



**Australian Government**  

---

**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

---

SRI LANKA  
IAA reference: IAA17/03531

Date and time of decision: 8 December 2017 15:13:00  
Jennifer Maclean, Reviewer

**Decision**

---

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

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

## Background to the review

---

### Visa application

1. The referred applicant (the applicant) claims to be a Tamil Hindu who was born, and resided solely, in the Northern Province of Sri Lanka. [In] March 2017 he lodged an application for a Class XE Subclass 790 Safe Haven Enterprise visa (SHEV).
2. A delegate of the Minister of Immigration and Border Protection (the delegate) refused to grant the visa [in] September 2017.

### Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. No further information has been obtained or received.

### Applicant's claims for protection

---

5. The applicant's claims can be summarised as follows:
  - he is a Tamil male from [District 1] of the Northern Province of Sri Lanka
  - he grew up in the LTTE-controlled Northern Province, and during the civil conflict he and his family moved to various places to avoid the advancing Sri Lankan Army (SLA), eventually settling in [District 2], where they stayed until the end of the conflict in 2009
  - in the latter stages of the conflict the LTTE forced all men of his age to be with them, however the applicant did not take any arms training or fight with the LTTE
  - in about March 2009 he and his family surrendered to the SLA and were taken to a camp. The applicant was taken to a separate camp to the one his family were in, where he was detained for nine month, questioned about his involvement with the LTTE, assaulted, threatened and tortured
  - on release from the camp the applicant and his family returned to their home in [District 1]. He was required to report to the local army unit whenever required, and on one occasion he was [detained] for a number of hours
  - he arranged to leave Sri Lanka by boat
  - the applicant's sister was forcibly recruited by the LTTE towards the end of the conflict, and is missing. He fears he will be imputed to be an LTTE supporter because of his sister's involvement with the LTTE
  - he accompanied his mother to missing person organisations to look for his sister. As a result, he believes his actions could be considered a threat to the army's image and Sri Lankan authorities will take an interest in him and beat, torture or kill him
  - as a young Tamil he fears he will be imputed with an association with the LTTE, and he will be monitored, taken into custody, and tortured or killed if he is returned to Sri Lanka. Because of his illegal departure from Sri Lanka he believes security forces will hold an impression he is involved with the LTTE and in continuing political unrest

- any person with a reasonable link to the LTTE is in danger
- the *Prevention of Terrorism Act* (PTA) remains in force and the applicant's profile is such that he may be detained and charged on return to Sri Lanka.

## Refugee assessment

---

6. 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

7. 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.

### *Identity and Nationality*

8. The applicant claims to be a Tamil Hindu who was born in [Town 1] in [District 1] of the Northern Province of Sri Lanka, and always resided in that province when in Sri Lanka. The applicant's wife and [children], his mother, father and siblings all continue to reside in [Town 1]. The applicant worked in the family [business] and [in another occupation] when there was not sufficient work in the business.
9. A number of documents have been provided to support his claimed identity, including a Sri Lankan national identity card, birth certificate and Temporary ID Card issued by Sri Lankan Police under the IDP Registration Project. On the evidence before me, I accept the applicant is a national of Sri Lanka from [District 1], Northern Province, and that he is a Tamil Hindu. I find that Sri Lanka is the receiving country for the purposes of the Act.
10. The applicant has not claimed he or his family suffered any harassment, discrimination or violence because of being Hindu, nor that his religion would cause him problems if he were to return to Sri Lanka.

*Tamil male from the Northern Province, LTTE links and imputed political opinion*

11. In his statutory declaration, and at the SHEV interview, the applicant detailed the situation in Sri Lanka, and various events that occurred. At the time he was born, and until the time of fleeing the country, Sri Lanka was ruled by two political entities. The Tamil militants, spearheaded by the LTTE together with the parliamentary Tamil moderates, controlled the Northern and Eastern Provinces, calling it Tamil Ealam, and the balance controlled by the Sri Lankan government. The Sri Lankan forces always fought to take control of the Tamil-dominated area, claiming it was part of the Sri Lankan territory. He grew up under this political culture, where the Sinhala government and forces saw him as not part of them, but needing to be oppressed and controlled, not given meaningful protection, and with the Tamils acting as if they were separate, free and independent and dealing with their own affairs. As a Tamil he had to obey the control of the LTTE, because he lived in their areas, but at the same time he needed and was compelled to be obedient to the Sinhala forces. However, the Sinhala forces did not give any protection against the directives of the LTTE. In 2006 the applicant and his family started moving with the Tamil group for safety and shelter. Firstly they moved from [Town 1] to [District 1], and finally ending up in [another town] in [District 2], which was controlled by the LTTE, where they stayed until the end of the war in 2009. In about March 2009 the applicant and his family surrendered to the Sri Lankan [army].
12. The applicant claimed that just prior to surrendering, he was with the LTTE members as they forced all men of his age to be with them in the last stages of the war, and knowing the LTTE would not be able to hold on, he did not attempt to escape and surrendered. At the SHEV interview the applicant advised he and his family were taken to [Camp 1] by the SLA, and a few days later he was taken to a different camp where he was held for about nine months. At the camp he was [tortured and threatened] because he was suspected of being a member of the LTTE. He was accused of being a Tiger, and questioned many times about the location of hidden weapons and he was asked to identify other Tigers at the camp. In his statutory declaration, at the Arrival interview, and in the SHEV application the applicant denied he had taken any army training or fought with the LTTE with arms. At the SHEV interview the applicant indicated whilst he was at [Camp 1] an announcement was made that whoever helped or served in the LTTE, even for one day, had to come and surrender, but he did not do so because he never did anything with them or never contributed to them. He indicated that because of the area he was born in he was among them, or forced to be with the LTTE, and apart from that he never committed anything against the government or anyone else. The applicant told the army he lived in an area controlled by the LTTE, that he could not avoid them, and had to obey them. Many of the applicant's friends joined the LTTE, and if he saw those people he talked to them, but this did not mean he joined the LTTE to fight with arms, but in the latter stages, LTTE compelled all of them and they had no way of escape.
13. The applicant provided consistent evidence regarding being a [occupation] in the LTTE-controlled Northern Province, moving from place to place in the Northern Province to avoid the advancing SLA, from 2006 to March 2009, surrendering to the SLA, and being detained in an Internally Displaced Person camp. Country information supports that the majority-Tamil civilian population of the areas controlled by the LTTE were required to interact with the LTTE as a matter of course, and that during the course of the long civil conflict hundreds of thousands of people were displaced and tens of thousands of people were killed on both sides of the conflict. I accept the applicant's account of moving with his family to avoid the conflict, surrendering to the SLA, and being detained in [Camp 1]. Although I find it somewhat implausible the applicant did not know the location or name of the camp he claims he was detained in for about nine months, taking into account that the applicant was a Tamil male of fighting age at that time, and the country information regarding the events at that time, I find

his account of being questioned regarding LTTE involvement, and being mistreated in the camp is otherwise plausible. I am prepared to accept the applicant's otherwise consistent evidence that he was separated from his family and taken from [Camp 1] to a different camp where he was detained for about nine months, periodically questioned and mistreated. The applicant consistently denied, at the Arrival and SHEV interviews, and in his statement of claims, he participated in any armed conflict or fighting, or that he trained in preparation for conflict, and I accept that evidence. There is no evidence to indicate the applicant was formally arrested, charged, or sent to jail or rehabilitation by the Sri Lankan authorities. I find that the authorities released the applicant from the camp because they were ultimately satisfied he was not of adverse interest as an LTTE member or supporter.

14. The applicant claimed he was taken from the camp back to [Camp 1] where his family were detained, they were all moved to [a different camp], and about one week later they were released with directions to stay at an address and report to the local army unit, or meet them whenever required. The applicant's family told him they had made complaints and representations, to several organisations who visited the camp for welfare work, about the applicant being taken by the army and to know his whereabouts. After being released the applicant and his family returned to their home in [Town 1] and started to resume their lives. Their house and most of the houses in the area were destroyed by security forces, and the area was full of intelligence officers from police terrorist units and informers. The applicant indicated he would have to report to authorities whenever requested to do so, and for someone like the applicant, at his age, life was not easy and he was questioned at every turn as to what he was doing and his background. He was asked questions in Sinhalese or badly-pronounced Tamil, both of which were not understandable, and any wrong answer led to problems and being taken away to the camp or police station. Given the country information regarding monitoring and surveillance of Tamils, I accept the applicant may have been required to report to authorities from time to time as a result of routine monitoring. The applicant has not described any specific examples of being taken to a camp or police station after being released from the IDP camp, nor did he indicate that any regular reporting requirements or conditions were imposed beyond ad hoc requests. I have found the applicant was not of adverse interest at the time he was released from the IDP camp, and I do not accept he was of continuing interest that would cause him to be taken to a camp or police station as claimed.
15. The applicant said he began to look for opportunities to leave the area. When the opportunity to go by boat came his way he took it because he considered the danger and fear in Sri Lanka was never going to end and he had to hold his life in fear every day. The applicant claims he is fearful of returning to those conditions as the security forces hold an impression he is involved with the LTTE, and in continuing political unrest, and because of his background he will be seen adversely by the army as linked to the LTTE.
16. At the SHEV interview the applicant claimed that almost at the end of the civil conflict his [sister] was forcibly taken by the LTTE. He indicated one member from each family had to join the LTTE, and as his sister was the only unmarried sibling with the capacity to join there was no choice. His sister remains missing, and his family are still attending missing persons organisations looking for her. I note the applicant did not mention this significant claim in his statement of claim dated [in] March 2017, or at the Arrival interview. At the Arrival interview [in] October 2012 the applicant referred to one of his sister's as missing, and that she was last seen two years ago, however no mention is made of her being forcibly recruited by the LTTE. Despite my concerns, I note the country information supporting that the LTTE forcibly recruited men, women and children, and demanded that families hand over a son or a daughter. I accept as stated in the arrival interview, that the applicant's sister is missing. It is

plausible and I am willing to accept that, as the only available unmarried sibling, the applicant's sister was forcibly recruited by the LTTE.

17. Whilst the applicant was in Sri Lanka he claims he accompanied his mother when she made enquiries about his missing sister, and he believes half his troubles started because of that. He indicated CID and army officers attend meetings about the missing people and obtain information about the young people who attend. On returning home from the meetings the officers will come to the house and advise of the need to come in for questioning. Just before the applicant left Sri Lanka in 2012 was the last time he was requested to report. On that occasion he claims he went to the office at [a time of day] and was blindfolded until [a number of hours later] when he was questioned. The applicant's wife and mother sought the assistance of a [religious official], and when the [religious official] came the applicant was released. I note the applicant did not refer to the blindfolding incident at the Arrival interview, or in his statement of claim. I find it implausible that he did not do so, given at the SHEV interview he indicated he 'thought it was his end'. I have accepted the applicant may have been required to report to authorities from time to time as a result of routine monitoring, however, I do not accept he was required to report because of his attendance at meetings with his mother, or that he was blindfolded on one occasion and released at the behest of the [religious official]. I do not consider it plausible that if the authorities had a genuine interest in the applicant they would have been persuaded to release him because of the involvement of the [religious official], and I consider the applicant has embellished his claims to exaggerate the degree of interest the authorities had in him to support his application for protection.
18. The applicant claims after he left Sri Lanka the authorities visited his home, took his details and registration, and enquired with his wife about his whereabouts, and indicated the applicant left the country illegally, and they will arrest and punish him if he comes back. The applicant did not claim he was required to report and sign on a regular basis, but rather that he was required to report when requested to do so. At the SHEV interview he indicated the 'problem is that we used to go and sign, so because we left illegally our illegal departure confirms what they thought was true'. The applicant's evidence regarding the purported visit by authorities after he left Sri Lanka was not specific regarding which authority visited or the date the visit occurred. Although I accept the applicant may have been required to report and sign from time to time whilst he was in Sri Lanka, I find it implausible, when the applicant did not have a regular reporting requirement, that the authorities became aware of the applicant's departure and that he was of interest to the authorities after he left Sri Lanka. I do not accept Sri Lankan authorities visited the applicant's home after he departed Sri Lanka.
19. The applicant also indicated his [other siblings] were questioned [a number of times] about any LTTE connections or involvement, the location of ammunition, and about the applicant's whereabouts/questions about him, however they were never blindfolded. The applicant's evidence regarding his [sibling]'s being questioned lacks any detail regarding who they were questioned by and the date they were questioned. No information is available to me regarding whether the brothers were previously detained in a camp and questioned regarding any LTTE links, however the applicant's evidence indicates they were not forcibly recruited to the LTTE, and I find it implausible that over three years after the end of the conflict the applicant's brothers would have been of interest to the authorities and questioned about their LTTE involvement. In any event, I do not accept the applicant was of interest to the authorities at the time he departed Sri Lanka, and I do not accept his [siblings] were questioned about the applicant after he departed Sri Lanka.
20. The applicant notes the war ended in May 2009, but to this day in Sri Lanka there is no settlement to the ethnic problem or political settlement to bring real or steady peace to the

country. Despite the promises of the new government and President there are signs of continued conflict, an example of which is the boycotting of the National Independence Day on 4 February 2017 in Jaffna and other Tamil areas. The applicant is of the opinion the security forces, for their convenience and to hold their grip on the government, is playing on the fear that the LTTE is still active, and is being financed by overseas Tamils. He claims they are not giving up on monitoring of young Tamils like him, and several are taken into custody and held in secret detention camps, and the truth may take years to be verified but those there will be dehumanised and perish.

21. I do not accept the applicant's claim that the 2017 Independence Day celebrations in Jaffna and other Tamil controlled areas were boycotted, showing signs of continued conflict. No independent evidence has been provided to support this assertion. In contrast, DFAT reported attendance at Independence Day celebrations by Tamil National Alliance leaders in 2015, and at the 2016 Independence Day ceremony the national anthem was sung in Tamil as well as Sinhala, and that these symbolic changes have contributed to a more positive outlook for reconciliation.<sup>1</sup>
22. According to DFAT the Northern Province of Sri Lanka is primarily populated by ethnic Tamils, with 93% of the population of the area being ethnic Tamils.<sup>2</sup> At its peak in 2004 the LTTE had an armed force of approximately 18,000 combatants, and the majority-Tamil civilian populations of the areas controlled by the LTTE were required to interact with the LTTE as a matter of course, and there were voluntary and forced recruitment of Tamils.<sup>3</sup> Aggressive forced recruitment campaigns continued as the conflict worsened in early 2009, including recruitment of women, children and men.<sup>4</sup> Towards the end of the conflict, a large number of LTTE members were arrested and detained by Government security forces following their surrender or capture. The majority of those arrested were sent to Government-run rehabilitation centres<sup>5</sup>
23. DFAT assesses that since the conflict ended in May 2009 the security situation in the north and east has improved dramatically with greater freedom of movement and a reduction in the military's involvement in civilian life.<sup>6</sup> During the civil conflict, and under the Rajapaksa Government, more Tamils were detained under emergency regulations and the PTA than any other ethnic group, and many Tamils, particularly in the north and east, reported being monitored, harassed and/or detained by security forces. While this was primarily due to the LTTE members and supporters being almost entirely Tamil, there were also instances of discrimination in the application of these laws, with LTTE support at times imputed on the basis of ethnicity.<sup>7</sup>
24. I have had regard to the 2015 US Department of State report, which notes that Tamils throughout the country, but especially in the north and east, reported security forces regularly surveilled or harassed members of their community, especially young and middle-aged Tamil

---

<sup>1</sup> Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, 2.30

<sup>2</sup> DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, 2.4

<sup>3</sup> DFAT "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, 3.27

<sup>4</sup> Centre on Conflict, Development and Peacebuilding (CCDP) - Graduate Institute of International and Development Studies, Geneva, "An Institutional History of of the Liberation Tigers of Tamil Eelam (LTTE)", CCDP Working Papers, 01 November 2014, CISA447F082828, p35

<sup>5</sup> DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, 3.28

<sup>6</sup> DFAT "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, 2.39

<sup>7</sup> DFAT "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, 3.8

men.<sup>8</sup> In addition, the 2012 UNHCR Guidelines confirms, at that time, post-war arbitrary detentions were widely reported, with detainees in the north and east reportedly subjected to interrogation, frequently including torture. The detainees were reported to be civilians suspected of LTTE connections.<sup>9</sup>

25. DFAT confirms 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.<sup>10</sup> However, 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.<sup>11</sup>
26. Significant improvements have followed the January 2015 presidential election. The parliamentary election, held on 17 August 2015, was deemed credible by international and domestic observers, and saw a change in government. The election saw Siresena defeat Rajapaksa, who had been president since 2005. There was a historically high voter turnout of 81.5 per cent, and Siresena won 51.3 per cent of the vote. The Tamil vote was reported as significant to his victory. Siresena campaigned on a good governance platform, expressing commitment to economic growth, transparency, ethnic reconciliation and protection of individual freedoms and rights. The Tamil National Alliance (TNA) won 16 seats and the TNA now formally leads the opposition.<sup>12</sup> At the time of publication, DFAT reported there were 29 Tamil members in the Parliament out of a total of 225 members.<sup>13</sup>
27. Under the Siresena Government, monitoring and harassment of Tamils in day-to-day life has decreased significantly, and members of the Tamil community have also described a positive shift in the nature of interactions with authorities; they feel able to question the motives of, or object to, monitoring or observation activities.<sup>14</sup> The Siresena government has prioritised human rights and reconciliation, and has made significant progress, including replacing military governors in the Northern and Eastern Provinces with civilians, returning some of the land held by the military since the conflict-era back to its former owners, releasing some individuals detained under the Prevention of Terrorism Act (PTA), including Tamils, and committing to reform the PTA, and engaging constructively with the United Nations. An Office of National Unity and Reconciliation (ONUR) has also been established to develop a national policy on reconciliation.<sup>15</sup> DFAT assesses there are currently fewer individuals detained under the PTA than there were during the conflict.<sup>16</sup> The emergency regulations were repealed in 2011, and although the PTA is still in place, it is under review.<sup>17</sup>
28. In September 2015, the report of the UN's Office of the High Commissioner for Human Rights investigation into Sri Lanka (OISL) found that grave violations, including possible war crimes and crimes against humanity, were likely committed by both sides during the civil conflict. In response, the Sri Lankan Government co-sponsored a resolution in the UN Human Rights

---

<sup>8</sup> US Department of State, "Sri Lanka – Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320, p33

<sup>9</sup> UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", *UN High Commissioner for Refugees*, 21 December 2012, UNB0183EA8, p17-18

<sup>10</sup> DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, 4.12-4.13

<sup>11</sup> DFAT "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, 4.18

<sup>12</sup> DFAT "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, 2.22-2.23

<sup>13</sup> DFAT "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, 3.24

<sup>14</sup> DFAT "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, 3.9

<sup>15</sup> DFAT "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, 2.29

<sup>16</sup> DFAT "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, 3.8

<sup>17</sup> DFAT "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, 3.48



Council which, while recognising the progress Sri Lanka had made on reconciliation, committed Sri Lanka to implementing a range of transitional justice mechanisms and reconciliation projects. In December 2015 the Sri Lankan Cabinet approved the formation of the *Secretariat for Coordinating Reconciliation Mechanisms* within the Prime Minister's Office to oversee mechanisms for advancing truth, justice and reconciliation in Sri Lanka; an Office on Missing Persons; an Office for Reparations; a Truth, Justice, Reconciliation and Non-Recurrence Commission; and a Judicial Mechanism with a Special Counsel. In January 2016, Prime Minister Wickremesinghe appointed an eleven-member *Consultation Task Force on Reconciliation Mechanisms* to conduct public consultations on the design of the four mechanisms, with a final report to the President expected in 2017. DFAT assesses that if implemented effectively these mechanisms will provide a platform to achieve genuine reconciliation.<sup>18</sup> On 11 August 2016, the Sri Lankan Parliament passed a Bill to establish the Office on Missing Persons (OMP), the first permanent and independent body established to address the issue of missing persons in Sri Lanka, however, at the time of DFAT's report the OMP was still being established.<sup>19</sup>

29. The applicant has provided country information indicating there are ongoing human rights concerns in Sri Lanka, however the majority of the reports refer to the conditions prior to, or soon after, the change of government in 2015. One recent article from the Australian Tamil Congress notes that the PTA remains in force and there have been several arrests under this law in the past year, however the article provides no information regarding the circumstances surrounding the arrests to be able to determine if those circumstances are relevant to the applicant's situation.<sup>20</sup> I accord more weight to DFAT's recent assessment of the situation in Sri Lanka, which is based on on-the-ground knowledge and discussions with a range of sources in Sri Lanka including in Colombo, Jaffna and Kilinochchi. DFAT indicates the report is a general, rather than an exhaustive country overview, however, I am satisfied it is an authoritative and credible document providing current and cogent information on the general situation in Sri Lanka at the current time.<sup>21</sup>
30. DFAT assesses that the LTTE no longer exists as an organised force in Sri Lanka, however the Sri Lankan authorities remain sensitive to the potential re-emergence of the LTTE throughout the country. Despite this there are no legal barriers to former LTTE members participating in public life, including in politics.<sup>22</sup> According to the UNHCR's Eligibility Guidelines, in December 2012 when the document was released, originating from an area that was previously controlled by the LTTE did not in itself result in a need for international refugee protection. However, a person's real or perceived links with the LTTE may have given rise at that time to a need for international refugee protection, including people with family links to former LTTE combatants or 'cadres'.<sup>23</sup> DFAT indicates the Sri Lankan Government has managed a large-scale rehabilitation process for former LTTE, with over 12,000 LTTE members arrested and sent to rehabilitation centres since the end of the conflict in 2009. DFAT assesses that high-profile former LTTE members are at highest risk of monitoring, arrest, detention or prosecution, including military and civilian former LTTE leaders. Low-profile former LTTE members, including former combatants and those employed in administrative or other roles, or who provided a high level of non-military support to the LTTE during the conflict, are likely to be detained and sent to a rehabilitation centre. Following release from rehabilitation low-profile former LTTE

---

<sup>18</sup> DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, 2.31-2.32

<sup>19</sup> DFAT "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, 2.33

<sup>20</sup> Australian Tamil Congress, "Sri Lanka still unsafe for Tamil asylum seekers to return", 17 February 2017, CISED50AD6095

<sup>21</sup> DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, p3

<sup>22</sup> DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, 3.29-3.31

<sup>23</sup> UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", *UN High Commissioner for Refugees*, 21 December 2012, UNB0183EA8

members may be monitored, but generally are not prosecuted. Close relatives of high-profile former LTTE members who remain wanted by the Sri Lankan authorities may be subject to monitoring.<sup>24</sup>

31. I am satisfied the situation for Tamils in Sri Lanka has significantly improved since the end of the conflict, and continues to improve. I am satisfied the Siresena Government are taking steps to address the past discrimination and violence against Tamils, and I do not consider the applicant as a Tamil male from the Northern province faces a real chance of harm on the basis of his Tamil ethnicity, his age or because he is from the Northern Province, or due to any real or imputed links to the LTTE, or because of any imputed political opinion, on the basis of his sister's involvement with the LTTE, or based on him being involved in searching for his sister, or because of his past experiences for the reasons below.
32. The evidence indicates that simply living in an LTTE-controlled area does not give rise to a need for protection. The applicant resided in the Northern Province, and he would have been required to interact with the LTTE during the conflict. The applicant was repeatedly questioned regarding his LTTE involvement whilst detained in the camp for nine months, however he was not formally arrested, charged, or sent to jail or for rehabilitation by the Sri Lankan authorities under the PTA or otherwise, and was released from the camp and returned to his home in [Town 1], which leads me to conclude authorities did not consider he was an LTTE member or supporter. Although the applicant was required to report and sign when requested to do so, country information indicates such harassment and monitoring of Tamils in the North was routine.
33. I also do not accept his relationship to his sister would lead to the applicant being imputed with LTTE links or an adverse political opinion. The applicant indicates his sister was recruited towards the end of the conflict. Although the applicant provided no details of his sister's involvement with the LTTE, and noting the limited time she would have been with the LTTE, I am not satisfied she held a high-profile position within the LTTE that would lead the applicant to come to the attention of the authorities on the basis of that association. The applicant has not indicated he or his brothers were ever questioned about his sister's involvement with the LTTE, which also leads me to conclude the applicant's sister is not a person of interest to the authorities. I am satisfied the applicant will not be imputed to have any LTTE links as a result of his sister's involvement with the LTTE.
34. With regard to the applicant being imputed an anti-government political opinion as a result of being involved in searching for his sister, I have found the applicant was not of interest to the authorities prior to his departure from Sri Lanka for this reason, and given the significant political changes in Sri Lanka since the applicant left in 2012, and the commitment to reconciliation and establishment of an Office on Missing Persons, I do not accept the applicant would currently be at risk as a result of these activities.
35. I accept, as a Tamil, and a young Tamil male from the North, the applicant has previously experienced harassment, violence and mistreatment. However, five years have passed since the applicant departed Sri Lanka, and the evidence supports that the security situation in the Northern Province has greatly improved, and the level of monitoring has decreased. I am not satisfied there is a real chance the applicant faces harm on return to Sri Lanka for reasons of his Tamil ethnicity, his age or area of residence, because of a real or imputed association with the LTTE including as a result of the disappearance of his sister who was involved with the LTTE.

---

<sup>24</sup> DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, p16-18

*Illegal departure/Returning asylum seeker*

36. The applicant claims he fears being mistreated, tortured or killed by Sri Lankan authorities if he is returned to Sri Lanka. By departing Sri Lanka illegally he believes this will confirm their suspicion he has done something wrong.
37. I accept the applicant departed Sri Lanka by boat, and on return to Sri Lanka he will be identified by the Sri Lankan authorities as a returning asylum seeker who departed illegally and without a passport.
38. Entry and exit from Sri Lanka is governed by the *Immigrants and Emigrants Act 1949* (Sri Lanka)(I&E Act). Under the I&E Act it is an offence to depart other than from an approved port of departure. Penalties for leaving Sri Lanka illegally can include imprisonment of up to five years and a fine of up to 200,000 Sri Lankan rupees (around AUD 2,000). In practice, penalties are applied on a discretionary basis and most cases result in the issuance of a fine and not imprisonment.<sup>25</sup> Upon arrival in Sri Lanka, involuntary returnees are processed by the Department of Immigration and Emigration, the State Intelligence Service and the Criminal Investigation Department. These agencies check travel documents and identity information against immigration databases, intelligence databases and the records of outstanding criminal matters. As returnees are processed en masse the processing can take several hours.<sup>26</sup> For returnees travelling on temporary travel documents, as would be the case for the applicant, police undertake an investigative process to confirm identity, which would address whether someone was trying to conceal their identity due to a criminal or terrorist background or trying to avoid court orders or arrest warrants. DFAT assesses that returnees are treated according to standard procedures, regardless of their ethnicity and religion, and detainees are not subject to mistreatment during processing at the airport.<sup>27</sup>
39. According to Sri Lankan Attorney-General's Department, which is responsible for the conduct of prosecutions, no returnee who was merely a passenger on a people smuggling venture had been given a custodial sentence for departing Sri Lanka illegally. However, fines are issued to act as a deterrent against future illegal departures. If a person pleads guilty, they will be fined (which they can pay by instalment) and they are then free to go. In most cases where a returnee pleads not guilty, returnees are immediately granted bail by the magistrate on the basis of personal surety or they may be required to have a family member act as guarantor.<sup>28</sup>
40. From DFAT's reporting in previous cases, I accept that following the normal entry procedures described above, the applicant may be arrested by police at the airport, have his fingerprints and photograph taken, and be transported to the closest Magistrates court at the first opportunity, after which custody and responsibility for the individual shifts to the courts or prison services. The applicant may be held in police custody at the airport, or if the Magistrate is not available within 24 hours because for example of a weekend or public holiday, he may be held at a nearby prison.<sup>29</sup> DFAT reports that thousands of asylum seekers have returned to Sri Lanka since 2009, including from Australia, with relatively few allegations of torture or mistreatment. DFAT assesses the risk of torture or mistreatment for the majority of returnees is low and continues to reduce, including for those suspected of offences under the *Immigrants*

---

<sup>25</sup> DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, 5.17

<sup>26</sup> DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, 5.19

<sup>27</sup> DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, 5.20

<sup>28</sup> DFAT "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, 5.22

<sup>29</sup> DFAT "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, 5.21

*and Emigrants Act 1949 (Sri Lanka)(I&E Act)*. Overall monitoring has reduced under the Siresena Government and community fear of mistreatment has also decreased.<sup>30</sup>

41. The applicant's country information contains reports of some returnees being subjected to detention, torture, arbitrary arrest and mistreatment. The majority of the reports are dated and refer to incidents prior to the change of government in 2015. In addition, I note the reports generally refer to returnees with real or perceived LTTE affiliation.
42. For the reasons given earlier, I do not consider the applicant was of any adverse interest to the Sri Lankan authorities at the time he left Sri Lanka, and I do not accept they have shown interest in him since he left Sri Lanka in 2012. The country information does indicate that Tamil asylum seekers face a real chance of any harm for that reason alone. I find there is not a real chance the applicant would be subjected to harm because he is a returning asylum seeker.
43. As the applicant departed Sri Lanka illegally, I accept there is a real chance he will be investigated and detained for a short period, potentially for a number of days pending bail, and it is likely a fine will be imposed on him, which can be paid by instalments, and he will be released. Although I accept the applicant may be detained for a period of time waiting to appear before a magistrate, I find the possibility is remote that he would be detained for more than that period. Having regard to the poor prison conditions in Sri Lanka, which DFAT states do not meet international standards because of lack of resources, overcrowding and poor sanitary conditions,<sup>31</sup> I do not consider a few days detention would constitute the threat to life or liberty, or be a significant physical harassment or ill treatment, or otherwise amount to serious harm for the applicant. I am also not satisfied that a brief period of detention in the conditions described, questioning and the imposition of a fine, considered together amounts to serious harm.
44. In addition, the evidence before me indicates the provisions and penalties of the I&E Act are laws of general application that apply to all Sri Lankans when returning to the country after departing illegally. The law is not discriminatory on its terms, nor is there country information to indicate the law is applied in a discriminatory manner or that it is selectively enforced. I am satisfied the process and penalty the applicant may face on return to Sri Lanka, as a result of his illegal departure, would not constitute persecution for the purposes of the Act.

#### **Refugee: conclusion**

45. I have considered the applicant's claims both individually and cumulatively as a Tamil male from the Northern Province, whose sister was forcibly recruited by the LTTE, who was involved in activities searching for that sister, who departed Sri Lanka illegally by boat, spent a period of time abroad and claimed asylum in Australia, and will be returning to Sri Lanka where he will likely be detained and questioned by Sri Lankan authorities for a brief period, and possibly incur a fine. I have determined that prior to his departure the applicant was not a person of adverse interest to Sri Lankan authorities, or any other person. In considering these matters cumulatively, I am not satisfied there is a real chance the applicant will face persecution from Sri Lankan authorities or any other person on his return or in the reasonably foreseeable future.
46. 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).

---

<sup>30</sup> DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, 4.22

<sup>31</sup> DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, 4.25

## **Complementary protection assessment**

---

47. 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**

48. 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.

49. I have found the applicant does not face a real chance of any harm because he is a Tamil male from the Northern Province, for any actual or imputed connection to the LTTE (including as a result of his sister's forced recruitment to the LTTE), for his involvement in activities to search for his missing sister, or for seeking asylum in Australia. I am also not satisfied there is a real risk of harm.

50. I am satisfied the applicant will be identified on arrival in Sri Lanka as having departed illegally and he may be detained for up to a few days, and he may be fined. If the applicant is detained he may be subject to poor prison conditions.

51. I am not satisfied the treatment of the applicant during airport processing, the imposition of a fine, or the poor prison conditions the applicant may be briefly subjected to, considered individually or in combination, constitute significant harm. There is no evidence to indicate the applicant faces the death penalty for any reason, and I do not accept there is a real risk the applicant will be arbitrarily deprived of life or tortured,. I am not satisfied the treatment the applicant may face as a consequence of his illegal departure amount to cruel, inhuman or degrading treatment or punishment. I am not satisfied there is an intention to inflict pain or suffering, severe pain or suffering or to cause extreme humiliation.

52. Considering the applicant's circumstances individually and cumulatively, I am not satisfied he will suffer a real risk of significant harm.

### **Complementary protection: conclusion**

53. 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.