues to screen Tamils in an attempt to identify LTTE suspects (2011-January 2015)," 11 February 2015 OGFDFC61A5

⁹ *ibid*

[Source deleted].

¹¹ Department of Foreign Affairs and Trade (DFAT), "DFAT Thematic Report – People with Links to the Liberation Tigers of Tamil Eelam", 3 October 2014, CIS2F827D91259 at 3.20

¹² *Ibid* at 3.21

¹³ *ibid*

¹⁴ DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105, 3.29.

also indicates that the level of monitoring and reporting requirements varied from district to district depending on the person's individual profile – some low-profile members may be required to report every week whereas others have no contact at all with local police or military.¹⁵ The applicant does not claim to have been a high-profile LTTE member and I do not consider it plausible, even if there was a universally applicable list of young Tamil males who were routinely subject to intense surveillance, that the applicant's name was on such a list. The applicant did not make the claim that he was beaten by the CID every week in either his 2016 or 2013 written statements or in his entry interview. In view of his failure to refer to this earlier, I consider this claim a recent invention and I do not accept that he was beaten up at any time when he went on to sign.

23. Nor do I accept that he worked only occasionally during the period between his release and his departure for Australia because an officer went to his house and harassed his parents and asked where he went every time he left the house for work or to job hunt. The applicant does not claim to have been a high-profile member of the LTTE and I do not consider it plausible that he would be so intensely monitored by the CID that they would know every time he left the house. Further, he provided evidence in his SHEV interview that he did some business for himself after his release selling [products] and that this occasionally took him away from home. I consider this aspect of his claims an exaggeration.
24. I also have concerns about the claims in his 2016 statement regarding the number and frequency of visits to his home by the authorities after he left Sri Lanka for Australia. He has said variously:
 - after he left unidentified men came to his house once in search of him (entry interview);
 - one group of men went twice and other groups had been looking for him and that his mother told them that he went to get a job, she hadn't heard from him and didn't know where he was (2013 statement);
 - unidentified men who they believe were CID officers came to his home over 16 times between [2012] and [2016]. The same men harassed them for the first two years and after that it was a new group of men (2016 statement).
25. In his SHEV interview, while he referred to visits to his home mostly every month, he did not refer to any of the following claims made in his 2016 statement: his parents were blackmailed using vulgar language; they beat his father; damaged his house; and [vandalized] his house. He also gave inconsistent evidence about when his passport was taken. After initially stating the SLA took it the first time they came looking for him after he came to Australia, he then said that it had been taken one month before he came to Australia.
26. On the basis of the country information before me, I accept that when he failed to report as required that the authorities made one or two enquiries about him at his home. However, given the significant changes, discrepancies, and omissions in his evidence about these visits by men he believes to be CID and what they did, I am satisfied that the applicant has exaggerated the number and frequency of these visits, and what happened during them. I do not accept that his passport was taken and I do not consider it plausible that up to twice a month from the time the applicant left the country until as recently as January 2016 the authorities would still be coming to the applicant's home asking about his whereabouts.
27. In his SHEV interview, the applicant stated that the authorities continue to target some Tamil boys and recently there was a boy arrested and his body was found tied in a sack. I accept this

¹⁵ DFAT "DFAT Country Information Report Sri Lanka" 18 December 2015 CISEC96CF14143

is possible. He did not, however, refer in his SHEV interview to the claim in his 2016 statement that following his release he kept hearing stories of disappearances, abductions and killings of Tamil detainees from the camp in 2011. DFAT states it is aware of reports that some of those released from rehabilitation centres have been re-arrested.¹⁶ Disappearances and unlawful killings by security forces and groups associated with them continued to be reported in 2014, although in lower numbers than previously.¹⁷ I accept that his experiences in detention made him genuinely fearful of the authorities and on hearing of such events that he had a real, subjective fear that he would be abducted or killed. However, he did not refer during his SHEV interview to the abduction of his friend S by the CID and I do not consider plausible his claim that he witnessed the body of another friend taken by CID officers from that person's house, cut into pieces and littered around [Town 2]. I consider both these claims embellishments.

28. I accept that the Sri Lankan authorities remain sensitive to the potential re-emergence of the LTTE. Persistent surveillance, intimidation and monitoring of former LTTE members by the security forces restricted their freedom of movement and association, and was seen as necessary to ensure there was no resurgence of the LTTE.¹⁸ The 2012 Guidelines, which while over five years old, remain the UNHCR's most recent assessment of the protection needs of asylum seekers from Sri Lanka provide that certain real or perceived links to the LTTE may give rise to a need for protection, however, accurately identifying people according to the categories set out may be difficult and the UNHCR recognises that each case depends on its individual circumstances.¹⁹

29. In the applicant's case I note the following. Since the end of the conflict, the Sri Lankan government has managed a large-scale rehabilitation process for former members of the LTTE; over 12,000 LTTE members had been arrested and sent to rehabilitation centres since the end of the conflict.²⁰ While modest numbers of former LTTE members continue to be detained and prosecuted within Sri Lanka's criminal justice system²¹ the Government of Sri Lanka has said that re-arrests of LTTE members released from rehabilitation are generally due to additional information about involvement in acts of terrorism.²² DFAT states that despite the high level of monitoring of those released from rehabilitation centres, relatively few arrests have occurred.²³ While there may be an increased risk of detention or prosecution in the case of high-profile former LTTE members, following their release from rehabilitation centres, low-profile former LTTE members may be monitored but generally are not prosecuted.²⁴ Further, the country information indicates that the focus of the Sri Lankan government's concern has changed since the end of the war; the LTTE itself is a spent force and there have been no terrorist incidents since the end of the war.²⁵ The government's present focus is to identify

¹⁶ Ibid at 3.22

¹⁷ US Department of State "Country Reports on Human Rights Practices for 2014 Sri Lanka" 25 June 2015 OIG2B06FAF8

¹⁸ Immigration and Refugee Board of Canada "Sri Lanka: Treatment of suspected members or supporters of the Liberation Tigers of Tamil Eelam (LTTE), including information about how many are in detention; whether the government continues to screen Tamils in an attempt to identify LTTE suspects (2011-January 2015)," 11 February 2015 OIGDFC61A5

¹⁹ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012, UNB0183EA8, p25.

²⁰ DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105 at 3.34

²¹ Ibid at 3.49

²² DFAT "DFAT Country Information Report Sri Lanka" 18 December 2015 CISEC96CF14143 at 3.66

²³ Ibid

²⁴ DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105 at 3.42

²⁵ UK Home Office, "Country Information and Guidance. Sri Lanka: Tamil separatism. Version 2.0", 19 May 2016 OGD7C848D17

Tamil activists in the diaspora who are working for Tamil separatism and to destabilise the unitary Sri Lankan state.²⁶

30. The applicant was just one of thousands who have undergone the rehabilitation process and while I accept he was subject to reporting conditions, country information indicates that this was routine for low-level members who were released from detention; by itself it does not suggest that he was of particular, on-going, adverse interest to the authorities and I do not accept that, by itself, being required to attend and sign at an army camp amounts to harm. He has not committed any criminal or terrorist related offences or otherwise done anything that would suggest his name has been placed on a 'stop' or 'watch' list.²⁷ Nor has he been involved in activities outside Sri Lanka that would be perceived as anti-government or pro-separatist.
31. The country information indicates that there is a general acceptance in the community that many were forced to participate in LTTE activities and while rehabilitees can experience difficulties finding employment societal discrimination against low-profile LTTE member is generally low.²⁸ Some post-release support is also provided to rehabilitees by both the government and international and domestic NGO's to assist in finding employment.²⁹ In the applicant's case he was able to find work, obtain a driver's licence and a passport, and has not otherwise claimed to have been subjected to discrimination because of his status. I am not satisfied that the applicant is at risk of serious harm on the basis of his status as a former rehabilitee or his perceived links to the LTTE.
32. The applicant states that he fears he will be harmed or mistreated because he is Tamil, however, I am not satisfied he is at risk of harm on the basis of his ethnicity. The country information before me indicates that Sri Lanka has undergone significant changes in the five years since the applicant left and, in particular, since the election of the Sirisena government.
33. DFAT's latest report acknowledges that while the security situation in the north and east has improved dramatically since the end of the conflict, military and security forces maintain a significant presence in the Northern Province.³⁰ However, the number of troops stationed there has reduced with most of the military restricted to their barracks.³¹ The monitoring and harassment of Tamils in day-to-day life has also decreased significantly; while some cases continue to be reported the overall prevalence of monitoring has greatly reduced.³² Members of the Tamil community have also described a positive shift in the nature of interactions with the authorities; they feel able to question the motives of, or object to, monitoring or observation activities.³³
34. DFAT assesses 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.³⁴ A Tamil now leads the opposition, Tamil inclusion in the political dialogue in Sri Lanka has increased under the Sirisena government and Tamils have a substantial level of political influence.³⁵ Reconciliation and human rights have been prioritised by the government and the

²⁶ *ibid*

²⁷ *ibid*

²⁸ DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105 at 3.53

²⁹ *Ibid* at 3.35

³⁰ *ibid* at 2.39

³¹ *Ibid* and 3.9

³² *Ibid* at 3.9

³³ *ibid*

³⁴ *Ibid* at 3.4

³⁵ DFAT "Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, 3.4 and 3.6.

President has taken a number of both real and symbolic steps including delivering a trilingual Declaration for Peace in Sinhala, Tamil and English, paying respect to all victims who had lost their lives in the war, and a significant step towards acknowledging losses on both sides.³⁶

35. It also moved to abolish surveillance and censorship of media and civil society groups although there is criticism that it has taken no measures to end impunity for security forces abuse.³⁷ Civil society groups also welcomed the restoration of the Constitutional Council which makes recommendations on appointments to the judiciary and independent commissions, and the restoration of the legitimacy and independence of Sri Lanka's Human Rights Commission (HRCSL).³⁸ Freedom from Torture (FFT) in its 2016 report noted that while it continued to receive referrals even after the election of the new government albeit at lower levels, it welcomed a number of encouraging developments including the co-sponsorship of the UN Human Rights Council resolution on promoting reconciliation, accountability and human rights in Sri Lanka and its current consultation process on transitional justice mechanisms stating they indicate an increased willingness to address the legacy of conflict-related human rights abuses.³⁹
36. DFAT assesses the number of incidents of extra-judicial killings, disappearances and kidnappings for ransom, including incidents of violence involving former LTTE members, has significantly reduced since the end of the war.⁴⁰ 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.⁴¹ DFAT is aware of reports of torture carried out by the police including from the UN Special Rapporteur and the HRCSL 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.⁴²
37. The rate of progress by the Sirisena government in a number of reconciliation and reform areas, including in relation to accountability for crimes committed in the war, ongoing human rights issues, reform of the security forces, prevalence of torture, detention conditions, reform of the PTA, and occupation of land by the military is not without criticism. Many issues remain and the pace of reform has been criticised as too slow. I note the statement by the UN High Commissioner for Human Rights dated 9 February 2016 that the prevailing climate of fear in the North and East "has mutated, but, sadly, still exists" while also acknowledging that virtually everyone agrees there has been progress, although "opinions differ markedly about the extent of that progress".⁴³
38. In considering the applicant's claims, personal circumstances and country information before me, I am not satisfied he is at risk of serious harm if he returns to Sri Lanka on the basis of his Tamil ethnicity, youth, age, imputed or actual political opinion, previous detention and monitoring, or the fact that he comes from an area formerly controlled by the LTTE.

³⁶ Ibid at 2.20

³⁷ UK Home Office "Country Information and Guidance, Sri Lanka: Tamil separatism Version 3.0", 1 August 2016, OGD7C848D77

³⁸ Ibid

³⁹ Freedom From Torture "Sri Lanka – Update On Torture Since 2009" 4 May 2016, CIS38A8012881

⁴⁰ DFAT "Country Information Report Sri Lanka", 24 January 2017, CISED50AD105 at 4.1

⁴¹ Ibid at 4.12- 4.14.

⁴² Ibid 4.15, 4.16 and 4.18.

⁴³ UK Home Office, "Country Information and Guidance Sri Lanka: Tamil separatism. Version 2.0", 19 May 2016, OGD7C848D17

Illegal departure/returning asylum seeker

39. The applicant was a passenger on a people smuggling boat. He fears he will be arrested, detained, prosecuted, tortured and/or killed by the authorities as a failed refugee and because of his illegal migration. I accept that he left Sri Lanka illegally and that on his return he will be perceived as a returning asylum seeker from the west and that, as a result, these will have consequences for the applicant on return.
40. As a returning asylum seeker, the information before me indicates that the applicant will be subject to a series of administrative checks by the Sri Lankan authorities who verify travel documents and identity, and check for any outstanding criminal matters, including checks against immigration and intelligence databases.⁴⁴ That investigative process often involves contacting the person's claimed home suburb or town police and checking criminal and court records to address whether someone was trying to conceal their identity due to a criminal or terrorist background.⁴⁵
41. I accept that, in that process, it is possible that the applicant's previous detention in rehabilitation facilities would come to light. There is information before me that the Sri Lankan authorities have continued to arrest, interrogate and, in some cases detain for extended periods, arrivals identified as having had a previous connection to the LTTE or Tamil separatist activities.⁴⁶ There is also country information containing reports of some returnees being tortured.⁴⁷
42. However, the country information does not support a conclusion that as a former rehabilitee the applicant is at risk of harm during the investigative process at the airport. The applicant has been issued with a Reintegration Certificate which confirms that his status as a suspected LTTE member was considered resolved at the end of his detention. As discussed above, the Sri Lankan authorities maintain sophisticated intelligence, including electronic 'stop' and 'watch' databases, on former members and supporters of the LTTE.⁴⁸ 'Stop' lists comprise a list of those against whom there is an extant court order or arrest warrant; they will be stopped at the airport and handed over to the appropriate authorities.⁴⁹ The applicant has no outstanding court order or arrest warrant and I do not accept that his name would be on a stop list at the airport. While I accept that he left while under a reporting condition, the information before me does not indicate that this would elevate his profile.
43. 'Watch' lists include names of those individuals that the Sri Lankan security services consider to be of interest, including due to separatist or criminal activities.⁵⁰ DFAT advises that those on a watch list are not likely to be detained, although there have been some media reports claiming that individuals, mostly Tamils, travelling from the United Kingdom have been detained on

⁴⁴ DFAT "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105 at 5.19

⁴⁵ Ibid at 5.20

⁴⁶ Tamil net "SL military continues to arrest Tamils from East returning from Middle-East", 31 May 2015 CXBD6A0DE7540; Sri Lanka Mirror "10 Tamils arriving in Lanka arrested", 4 March 2015, CXBD6A0DE6065; Tamil net, "16 Batticaloa Tamils arrested within last 100 days at Colombo airport", 3 May 2015, CXBD6A0DE6027; Sri Lankan Mirror "Another Tamil returnee arrested", 1 July 2015 CXBD6A0DE16698; United Kingdom Home Office "Country Information and Guidance. Sri Lanka: Tamil separatism" Version 2.0 19 May 2016 OGD7C848D17

⁴⁷ International Truth and Justice Project "Silenced: survivors of torture and sexual violence in 2015", 7 January 2016, CIS38A801275; Tamils Against Genocide, "Returnees at Risk: Detention and Torture in Sri Lanka", 1 September 2012, CIS24826; Freedom from Torture, "Sri Lanka - Update on torture since 2009", 6 May 2016, CIS38A8012881;

⁴⁸ DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105, 3.29.

⁴⁹ UK Home Office, "Country Information and Guidance Sri Lanka: Tamil separatism. Version 2.0", 19 May 2016, OGD7C848D17

⁵⁰ DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105, 3.29

arrival at the airport.⁵¹ DFAT has not been able to verify these reports but notes that those on a watch list are likely to be monitored.⁵² I accept that on his return the applicant may again be subject to some monitoring. However, as discussed above, I do not accept that monitoring amounts to harm and I am otherwise satisfied that the applicant is not at risk of adverse attention or harm from the Sri Lankan authorities when scrutinised on his return to Sri Lanka.

44. Those who depart the country irregularly are usually considered to have committed an offence under the *Immigrants and Emigrants Act 1949* (the I&E Act).⁵³ I accept that as a person who departed illegally he will be subject to a penalty under the I&E Act. Illegal departees are generally charged under the I&E Act, arrested at the airport and then taken to the closest Magistrates Court after investigations have been completed.⁵⁴
45. Returnees can remain in police custody at the CID airport office for up to 24 hours after arrival, and if a Magistrate is not available before this time (eg because of a weekend or public holiday), may be held at a nearby prison.⁵⁵ Once before a court, a person who pleads guilty is liable to be fined and released.⁵⁶ While penalties under the I&E Act can include imprisonment of up to five years, DFAT advises that no returnee who was merely a passenger on a people smuggling boat has been given a custodial sentence for illegally departing.⁵⁷ As the applicant was not involved in people-smuggling, I find there is no real chance of him being given a custodial sentence.
46. If they plead not guilty, returnees are immediately granted bail by the magistrate on personal surety or may be required to have a family member act as guarantor, in which case the person may need to wait until a family member comes to court to collect them.⁵⁸ There are rarely any conditions in relation to the bail and if they are, they are imposed on a discretionary basis; the person will only need to return to court when the case against them is being heard (or if required to give evidence as a witness in another case).⁵⁹
47. On the basis of DFAT's advice, I find that if the applicant pleads guilty he will be fined and released. If he pleads not guilty, he will be granted bail and required to return to court at a later time where, if he is found guilty, he will also be fined. The applicant's family continues to live in Sri Lanka and he has not claimed that, if required, there would be nobody to guarantee his bail. I find the prospect of the applicant spending more than a few days in detention pending bail, including the period on remand prior to being brought before a Magistrate, to be remote. The applicant did not claim any inability to pay the fine. He has a history of employment and I find the imposition of a fine will not amount to serious harm.
48. Considering the possibility that he arrives on a weekend and is detained until he can appear before a magistrate and then until bail is granted, the period of detention will be, at the most, a few days. Section 5J(5)(a) of the Act refers to a threat to a person's liberty as an instance of serious harm. However, whether a risk of loss of liberty constitutes serious harm requires a qualitative judgment, including an evaluation of the nature and gravity of the loss of liberty.⁶⁰ While I accept that prison conditions in Sri Lanka are poor due to old infrastructure,

⁵¹ Ibid at 3.29

⁵² Ibid

⁵³ Ibid

⁵⁴ Ibid at 5.21

⁵⁵ Ibid

⁵⁶ Ibid

⁵⁷ Ibid at 5.22

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ *MIBP v WZAPN; WZARV v MIBP* [2015] HCA 22.

overcrowding and a shortage of sanitary and other facilities,⁶¹ in my view, a brief period of detention even in poor conditions, does not rise to the level of a threat to his life or liberty, or to significant physical harassment or ill treatment, or otherwise amount to serious harm.

49. In my view, taking into account the totality of the treatment that the applicant will experience including being detained and investigated for several hours at the airport, then potentially being detained on remand for a number of days during which he will be held in overcrowded and unsanitary conditions, and having to pay a fine, I find that this treatment does not amount to serious harm. Further, the treatment of the applicant under the I&E Act is not discriminatory conduct but rather the application of a law which applies to all Sri Lankans.⁶² The evidence does not suggest that the law is selectively enforced or applied in a discriminatory manner. Accordingly, I find that the investigation, prosecution and punishment for illegal departure under the I&E Act would be the result of a law of general application and does not amount to persecution within the meaning of s.5J(4). For these reasons, I am not satisfied that the applicant is at risk of serious harm on the basis that he is an illegal departee.
50. Considering his claims together as well as individually, I am not satisfied that if the applicant is returned to Sri Lanka there is a real chance that he would suffer serious harm for any of the reasons claimed.

Refugee: conclusion

51. 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

52. A criterion for a protection visa is that the applicant is a non-citizen in Australia (other than a person who is a refugee) in respect of whom the Minister (or Reviewer) is satisfied Australia has protection obligations because there are substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm.

Real risk of significant harm

53. 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.

54. I have accepted that the applicant was detained in a series of rehabilitation camps for a period of over two years and that he was subject to reporting conditions (monitoring) on his release.

⁶¹ US Department of State, "Country Reports on Human Rights Practices 2015 – Sri Lanka", 13 April 2016, OGD95BE926320.

⁶² *Chen Shi Hai v MIMA* (2000) 201 CLR 293; and *Applicant A v MIEA* (1997) 190 CLR 225.

However, I have rejected other of his claims and I do not accept that he was a person of interest to the authorities at the time he left Sri Lanka over and above the ongoing requirement to report or that he will be subjected to adverse interest on his return except insofar as he may again be subject to some monitoring in the form of being required to report.

55. I accept that on return to Sri Lanka the applicant will be subject to a series of administrative processes and identified as an illegal departee and a returning asylum seeker. He is likely therefore, as discussed above, to be investigated and detained for several hours at the airport, and depending on the availability of a magistrate, may be detained for a number of days pending bail for the offence of illegal departure, and fined accordingly. I have found, however, that even if his history as a rehabilitee comes to light on his return, he is not otherwise a person of interest to the Sri Lankan authorities. He may be subjected to some monitoring again on his return, however, I do not accept that monitoring amounts to significant harm and I do not accept there is a real risk of torture or that he will be mistreated while being held and investigated at the airport or in remand, or face a total period of detention of longer than a few days in the worst case scenario.
56. The conditions to which he may be subject if detained on remand for a few days are likely to be poor. However, I do not accept that amounts to significant harm. The treatment does not consist of the death penalty or arbitrary deprivation of life. I am not satisfied that the acts or omissions of the Sri Lankan officials in this process are intended to cause pain or suffering or extreme humiliation. Nor am I satisfied that it amounts to serious pain or suffering, pain or suffering that is cruel or inhuman in nature, or extreme humiliation. I similarly find that the imposition of a fine under the I&E Act for his illegal departure does not amount to significant harm within the meaning of s.5(1) and s.36(2A).
57. I am not satisfied that the applicant is at risk of significant harm for any reason within the meaning of ss.36(2A) and 5(1) on his return to Sri Lanka or in the reasonably foreseeable future.

Complementary protection: conclusion

58. There are not substantial grounds for believing that, as a necessary and foreseeable consequence of being returned from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm. The applicant does not meet s.36(2)(aa).

Decision

The IAA affirms the decision not to grant the referred applicant a protection visa.

Applicable law

Migration Act 1958

5 (1) Interpretation

...

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.