



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA

IAA reference: IAA17/02483

Date and time of decision: 30 November 2017 16:03:00

Rebecca Mikhail, Reviewer

Decision

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

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Tamil from Sri Lanka. [In] August 2016 he lodged an application for a Safe Haven Enterprise Visa (application for protection). [In] April 2017 a delegate of the Minister for Immigration and Border Protection (the delegate) refused the grant of 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 12 May 2017 the IAA received a submission from the applicant.
4. In part, the submission refers to the applicant's original claims before the delegate, aspects of the delegate's decision, country information that was before the delegate and legal argument which I do not consider to be new information and have had regard to.
5. The applicant has also attached a translation of a warrant for arrest but I am satisfied this document was before the delegate and I do not consider it to be new information.

Applicant's claims for protection

6. The applicant's claims can be summarised as follows:
 - He was born in [Village 1], [District 1] in the Eastern province of Sri Lanka on [birth date] but last resided in [District 1] prior to his departure from Sri Lanka.
 - He is of Tamil ethnicity and worked as a farmer and a [occupation]. His wife and son continue to reside in [District 1].
 - His [relative], [Mr A], was a high-ranking leader and [Senior Position 1] of the Liberation Tigers of Tamil Eelam (LTTE) in [District 1].
 - In [2007] he was detained by the Pillayan group for [a duration] and questioned about the whereabouts of [Mr A] and beaten. He managed to escape to [Village 1] and the Pillayan group agreed not to harm him but warned that if they discovered they had any contact with [Mr A] they would kill his family. After returning to his home in [District 1] he was monitored by the Pillayan group and in 2008 [his house was attacked].
 - In 2011 he paid a bribe to have [Mr A] released from a government controlled camp and he was required to guarantee that he would be responsible for [Mr A] when he was released. A week later [Mr A] flew out of Sri Lanka for [Country 1] and registered with the United Nations High Commission for Refugees (UNHCR) and remains in [Country 1].
 - He was afraid he would be answerable to the government because [Mr A] had left the country so he fled to [Country 2] on a [temporary] visa in November 2011 but returned to Sri Lanka in February 2012 due to health issues and because his wife told him it was safe to return.
 - During 2012 he [worked for] various politicians from the Tamil National Alliance (TNA) [during] the elections.

- In August 2012 his wife received a call from someone claiming to be a government officer who told her that the government was requesting all active members of the LTTE to return to Sri Lanka. He contacted [Mr A] who told him that he would not return to Sri Lanka and the applicant should not respond to any requests from the government.
- Around [August] 2012 he received a letter from the Criminal Investigation Department (CID) stating that [Mr A] is now required to return to Sri Lanka. Out of fear he stopped driving politicians around and went to stay [in] [Village 1].
- In late August 2012 he received a letter from the police advising him that a complaint had been received against him in relation to the fact that [Mr A] had not returned to Sri Lanka and he was required to attend the police station on [date] August 2012.
- [In] September 2012 members of the Tamil Makkal Viduthailai Pulikal (TMVP) came to his house and ransacked it and gave his wife a letter accusing him of supporting the TNA and that if he did not end his association with the TNA and work with the TMVP his life would be in danger. The applicant then fled Sri Lanka by boat out of fear for his life.
- After fleeing Sri Lanka the CID enquired about his whereabouts with his wife.
- His wife was hospitalised in April 2016 due to stress.
- He fears will be killed by the TMVP or CID if he returns to Sri Lanka.

Refugee assessment

7. 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

8. 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.
9. Included in the application for protection was a letter from the applicant’s mental health practitioner, [Ms B] (“Accredited Mental Health Practitioner”), dated [in] February 2016. I note

the applicant subsequently provided the exact same letter to the delegate but the letter was dated [in] April 2017. The letter indicates that the applicant was referred to [Ms B] by his General Practitioner in October 2015 for an urgent mental health assessment and counselling as he presented with severe symptoms of anxiety and depression. The letter claims the applicant experienced severe torture and trauma in 2007 where he reported that he was brutally hit by the TMVP who demanded information about [Mr A] who was an LTTE member. He claims he sustained a fracture and concussion after being [hit] and has to undergo scanning every five years and he reports frequent severe [symptoms] resulting in severe anxiety and depression. [Ms B] states that she continues to see the applicant once a fortnight for psychological intervention to reduce his symptoms of post-traumatic stress disorder (PTSD). The applicant also provided two medical reports from health professionals issued during his time in Australian immigration detention in 2012 and 2013 which refers to a diagnosis of "PTSD with hyperarousal, reexperiencing and avoidance" and a referral for counselling for torture and trauma. I accept that the applicant has been diagnosed with PTSD and has been receiving psychological counselling since being in Australia.

10. I have taken the applicant's mental health condition in assessing the applicant's evidence and in particular the oral evidence he provided during the protection visa interview held [in] March 2017. Having listened to the protection visa interview recording I observed there were a number of instances where the applicant did not understand the delegate's question, though it is difficult to determine whether this is as result of his mental health condition, but I am satisfied the applicant genuinely misunderstood some of the questions as opposed to deliberately not answering the question being asked of him. I also note that the applicant appeared lucid and attentive throughout the interview.
11. The letter from [Ms B] also refers to claims raised by the applicant in his application for protection about incidents that occurred to him in Sri Lanka. In her letter, [Ms B] also comments that "From the detailed history elicited (sic) it is observed that it is unsafe for [the applicant] to live in Sri Lanka as he remains POI with Sri Lankan Army and TMVP. He reports that he will be arrested and taken under their custody if he enters Sri Lanka. He believes that he cannot live in any other states of Sri Lanka due his identity being noted by the Sri Lankan army." Although I have considered [Ms B]'s letter and diagnosis in respect of the applicant's ability to provide evidence and any corroboration between his mental health condition and his claims, I have given little weight to [Ms B]'s assessment of the risk the applicant faces on return to Sri Lanka as it appears her assessment is merely based on the applicant's personal testimony.
12. The applicant has provided a number of identity documents from Sri Lanka including his driver's license and national identity card and I note that he spoke Tamil during his interviews with departmental officers. On the basis of the evidence before me I accept that he is a Tamil and citizen of Sri Lanka who was born on [birth date] and resided in [District 1] in the Eastern Province of Sri Lanka. I am not satisfied he has the right to enter and reside in any other country. I am satisfied that Sri Lanka is the receiving country for the purpose of this assessment.
13. I also accept his claim that he worked as a farmer and a [occupation] whilst he resided in Sri Lanka and that his wife and child remain residing in [District 1].
14. In the applicant's statement of claims, he claimed that his [relative], [Mr A], was [Senior Position 1 in] the LTTE. During the protection visa interview he claimed [Mr A's] LTTE name was "[alias]" and that he joined the LTTE in 1991 and clarified that the [Senior Position 1] for the LTTE was someone called [Mr C] but that [Mr A] was the [Senior Position 1] for [District 1]. He claims that around 2004 [Mr A] moved from [District 1] to [Location 1] after the LTTE split. However, I note

that he told departmental officers in his enhanced entry interview held [in] December 2012 that [Mr A] lived in [Location 1] between 2007 and 2009.

15. [In] March 2017 the delegate wrote to the applicant giving him an opportunity to comment on country information that indicates that [Senior Position 1] for the LTTE in [District 1] was a man known as “[alias]” whose real name was [name deleted] and who held this position until [2009] when he was killed in fighting.
16. In response to the above letter the applicant responded that [Mr A] was one of the senior leaders of the LTTE in [District 1] and to the best of his knowledge he was close to the LTTE [Senior Position 1] [Mr C] and he was part of [an area] of the LTTE and was positioned in [District 1] for most the time and towards the end of the war he was based in [Location 1].
17. The applicant also provided photos and videos of [Mr A’s] wedding in 2002 where he claims top LTTE leaders attended including “[Mr C]” and [other named persons]. He also provided an accredited translation taken from the wedding video of the oath taken by [Mr A and his] new wife in the presence of top LTTE leaders where [Mr A] indicates he is a member of the LTTE. The applicant also claims that the video and photos indicate that he was also present at the wedding. He has also provided separate photos showing the images of [Mr C and other people] on different occasions.
18. Country information before the delegate indicates that [various claimed attendees of the wedding held senior positions in the LTTE].¹
19. I note the wedding photos provided are very blurry and during the protection visa interview the applicant explained that the photos were taken from the negatives but could not provide much further explanation for why the photos were so blurry. Nonetheless, I have watched the video of [Mr A’s] purported wedding and I am satisfied that significant leaders of the LTTE including [particular senior officials] were in attendance and appeared to witness the marriage contract and were seated next to the bride and groom throughout much of the wedding and I was also able to identify the applicant in the wedding. I also observed that the video was dated in 2002 and there was also a large picture of a person in an LTTE uniform placed behind the bride and groom. Although there is no other evidence before me to indicate the groom is the applicant’s [relative], [Mr A], I am willing to accept that he was.
20. On the evidence before me I accept that the applicant’s [relative], [Mr A], joined the LTTE in 1991 and, although I am not satisfied he was [Senior Position 1] for the LTTE in [District 1], I am satisfied he held a senior position in that unit in [District 1] given the number of senior leaders of the LTTE that attended his wedding and were given significant prominence in the ceremony and the transcription of [Mr A’s] wedding oath where he claimed to be a LTTE member. Although there are discrepancies in the applicant’s evidence in relation to when [Mr A] lived in the [Location 1] I accept that [Mr A] moved to the [Location 1] sometime after the LTTE split in 2004.
21. The applicant also claims that he has been informed that the wedding video and photographs are in the possession of the Sri Lankan government authorities and hence they will apprehend him at the airport upon his return. The applicant has not indicated how he knows that the photos and video of [Mr A’s] wedding are in the possession of the Sri Lankan government authorities or why and on the evidence before me I do not accept this claim.
22. The applicant claims that around [June] 2007 he received a letter from the Pillayan group requesting that he attend their [office] and if he did not attend severe action would be taken

¹ [Source deleted].

and he must not inform anyone about the letter. He attended the office on this day and was questioned about when he last spoke to [Mr A]. He advised the group that he had not spoken to [Mr A] since he left [District 1] but they did not believe him and beat him with rods. In the evening he was taken in a van to [another location] where he was questioned again about [Mr A] and the contact he had had with him and his whereabouts. He told them that he did not know and [he was tortured, suffering various injuries]. He claims that [he escaped soon after]. [He] ran from the camp to the main road [to] [Village 1] where he [stayed]. He claims that, after contacting his wife, she and her mother and his child went to the Pillayan office to explain that none of their family had any contact with [Mr A] since 2005 and begged them to allow the applicant to return home and not to harm him. As they respected his mother-in-law who was a [occupation], they agreed to allow the applicant to return to [District 1] and not to harm him but warned that if they discovered they had any communication with [Mr A] they would kill his family. The applicant returned to his home within one week but out of fear his nephew moved in with them for added security.

23. According to [a] report dated [in] December 2012 the applicant provided, it appears the applicant gave a different reason for his detention in 2007 to a mental health nurse in 2012, nonetheless, I have given more weight to his general consistency in all other instances in which he raised this claim in regards to this incident, including his arrival and enhanced screening interviews. I have also considered country information that was before the delegate which indicates that in March 2004 Karuna broke away from the LTTE and formed an underground organisation and political party called the TMVP with a band of his supporters and that Pillayan was initially his deputy. The Sri Lanka Army took control of the Eastern region from the LTTE in 2007 and reports indicate the human rights situation deteriorated in the area after this and during 2008 and the TMVP was reportedly engaged in abductions, terror, and crime, which have apparently been carried out with the knowledge and tacit agreement of Government actors and local authorities.² I also note the applicant's account of torture and beating is consistent with country information in regards to methods of torture used by the Sri Lankan authorities including being hoisted upside down by a pulley system.³ I accept that in 2007 the applicant was [detained] by Pillayan/the TMVP and interrogated and beaten in regards to contact he has had with, and the whereabouts of, [Mr A] and that he subsequently escaped and was able to return home to [District 1] after his wife and mother-in-law mediated on his behalf but was warned by Pillayan/TMVP that his family would be killed if he contacted [Mr A].
24. The applicant further claims that since his escape from detention and until 2008 he believes he was being monitored by the Pillayan group and referred to [an] attack on his house in September 2008. Although he reported the attack to the police he claims the officers were distracted and disinterested. During his arrival interview the applicant referred to the [attack] but claimed that he did not know he was behind the attack. During the protection visa interview he claimed it was the Pillayan group behind the attack but then claimed he did not know the reason for the attack. Whilst I accept that the applicant's house was [damaged] in 2008 I am satisfied the applicant does not know who [is responsible] and I am not satisfied on the evidence that Pillayan/TMVP were responsible for the attack or that it was connected to the applicant's [Mr A's] role in the LTTE.
25. The applicant has also claimed that he often witnessed members of the Pillayan group watching him and his nephew when they were out and they followed them on their motorbikes and I

² UK Home Office, "Country Information and Guidance, Sri Lanka: Tamil separatism (version 3.0)", 1 August 2016, OGD7C848D77; "Mapping Militant Organizations - Liberation Tigers of Tamil Elam", Stanford University, 23 July 2013, CIS36DE0BB2618

³ International Truth & Justice Project Sri Lanka (ITJP), "Silenced: survivors of torture and sexual violence in 2015", 7 January 2016, CIS38A801275

accept this as plausible given [Mr A] was a known member of the LTTE and this occurred in the period shortly after the LTTE had been driven out of the area.

26. During the applicant's enhanced screening interview held [in] December 2012 he claimed that [Mr A] and his wife were living in [Location 1] between 2007 and 2009 and at the end of the civil war his [relative] was detained in an "IDP" camp and [Mr A] was detained by the Sri Lankan Army. In the application for protection the applicant claims that his wife received a call from [Mr A] in 2011 advising that he was still alive and requested they pay [an amount] in order for him to escape a government controlled camp he was being held in. The applicant claims he then went to the camp and paid the money and signed a form which required him to guarantee that he would be responsible for [Mr A] on release. He claims a week later [Mr A] fled the country by plane to [Country 1] with the assistance of his [wife's relative] where he registered with the UNHCR and where he still remains.
27. During the protection visa interview the applicant clarified that he bribed the CID in order to have [Mr A] released from detention. One country information report that was before the delegate confirms that families of people held in rehabilitation camps were often required to pay money to the Sri Lankan authorities, including the CID, for their release and the bribes ranged from 3.5 to 10 Lakh.⁴
28. Due to fear of being responsible to the government for [Mr A] who had just left the country, the applicant claims he left Sri Lanka for [Country 2] on a [temporary] visa in November 2011 but returned to Sri Lanka in February 2012 due to health issues and because his wife told him that no one had come looking for him since he left Sri Lanka and it would be safe to return.
29. The applicant has further claimed that around August 2012 his wife received a call from a government officer explaining that the government was requesting all active members of the LTTE to return to Sri Lanka. However [Mr A] said he would not return and the applicant should not respond to any requests from government officials. Around [date] August 2012 he received a letter from the CID stating that he had signed a release for [Mr A] and it is now safe for [Mr A] to return and [Mr A] is now required to return to Sri Lanka. Out of fear the applicant stopped [working for] TNA politicians around during the 2012 election and moved to [Village 1] but would return to his home in [District 1] at random times in the evening to see his family.
30. Around mid-to late August 2012 his wife called him to tell him that she had received another letter from the police advising that a complaint had been lodged against him because [Mr A] had not returned to Sri Lanka and he was required to attend the station on [date] August 2012. He spoke to [Mr A] who said he would not return to Sri Lanka and warned that as his guarantor the applicant would be killed. The applicant has provided a copy of this letter and English translation which is dated [August] 2012. It states that it is from [a police station] and that a complaint has been received against him regarding sending [Mr A], who was an active member of the LTTE, abroad. It requested he present himself to the police station to give a statement [in] August 2012. He also claims that the authorities have continued to contact his wife as recently as last year.
31. The applicant also provided the delegate with a photo image of an arrest warrant issued by [a court] in the applicant's name dated [2014] and its translation which notes it has been issued for the offence of failing to attend court. During the protection visa interview the applicant explained that the authorities issued a warrant for him because he refused to hand over [Mr A] and he did not attend the police station when requested. He explained that he received a

⁴ Ibid.

summons to attend court in 2012 but cannot remember exactly when, however, I note the applicant has not previously made this claim and has not provided a copy of the summons and it is not clear why he would have been summoned to attend court when he had not been charged with an offence and had only been summoned for questioning. When the delegate asked him why it would take the authorities two years to issue an arrest warrant, he referred to [Mr A's] role in the LTTE and that he sent him to [Country 1] and that evidence of [Mr A's] wedding photographs are now in the possession of the CID and all his male siblings are not in Sri Lanka. I find this does not provide an explanation as to why a warrant for his arrest was issued two years later in 2014 and for this reason I have not given this document any weight.

32. The applicant also provided a copy of another warrant and translation which indicates it was issued pursuant to section 109 of the Criminal Procedure Act of 1979 addressed to the applicant and dated [in] 2016 requesting that he meet [a particular officer] [on a certain date in] 2016 at [a particular police station]. It states that if he fails to appear action will be taken against the suspect under section 172 of the Act. I agree with the delegate's concern in regards to this document as s.172 of this Act refers to "Effect of Material error" in court proceedings meaning that if the Supreme Court or Court of Appeal is of the opinion that any person convicted of an offence was misled in his defence by an error in the indictment or charge, it shall direct a new trial.⁵ This does not correspond with the applicant's claim and the nature of this warrant and, given his claim that he was issued an arrest warrant from the court in 2014, it seems implausible that he would then receive such a letter two years later requesting he meet a police officer for questioning. For this reason I have not given this document any weight.
33. During the protection visa interview, when the delegate asked the applicant why would the CID issue a court document to him if they had allowed [Mr A] to be released, he responded that it was because [Mr A] was given to him and he was asked by the CID to surrender [Mr A] in 2012 and that everyone receives such a letter if their relatives had been released to their care. I find the applicant's explanation problematic in this regard and there is no country information before me to support this claim or his claim that the authorities contacted such people in 2012 stating it was now safe for their relatives to return to Sri Lanka. I also note the applicant did not provide a copy of the first letter he claims he received. For these reasons I do not accept that the applicant was contacted by the Sri Lankan authorities in August 2012 advising that [Mr A] must now return to Sri Lanka as it was now safe for him to do so and that he would not be harmed.
34. I also note that during the applicant's enhanced screening interview and his subsequent arrival interview he claimed that [Mr A] left Sri Lanka and travelled to [Country 3] and did not refer to his travel to [Country 1]. During the protection visa interview when this was raised he said that he was upset and tense during the arrival interview and was not of a clear mind and reiterated that [Mr A] did not go to [Country 3] but went to [Country 1]. The applicant also provided the delegate with a photocopy of [Mr A's] alleged appointment card with the UNHCR with a reference number of [a date in 2014] and in his name. The card is in English and does not indicate which UNHCR office it relates to as there is no reference to [Country 1] on the card. I am not satisfied this supports the applicant's claim that [Mr A] is in [Country 1]. For this reason I prefer his initial evidence he gave during his first two interviews with the Australian authorities that [Mr A] fled to [Country 3].
35. Although I am satisfied the applicant has exaggerated aspects of his claims, country information before the delegate also indicates that former LTTE combatants who were released from detention are subject to intense surveillance with one source claiming they are constantly

⁵ Commonwealth Legal Information Institute, "Code Of Criminal Procedure Act (No. 15 of 1979) - Sect 172", 11 April 2017, CISED50AD3857

tracked and must report to the police and military, where harassment continues. DFAT has also recently stated that former LTTE are required to register with their local military unit's Civil Affairs Office and may be subject to ongoing monitoring and reporting requirements; the level of which would depend on whether they are low-profile or high-profile former members.⁶ I have also given weight to the fact that the applicant has consistently claimed, since his earliest enhanced screening interview, that in August 2012 the Sri Lankan authorities sent him a letter in regards to summoning him for questioning in relation to [Mr A] who had left the country shortly after being released from detention. I have also considered the medical evidence the applicant provided which indicates he raised this claim to mental health professionals in Australian immigration detention as early as December 2012, where he also referred to receiving a call from his wife claiming that the CID had called on her and demanded to know where the applicant was. According to another medical report in January 2013, he also told a psychologist in detention that "he is always worried about the safety of his family as the CID have been asking question about his whereabouts".

36. I have accepted that [Mr A] was a senior member of the [LTTE] in [District 1] and I also accept that [Mr A] was detained by the Sri Lankan Army at the end of the civil war and released in 2011 after payment of a bribe. I am also satisfied that the Sri Lankan authorities are aware of [Mr A's] role in the LTTE given he was detained for approximately two years after the war and country information before the delegate indicates that the rehabilitation process for former LTTE combatants at the end of the civil war was partly used to screen high-profile from low-profile LTTE members through interviews, information provided by informants and other relevant information that demonstrated the depth of involvement, period of involvement and activities conducted.⁷
37. I also accept that [Mr A] fled the country shortly after his release from detention. Although the applicant claims that [Mr A] fled the country via air, he further claimed he was assisted by his [wife's relative] and there is no further information before in regards to how his departure was facilitated. I accept that in August 2012 the applicant received a letter from the police asking him to attend their station on [date] August for questioning in regards to [Mr A] who was no longer in the country. I accept that, as a result of receiving this letter, the applicant then fled the country shortly thereafter in fear of his life. I accept that the CID has enquired with his wife in regards to the applicant's whereabouts since he left the country.
38. I accept that the applicant fled Sri Lanka illegally by boat [in] October 2012 and will return to Sri Lanka as a failed asylum seeker. In a recent 2017 report by the Australian Department of Foreign Affairs and Trade (DFAT) it states that, upon arrival in Sri Lanka, involuntary returnees are processed by different agencies, including the Department of Immigration and Emigration, the State Intelligence Service and the CID. These agencies check travel documents and identity information against the immigration databases, intelligence databases and the records of outstanding criminal matters. Police undertake an investigative process to confirm identity to determine 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 returnee, contacting their claimed home suburb or town police, contacting their neighbours and family and checking criminal and court records.⁸

⁶ UK Home Office, "Country Information and Guidance, Sri Lanka: Tamil separatism (version 3.0)", 1 August 2016, OGD7C848D77; UK Home Office, "Sri Lanka - Bulletin: Treatment of Returns", 1 December 2012, CIS28615; DFAT, "Country Information report-Sri Lanka", 24 January 2017, CISED50AD105

⁷ DFAT, "Country Information report-Sri Lanka", 24 January 2017, CISED50AD105

⁸ Ibid.

39. I am satisfied that the applicant will be subject to the above process on return to Sri Lanka. According to expert testimony provided to a hearing of the UK's Upper Tribunal on Immigration and Asylum, Sri Lankan authorities collect and maintain sophisticated intelligence on former LTTE members.⁹ I am satisfied that, during the above process, there is a real chance [Mr A's] profile as a former senior LTTE member will become known, including the fact that [Mr A] had fled the country shortly after his release from detention in 2011. I am also satisfied there is a real chance the Sri Lankan authorities will discover that the applicant had been summoned for questioning about [Mr A's] whereabouts in August 2012 which he did not respond to and the authorities continued to enquire about the applicant after he fled the country. The UK Home Office stated in August 2016 that a person who evidences past membership or connection to the LTTE would not in itself warrant international protection unless they have or are perceived to have a significant role in relation to post-conflict Tamil separatism or appear on a 'stop' list at the airport.¹⁰ Nonetheless, I have also considered recent country information reports that former LTTE members who had been subject to "rehabilitation" were being re-arrested on return to Sri Lanka and some of these people claim to have been subject to further mistreatment and torture¹¹ and are still subject to monitoring and surveillance. DFAT has also recently assessed that close relatives of high-profile former LTTE members who remain wanted by Sri Lankan authorities may be subject to monitoring. Considering the country information and the applicant's particular circumstances, I am satisfied there is a real chance the applicant will be subject to prolonged questioning and investigation and even detention in regards to the whereabouts of [Mr A], either on his arrival or after his return to [District 1].

40. DFAT assesses that there have been credible reports of torture carried out by Sri Lankan military and intelligence forces during the civil conflict and in its immediate aftermath and that Tamils faced a higher risk of torture during the conflict. It however recently assessed that torture in Sri Lanka, perpetrated by either military, intelligence or police forces, is not presently systemic or state-sponsored and the risk of torture from military and intelligence forces has decreased since the end of the civil conflict and such practices generally reflect low capacity, lack of training and due process in arrest and detention procedures, and poor policing methods that focus on extracting confessions rather than undertaking thorough investigations. Nonetheless, DFAT acknowledged other credible sources, including the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, who recently reported that torture might be carried out by police in relation to regular criminal investigations, a risk which can increase when there is a perceived threat to national security. In October 2016, the Human Rights Commission of Sri Lanka (HRCSL) also submitted a report to the UN Committee Against Torture that claimed "torture to be of routine nature... practiced all over the country, mainly in relation to police detentions" and that torture is used during interrogation and arrest and is used regardless of the nature of the suspected offence.¹² The UK Home Office has also recently assessed that if a person is detained by the Sri Lankan authorities there remains a real risk of ill-treatment or harm.¹³ Other recent reports also refer to the continued use of torture against by

⁹ Ibid.

¹⁰ UK Home Office, "Country Information and Guidance, Sri Lanka: Tamil separatism (version 3.0)", 1 August 2016, OGD7C848D77

¹¹ "SL military continues to arrest Tamils from East returning from Middle-East", 31 May 2015, Tamil net, CXBD6A0DE7540; "16 Batticaloa Tamils arrested within last 100 days at Colombo airport", 3 May 2015, Tamil net, CXBD6A0DE6027; "Another Tamil returnee arrested", 1 July 2015, Sri Lankan Mirror, CXBD6A0DE16698; UK Home Office, "Country Information and Guidance, Sri Lanka: Tamil separatism (version 3.0)", 1 August 2016, OGD7C848D77

¹² DFAT, "Country Information report-Sri Lanka", 24 January 2017, CISED50AD105

¹³ UK Home Office, "Country Information and Guidance, Sri Lanka: Tamil separatism (version 3.0)", 1 August 2016, OGD7C848D77

the Sri Lankan authorities, including against people accused of having personal or family ties to the LTTE.¹⁴

41. Given the above country information and the applicant's profile and that of [Mr A], I am satisfied that, during detention and interrogation in relation to the whereabouts of [Mr A], the applicant faces a real chance of significant physical harassment and ill-treatment amounting to serious harm within the meaning of s.5J(4)(b) of the Act. I am satisfied that the physical harm inflicted on the applicant is systematic and discriminatory and would be inflicted for the essential and significant reason of his imputed political opinion of actual or suspected connections with the LTTE arising from [Mr A's] former LTTE membership. I am satisfied the harm amounts to persecution within the meaning of s.5J(4).
42. I find the harm will be inflicted by the Sri Lankan authorities who exercise effective control throughout the entire country.¹⁵ For this reason I am satisfied that effective protection measures are not available to the applicant and that the real chance of serious harm relates to all areas of the receiving country. As the harm arises as a result of [Mr A's] known profile as a former senior member of the LTTE, I find that there are no reasonable steps available to the applicant to modify his behaviour to avoid a real chance of serious harm. The applicant has a well-founded fear of persecution within the meaning of s.5J.
43. As I have found the applicant faces a well-founded fear of persecution in relation to [Mr A's] former LTTE membership, I have not considered his other claims for protection.

Refugee: conclusion

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

Decision

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

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

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

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¹⁴ US Department of State, "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320; Freedom from Torture, "Sri Lanka - Update on torture since 2009", 06 May 2016, CIS38A8012881; ITJP, "Silenced: survivors of torture and sexual violence in 2015", 7 January 2016,

¹⁵ DFAT, "Country Information report-Sri Lanka", 24 January 2017, CISED50AD105

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.