



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA17/03780

Date and time of decision: 23 July 2018 15:17:00
G Deal, Reviewer

Decision

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

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

Background to the review

Visa application

1. The applicant (the applicant) claims to be a Tamil from Sri Lanka. On [date] March 2013 he arrived by boat in Australia. On 6 March 2017 an application for a Safe Haven Enterprise Visa (SHEV application) was lodged on the applicant's behalf with the Department of Immigration, now the Department of Home Affairs.
2. On 18 October 2017 a delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa. With the exception of his brief detention in 2008 following a roundup of [suspects] after a bomb blast, the delegate did not accept the applicant's claims as he found them implausible, to contain inconsistencies and to lack detail. He accepted the applicant may have been imputed to have Liberation Tigers of Tamil Eelam (LTTE) associations at that time because of his Tamil ethnicity but ultimately did not accept the applicant had a profile of interest to the authorities, did not meet the relevant definition of refugee, did not face a real risk of significant harm and was not a person in respect of whom Australia had protection obligations.

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. On 13 November 2017 the IAA received a submission from the applicant. To the extent the submission engages in argument with the delegate's decision based on information which was before the delegate I have had regard to these arguments. In part it also restates claims made to the delegate which are already before me.
5. In the submission the applicant claims his cousin (who he claimed before the Department was detained and questioned together with the applicant in 2008 following a bomb blast in the area) was an LTTE member and he was killed by unknown people who they suspect were from the Criminal Investigation Division (CID). I consider this new information. By way of explanation he says he did not mention this to the Department as he did not think it was related to his protection visa claims. I do not accept this explanation. He states that his cousin's LTTE involvement was what led him to being imputed as a member. The applicant's central claim is that he was suspected of involvement with the LTTE and I consider that the relevance of the new claim about his cousin would have been clearly apparent to him. In the SHEV interview the applicant was explicitly asked if he ever had any links with the LTTE, if he knew anyone who was linked to the LTTE or if he had any family members who were members of the LTTE and he said "no". His responses to similar questions in the arrival interview were consistent with this. He has provided no further detail about his cousin's involvement with the LTTE. I also consider he has had adequate opportunity to provide his claims and information to the Department. I do not accept the claim is credible. I am not satisfied that exceptional circumstances exist to justify consideration of the information.
6. The applicant claims that due to harassment by the authorities and his lack of education he will be unable to work or run a business and will suffer significant economic hardship which would threaten his capacity to subsist. He also claims he will be interrogated and harmed at the airport because of his imputed LTTE association and that he has recently heard about failed asylum seekers returning from Australia being harassed although did not provide a

source for this information. He has also said that he fears being detained and harmed before the International Committee of the Red Cross can locate him to assist him as he does not have a support system in Sri Lanka and his family will face the same danger if they try to assist him. None of these claims were before the Department and I consider them new information. The applicant has not explained why these claims were not raised earlier. I consider he has had adequate opportunity to put forward his claims and supporting information to the Department. In his SHEV application he stated he had completed both primary and secondary schooling as well as a Bachelor's Degree and some other studies in [a particular discipline]. Both his parents continue to live in [Town 1] in the Northern Province of Sri Lanka and he has not indicated they are infirm or otherwise unable to assist him. He has also provided very little detail about these new claims, or evidence in support. In light of the above I am not satisfied that exceptional circumstances exist to justify consideration of the information.

7. The applicant provided excerpts from a media article and two country information reports in support of the assertions that the north continues to have a large military presence, that the *Prevention of Terrorism Act (PTA)* is used to detain Tamils suspected of LTTE links, including forcibly returned asylum seekers, that those severely mistreated by authorities were in large part as reprisals against family members and that military intelligence were looking for those returning from abroad to interrogate abduct, detain and torture. I consider these excerpts new information. None of the excerpts contains 'personal' information. All sources also appear to have been published before the delegate's decision was made. The applicant has not explained why any of this information was not provided to the Department and I consider he has had adequate opportunity to put forward his claims and supporting information before the Department. The applicant has not satisfied me as to the matters in s.473DD(b).
8. Attached to the submission were a number of news articles and two short videos which I consider new information. All but two (discussed below) appear to have been published before the delegate's decision, many a year or two prior. They discuss the use of torture, sexual assault and abduction by the Sri Lankan authorities and the government's admission in this regard, the killing of two students by the police, missing persons, the confiscation of land during the conflict, warnings that former rebels should not return to Sri Lanka and Sri Lanka's efforts to rebuild after the war. Some contain personal information, such as the name of missing persons, or a priest who was tortured by the authorities about a year ago, although none of this personal information refers to the applicant or his family or anyone seemingly relevant to his claims. Further, the applicant's claims before the Department did not relate to him being a student, the confiscation of lands, sexual assault, or of having any missing relatives or friends. The applicant consistently told the Department that neither he nor any of his family members had any involvement with the LTTE. The government's admissions about the systemic use of torture in one of the videos and short article only came after mounting pressure from various international bodies such as the United Nations after the Special Rapporteur's visit to Sri Lanka in 2016 and the government's comments in the new information focus on highlighting initiatives undertaken by it to combat this issue. A number of country information reports in relation to the systemic use of torture in Sri Lanka, such as the Report of the Special Rapporteur and reports by Freedom from Torture and the International Truth and Justice Project were before the delegate and I do not consider the new information adds anything to this. I also consider the applicant has had adequate opportunity to provide his claims and information to the Department. He was also given the opportunity to provide further information and documents up to two weeks after his SHEV interview but nothing further appears to have been provided in this time. I am not satisfied there are exceptional circumstances to justify consideration of the information.

9. The submission also contains copies of two news articles, which I consider new information, both of which were published after the delegate's decision, and could not have been provided to the delegate. The first discusses a Sri Lankan military officer who motioned a death threat to Tamil protestors in London in March 2018, stating that this officer should not have been allowed into the UK or to hold office in the UK. I do not consider the article relates in any material way to the applicant or his claims. The second article appears to be an introduction to a news story by Aljazeera on the systemic use of torture in Sri Lanka but no video link was provided. The article provides little detail. As already detailed a number of country information reports on the use of the torture in Sri Lanka were before the delegate. I am not satisfied exceptional circumstances exist to justify consideration of the information.
10. I have obtained the 2018 DFAT report¹. I am satisfied there are exceptional circumstances to justify considering this recently published report which documents the changing conditions in Sri Lanka in relation to the treatment of Tamils and returnees. It was only published after the delegate's decision, and the delegate relied upon the earlier version of this report.
11. The applicant requests the opportunity for a further interview to discuss his refugee claims. I have decided not to interview the applicant. I consider the applicant has had adequate opportunity to provide his claims and supporting information, had the assistance of a lawyer in preparing his application and I do not consider an interview is otherwise required.

Applicant's claims for protection

12. The applicant's claims can be summarised as follows:
 - He is a young Tamil male from the Northern Province of Sri Lanka.
 - In 2006 the army attempted to force their way into his family home in [Town 1] because of suspected LTTE links.
 - In 2008 he was taken and questioned at an army camp on suspicion of having LTTE links and released with fortnightly reporting obligations until 2009.
 - In 2009 when his family moved back to [Town 1] the applicant was still viewed with suspicion by the authorities and so had to report fortnightly.
 - On [date] 2012 he was abducted in a white van, taken to an Eelam People's Democratic Party (EPDP) camp and tortured on suspicion of having LTTE links. His parents paid a bribe to secure his release. A few days later they called his mother saying if he did not return to the camp they would shoot him. He fled to Colombo where he hid for two months before leaving Sri Lanka.
 - He fears he will be tortured or killed by the EPDP or the army.
 - When he was in Colombo the EPDP and CID army looked for him at his home and the EPDP and CID are still looking for him.
 - He will be a failed asylum seeker.

Factual findings

13. Based on the applicant's evidence, including his documentary evidence I accept he is a young Tamil male from the Northern Province of Sri Lanka. I also accept his parents still live in their

¹ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064.

home town in [Town 1] in the Northern Province of Sri Lanka and that the applicant has completed primary and secondary schooling and further studies including a Bachelor's Degree in [a particular discipline].

14. The applicant claims his family started experiencing problems with the authorities in 2006 when his family were living in [Town 1], an army controlled area, near an LTTE cemetery. They would occasionally see LTTE members paying their respects at the cemetery. Because of their proximity to the cemetery they knew the authorities suspected they were also LTTE members. One night in 2006 the army went to their home demanding to be let in accusing his family of working for the LTTE as spies and stating if they did not come out they would be shot. They were scared and so they secured the door and retreated further into the house and barricaded themselves in a room. The army attempted to knock down the second door but eventually left at 3am the next day. The army had destroyed their belongings including their television. In fear his family moved to another house located in [Town 2] the next day and reported their move to the police who reported this to the army.
15. In 2008 the army found out where they were living and because of this and the applicant was taken to an army camp on suspicion of having LTTE links given his family's experience with the army in 2006. He was released with fortnightly reporting obligations which continued until the end of the war. After the end of the war they returned to [Town 1]. The army base near their home had become larger and the army viewed his family with suspicion and the applicant was again required to report fortnightly. He started [a business in their home]. Some of his customers were students who were members of the United National Party (UNP) and they placed an order with him to print some of their political posters. They also asked him to put some of the posters up and to have them available in his [business] which he agreed to do as a favour to them.
16. In 2012 LTTE posters began appearing in his area. In July 2012 two suspicious looking men visited his [business] asking questions about his business. They returned in the evening on another day with two other men in a white van and abducted him and took him to a camp which he later discovered was an "EPDP and army camp". They severely mistreated him in an attempt to force a confession he was an LTTE member. They told him they strongly suspected he was responsible for the LTTE posters because he had printed and put up political posters in the past. His parents secured his release after bribing the authorities and provided he returned to the camp if and when required. Two or three days later they called his mother asking him to return to the camp and she said he was at a wedding returning in a couple of days. The men said if he did not go to the camp the next day they would shoot him. Fearing for his safety that same day his mother sent him to Colombo where he spent two months with friends while he organised his departure from Sri Lanka. As at February 2017 he said that the army and the EPDP still asked for him every couple of months and it was clear they were still interested in him.
17. Unlike the delegate I found the applicant's account of his family's harassment in 2006 at their home by the authorities in the SHEV interview to be highly detailed and compelling. He said the army arrived at the house at about 7 in the evening and that his family locked the door. The army broke the front door and entered the house. He and his family went into another room and locked the door and put a bench and suitcases up against the door to stop the army from entering. The army started banging on the second door and said they had seen visitors going to the house who they suspected were LTTE supporters. This went on for a while and his father eventually called a friend who was a former [official] who said he would speak to a friend who was a policeman. His father's friend eventually advised them it was an army matter and the police could not assist and that the army would not normally behave in

this manner. The neighbours gathered out the front of the house after hearing the commotion and eventually the army left and the neighbours told the family when it was safe to come out of their home. The applicant's family contacted a family member who told them about a house that was available for rent in [Town 2] and they moved immediately. When asked how he knew it was the army he said they spoke Sinhala and the neighbours confirmed they were army members. The delegate asked questions clearly indicating he did not accept it was the army, such as why they did not persist with targeting his family and the applicant mentioned something about a commander putting his sword under the door and threatening to cut them up. His SHEV application indicates he was in [Town 1] from 2005 to 2006. At the time the applicant would have been just [age] years of age.

18. Given the consistency of the claim, the high level of detail and the country information before me that indicates fighting intensified in 2006 and paramilitary groups, carrying weapons, were operating in the Northern Province and were often perceived as being part of the government by the locals at that time, I am willing to accept a group of men harassed the applicant's family at their home in 2006, as they were located near a cemetery controlled by the LTTE and that they attempted to gain entry into the applicant's family home and that his family fled to [Town 2] the next day in fear of their safety.²³ I am willing to accept his family may have been suspected of LTTE links given their proximity to the cemetery. Based on the applicant's description of the event and the country information before me I consider it more plausible that the perpetrators were members of a paramilitary group, possibly acting without authority; as the family's friend commented, the army would not normally act in the way the perpetrators did that night. I do not accept it was the army or the CID.
19. Unlike his evidence about the 2006 events, I found significant inconsistencies in the applicant's evidence in relation to his claimed detention in 2008. In the arrival interview he said that he and his cousin were detained and severely mistreated by the army as part of a round up in the area and released the next day. There was no mention of having been released after paying a bribe or of him having any reporting obligations. In his SHEV application I found the applicant's account sought to create a link between his 2008 detention and his family's harassment in 2006 in an effort to strengthen his claim he had a profile of interest to the authorities. He said that he was detained in 2008 on suspicion of having LTTE links because the army discovered his family had moved to [Town 2] and because of their experience with the army in 2006 and that he was only released because his parents paid the authorities a bribe. However, in the SHEV interview it became apparent that the applicant was rounded up with his cousin and other suspects after a bomb blasts in the area and subsequently released. When the delegate asked if many people had been rounded up at the same time he said they had. He added that after they took his details it was revealed to the authorities that he had problems with the army in 2006 and because of this he was required to sign in every fortnight at the army camp until 2009. I consider if the applicant was of genuine ongoing interest to the army or the authorities after the incident in 2006 (whether or not the intruders were acting with the imprimatur of the authorities) he would have been harassed or detained in the intervening two years. Further in the SHEV interview the applicant said the authorities went to their home when they moved to [Town 2] in or about 2006 and checked their papers and left without incident. Additionally, the applicant was just [age] years of age at the time of the 2006 incident and it is unclear why he would be singled out from his family as being an LTTE member when his other family members, such as his father, were seemingly not.

² Danish Immigration Service, "Human Rights and Security Issues concerning Tamils in Sri Lanka", 71, 1 October 2010, CIS19345, p.7.

³ Ibid, p.12.

20. As it has been consistently claimed I am willing to accept the applicant was detained with his cousin in 2008. Based on the detail provided in his SHEV interview about this incident I also accept they were detained when the authorities detained a number of suspects in the area following a bomb blast and that he may have been severely mistreated during this incident. The incident occurred about two years after his family had moved to [Town 2] and had reported their move to the authorities and given the nature of the incident I do not accept it was connected to his family's harassment by the army in 2006. I consider it more plausible that he was detained simply because he was a young Tamil male in the vicinity of the bomb blast. Given the inconsistency, I do not accept he was released because of the payment of a bribe. Very little detail was provided about his mother securing his release and given the short duration of his detention and his description of the incident I consider it more plausible that that applicant was released as he was no longer of any interest to the authorities on suspicion of any involvement. Given it was at a time when fighting had intensified in Sri Lanka, nearing the end of the war, I am willing to accept the applicant may have had reporting obligations on release.⁴
21. The applicant claims that after the end of the war his family moved back to their home in [Town 1]. The army camp near his home had become larger and the army viewed him with suspicion and so he was again required to report to the camp on a fortnightly basis. However there was no mention of his harassment or reporting obligations on their return to [Town 1] in the arrival interview. In the SHEV interview I found his account of his 2009 reporting obligations brief and almost dismissive, he only mentioned his claimed 2009 reporting obligations after he commenced describing an incident in 2012 and realised he had not yet mentioned his claimed 2009 reporting obligations. He said for the first time that the CID began regularly calling and questioning him when they returned to [Town 1] because of their past problems with the army and that it was in these circumstances he had to recommence reporting to the army camp. The country information before me indicates the authorities screened thousands of civilians after the end of the war and arrested and sent those suspected of LTTE links to rehabilitation camp which the applicant has not claimed happened to him; when questioned about rehabilitation camps the applicant appeared confused and the delegate had to explain to him what a rehabilitation camp was.⁵ I do not accept the applicant had to report to the army on a regular basis on his return to [Town 1] in 2009 after the end of the war on suspicion of having LTTE links.
22. The applicant claims he printed posters for the UNP political party for customers in his [business] which led him to viewed with suspicion when LTTE posters started appearing in the area and he was abducted in a white van on [date] 2012 and severely mistreated on suspicion of LTTE links and was only released when his parents paid them a bribe. His mother was called a couple of days after his release by the same men who threatened to shoot the applicant if he did not return and it was in these circumstances that he fled and hid in Colombo for two months before departing Sri Lanka. Inconsistently in the arrival interview he said he was accused of printing posters for the opposition party rather than the LTTE. In the SHEV interview the applicant said that two men came pretending to be customers asking him for examples of his past work and that he showed them copies of past notices he had printed and that on another day four men came in a white van stating they were from the EPDP and that they were coming with the CID and they wanted to question him. He was severely mistreated and questioned. When asked about the incident he said they said to him "...to

⁴ UN High Commissioner for Refugees, UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183EA8, p.6.

⁵ Danish Immigration Service, "Human Rights and Security Issues concerning Tamils in Sri Lanka", 71, 01 October 2010, CIS19345, p.15.

whom you made these notices...which party are you working for?...I told them I don't work for any particular party....they related that to another notice posted in our area saying the liberation movement will come back...somebody had put up a notice saying LTTE will come to [Town 2] and they showed me ...that I was responsible for the LTTE notice...". He was detained from around 7 the night before until 1 pm the next day. His mother got hold of some influential people and managed to get him released. After two days the army called his mother and asked the applicant to report the following day failing which they would shoot him. His mother lied and said he was at a wedding and she arranged for him to go to Colombo where he stayed for two months eventually departing Sri Lanka in September 2012.

23. In support of his claims the applicant provided a copy of a police complaint lodged by his mother on the day of his claimed abduction with an English translation by an accredited translator which states that four men in a white van went to their house in [Town 1] on [date] 2012 stating they were from the "EPDP investigation unit" and that they had come to question the applicant and that they took him after having pointed a revolver at him. Also provided was an affidavit from his mother dated 15 March 2017 which broadly re-states his claims. It was translated in Sri Lanka and not by an accredited translator. The affidavit repeats the applicant's claims however some of the detail in the affidavit is at odds with the police report or is highly improbable leading me to place little weight on it. For example, it states that the 2012 incident was perpetrated by the "Criminal Investigation Department, army and the Eelam People's Democratic Party" despite the police report simply stating the EPDP were responsible.
24. The applicant said that he left Sri Lanka legally by plane using a passport in his name with his photo that was obtained by his agent. When asked if he were able to leave without issue he said that his agent cleared everything for him. When asked, he said he had no problems in [Country 1] and he travelled by train and bus from [Country 1] to [Country 2] and had no problems during that leg of the journey either. He said the agent took his passport but he could not remember when, he suspected it was in Indonesia [Country 3] or [Country 2]. He also mentioned his only brother had gone to study in [in another country] and had somehow secured a [visa] while there and that he was now working.
25. As it has been consistently claimed and given the country information before me indicates elections were held in 2013 I am willing to accept the applicant opened [a business] in 2011 and that he printed posters for customers from the UNP political party in 2012.⁶ In the arrival interview he said he had only been questioned on suspicion of printing notices for the opposition party, there was no mention of posters for the LTTE. I find it highly improbable that authorities would detain, severely mistreat and question him in relation to printing posters for the UNP. In his SHEV application he states that the abductors strongly suspected him of printing LTTE posters that had appeared in the area because he had printed the UNP posters. In the SHEV interview he said he was questioned about posters for the opposition party and then he mentioned that they also questioned him about LTTE posters. I consider the inclusion of information about LTTE posters and his being accused of printing these, a later fabrication intended to strengthen his claim the authorities continued to suspect him of LTTE involvement. In the SHEV interview he described the perpetrators as the EPDP who came with the CID and that he was taken to an "EPDP and army camp". The police report describes the perpetrators as members of the EPDP. While the country information before me indicates pro-government paramilitary groups had close links with the government there

⁶ "Sri Lanka Timeline - Year 2012", 31 December 2012, CIS961F9402802, p.21.

is nothing before me to suggest they openly operated together.⁷ The country information indicates the EPDP were active in the north in 2012 and had established a political party with elected members in regional and national government structures but that they also continued to engage in all sorts of criminal activities including extortion, kidnapping and ransom collection.⁸ It has also been observed that paramilitary groups like the EPDP had a propensity to abuse their powers as their activities were not subject to any checks or balances.⁹ The applicant had been in [Town 1] for some three years prior to this claimed incident and has not claimed to have been detained or questioned on suspicion of LTTE involvement after the end of the war. He also appears to have been able to legally leave Sri Lanka on his own passport in 2012 without issue although I note he claims this was because he had an agent who had cleared the way for him. The applicant has not claimed he or any of his family had any involvement with the LTTE. In light of the above while I am willing to accept the applicant may have been detained, questioned and severely mistreated by the EPDP in connection with printing notices for an opposition party in the lead up to the elections I do not accept he was detained by the authorities on suspicion of LTTE involvement. Nor do I accept they called his mother two or three days later and threatened to kill him if he did not return to their camp for questioning.

26. Given the EPDP reportedly engaged in criminal activities such as extortion and ransom collection and that the applicant claimed his mother secured his release through the payment of a bribe in his SHEV application and interview I am willing to accept this aspect of the claim. However, given the nature of each of the incidents I do not consider his questioning and mistreatment in 2012 to be related to the 2008 incident or 2006 incident. I consider each of these incidents discrete. The applicant claimed to have copies of CID letters addressed to him, which he said he would forward to the Department within two weeks of the SHEV interview, but did not do so. I do not accept the applicant was wanted by the authorities in connection with an adverse security profile when he left Sri Lanka in 2012.
27. The applicant said for the first time in the SHEV interview that while in Colombo the CID went to his home looking for him, questioned and severely mistreated his father. When the delegate asked why they would mistreat his father the applicant did not really answer the question stating that they were asking about his whereabouts. I do not accept the applicant was wanted by the authorities in connection with an adverse security profile when he left Sri Lanka. It follows that I do not accept the authorities went to his home looking for him after his departure or that his father was mistreated by them during one of these incidents. It follows that while I accept he went to Colombo and stayed with friends for two months while making arrangements to leave Sri Lanka, I do not accept he was in hiding during this time. I do not accept the authorities have gone to his home looking for him on suspicion of him having had LTTE involvement since he has been in Australia.
28. I accept the applicant will be identifiable as someone who has attempted to seek asylum in Australia on his return to Sri Lanka.

⁷ UN High Commissioner for Refugees, UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183EA8, p.12.

⁸ Ibid.

⁹ Danish Immigration Service, "Human Rights and Security Issues concerning Tamils in Sri Lanka", 71, 1 October 2010, CIS19345, p.10.

Refugee assessment

29. 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

30. 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.
31. I accept the applicant’s family were harassed by a group of unknown people, possibly rogue military officers or members of a paramilitary group operating in the north such as the EPDP, at the height of the conflict in 2006, that he was detained and questioned, along with a number of other suspects, on suspicion of involvement in a bomb blast in 2008 and quickly released after being cleared and that he was detained and severely mistreated by members of the EPDP in connection with printing political posters in 2012. However I do not accept that these incidents were related or that he was of interest to the authorities in connection with an adverse security profile when he left Sri Lanka lawfully in 2012.
32. The country information before me indicates that there was a change in the situation in Sri Lanka after the applicant’s departure in 2012 and particularly after the election of the Sirisena government in 2015. Following the election of the Sirisena government it was noted by DFAT¹⁰ that the Sirisena government had prioritised human rights and reconciliation and had made significant progress, including replacing military governors in the Northern and Eastern Provinces with civilians; returning some land held by the military; releasing some people held under the PTA; committing to reform the PTA; providing greater freedom of movement in the north and east, including removing military checkpoints on major roads and restrictions on travel to the north and east; reducing the military’s involvement in civilian life in the north and east; engaging constructively with the United Nations; as well as putting in place a number of symbolic changes. In its more recent report DFAT¹¹ has noted criticisms had been directed toward the government in 2017 because of its slow progress in relation to

¹⁰ DFAT, “DFAT Country Information Report – Sri Lanka”, 24 January 2017, CISED50AD105.

¹¹ DFAT, “DFAT Country Information Report – Sri Lanka”, 23 May 2018, CIS7B839411064.

its transitional justice agenda. It was noted that the military was still involved in some civilian activities in the north and that protests continued in the north because of the military's occupation of private land, land claims disputes between displaced persons and the government's slow progress in relation to the confiscation of land and missing persons.

33. DFAT reports that it understands close relatives of high profile former LTTE members, who are wanted by the authorities, may be subject to monitoring. DFAT also states that the government remains sensitive to the potential re-emergence of the LTTE and that the authorities maintain 'stop' and 'watch' electronic databases, to alert security forces to those of particular interest, such as former LTTE cadres, those who have engaged in separatist or criminal activities or those with an extant court order, arrest warrant or order to impound their passport.
34. In its 2017 report DFAT¹² noted that more Tamils were detained under emergency regulations and the PTA than any other ethnic group, in part because LTTE support was imputed on the basis of ethnicity. It was also observed that the overall prevalence of monitoring of Tamils had greatly reduced and Tamils had described a positive shift in the nature of interactions with the authorities and felt more able to question their motives. In both its 2017 and 2018¹³ reports DFAT has reported that since the Sirisena government has come into power Tamils have gained a substantial level of political influence. DFAT understands that Tamils are not harassed by authorities because of their political involvement and that there are no barriers to Tamil political participation. Further, monitoring of Tamils in day to day life has significantly decreased under the current government although in respect of Tamils in the north, those associated with politically sensitive issues, such as missing persons, land release and memorial events may still be subject to surveillance. Consistently with this general reporting, the UK Home Office has also stated that it considers being of Tamil ethnicity does not, in itself, warrant international protection.¹⁴ The applicant printed UNP posters six years ago but has not claimed to have been involved in protests or activities related to sensitive political issues in the past or while in Australia.
35. The applicant fears being tortured or killed by the EPDP and the army on suspicion of LTTE involvement. The International Truth and Justice Project (ITJP) reported in 2016¹⁵ that human rights abuses by the security forces continued with impunity and largely targeted Tamils and the EPDP often played a key role in brokering the release of victims for ransom. ITJP's report was based on sworn statements from 20 people claiming to have survived being tortured by the authorities in the past; the most recent abduction was in December 2015. The victims were former LTTE soldiers, had attended a high profile protest in relation to missing persons or had attended peaceful protests or election activities demanding rights for Tamils. The December 2016 Report of the Special Rapporteur,¹⁶ which included interviews with 40 torture survivors, concluded that the practice of torture was less prevalent and severe than during the conflict but that it persisted and was being used by the CID against suspects in criminal and terrorist investigations under the PTA and cautioned that anyone deemed to have any link to the LTTE during the conflict remained at risk. The UK Home Office's report on

¹² DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105.

¹³ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064.

¹⁴ UK Home Office, "Country Policy and Information Note. Sri Lanka: Tamil separatism. Version 4.0", 31 March 2017, OG6E7028822, p.13.

¹⁵ International Truth & Justice Project Sri Lanka (ITJP), "Silenced: survivors of torture and sexual violence in 2015", 7 January 2016, CIS38A801275, p.10.

¹⁶ United Nations, "Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Sri Lanka A/HRC/34/54/Add.2", 22 December 2016, CIS38A80123313, p.6.

Tamil Separatism¹⁷ reports that since the current government has come into office “white van abductions” are very seldom reported and the number of torture complaints has been reduced. It notes however, that new cases continue to emerge of the police mistreating Tamils in order to extract confessions. Consistent with this, DFAT states that recent publications indicate torture continues to be perpetrated primarily by the police against Tamils but notes that local sources have indicated this is primarily due to outdated policing methods rather than being ethnically based, that the message from senior officials prohibiting the use of torture has been slow to filter down and relevantly assessed that overall there is a low risk of Tamils being tortured. In the SHEV interview the applicant said neither he nor his family had any involvement with the LTTE and I do not accept the applicant was wanted by the authorities in connection with an adverse security profile when he left Sri Lanka. Other than printing posters for members of the UNP in his [business] some six years ago he has not claimed to have been involved in political activities while in Sri Lanka or Australia. It has been almost six years since he ran his [business] and was in Sri Lanka. He has not claimed to have experienced any difficulties when leaving Sri Lanka legally in 2012.

36. Based on the applicant’s profile and the available country information discussed above, I am not satisfied that there is a real chance the applicant will be harmed on his return to Sri Lanka by reason of his ethnicity, origin, his past experiences in Sri Lanka including the events in 2006, 2008, 2012 or because he has lived in Australia for more than five years.
37. I accept that on return the applicant may be identified by the authorities as a returning asylum seeker. DFAT¹⁸ notes that returnees face a number of issues on their return including significant expense or debt incurred in connection with their journey, difficulties finding suitable employment and housing and the social stigma often experienced by those returning after having attempted to seek asylum abroad. Those with skills in high demand are best placed to find employment notwithstanding on-going challenges in obtaining recognition for foreign qualifications. DFAT also states it is aware of anecdotal evidence of “failed asylum seekers” being contacted by the CID (and not simply for registration purposes) in the north as recently as 2017, noting a UNHCR survey indicated almost half of those returning to the north had been visited and predominately by the police. The UNHCR survey was undertaken in 2015 and is now somewhat dated. A number of sources before me indicate that the number of returning asylum seekers allegedly subjected to torture in Sri Lanka on their return is low and past victims have been those suspected of having engaged in protests about Tamil rights overseas, former LTTE members or those who have otherwise had involvement with the LTTE in the past.¹⁹
38. The applicant’s parents still live in [Town 1] in the Northern Province of Sri Lanka and he has not said he would not go back to living at the family home if he returned to Sri Lanka. I accept the applicant may be contacted and monitored for a period by the authorities, face initial difficulties finding employment and accommodation (if he does not return to the family home) as well as difficulties paying for or repaying the costs associated with his journey and may suffer the social stigma of being a returning asylum seeker. However, I do not accept these circumstances amount to serious harm.

¹⁷ UK Home Office, "Country Policy and Information Note. Sri Lanka: Tamil separatism. Version 4.0", 31 March 2017, OG6E7028822, p.10.

¹⁸ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064, p.43.

¹⁹ Freedom from Torture, "Sri Lanka - Update on torture since 2009", 6 May 2016, CIS38A8012881, pp.4,5; Tamil net "16 Batticaloa Tamils arrested within last 100 days at Colombo airport", 3 May 2015, CXBD6A0DE6027; UK Home Office, "Country Policy and Information Note. Sri Lanka: Tamil separatism. Version 4.0", 31 March 2017, OG6E7028822, p.60.

39. I accept the applicant left Sri Lanka on his own passport, in a manner that did not involve any unlawful means, and the agent who assisted him took his passport in [Country 2] or [Country 3]. DFAT²⁰ and the UK Home Office²¹ indicate that following arrival at the airport, returnees will be processed in a group by a number of government agencies. The process can take several hours. Australian officials based in Colombo may meet charter flights carrying voluntary and involuntary returnees. If returning on a temporary travel document, police will undertake further investigations, for example, to ensure the returnee is not trying to hide their identity due to a criminal or terrorist background or has any outstanding court orders or arrest warrants. This process can include contacting the person's claimed home suburb or town police, family and neighbours. Overall, DFAT understands returnees are not mistreated during processing at the airport.
40. There is nothing before me to indicate the applicant has a criminal or terrorist background or any outstanding court orders or arrest warrants.
41. I accept the applicant is likely to be questioned at the airport for processing, with a group of other returnees, which may take several hours however based on his profile and the available country information discussed above I am not satisfied there is a real chance of the applicant suffering harm as a result.

Refugee: conclusion

42. The applicant does not meet the requirements of the definition of refugee in s.5H(1). The applicant does not meet s.36(2)(a).

Complementary protection assessment

43. 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

44. 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.
45. For the reasons already discussed, I accept there is a real risk the applicant may be contacted by the authorities on his return to his home village and may face difficulties finding

²⁰ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064, p.41.

²¹ UK Home Office, "Country Policy and Information Note. Sri Lanka: Tamil separatism. Version 4.0", 31 March 2017, OIG6E7028822.

employment, accommodation, meeting the costs of his journey to Australia and suffer the social stigma of being a returning asylum seeker. However, based on his profile and the country information before me I am not satisfied that any of these circumstances would result in the applicant suffering 'significant harm' as defined under s.36(2A). I am not satisfied the applicant faces a real risk of significant harm as a consequence of his being a returning asylum seeker.

46. In considering the applicant's refugee status, I have concluded that there was no 'real chance' the applicant would suffer harm on his return to Sri Lanka for the other reasons claimed. 'Real chance' and 'real risk' involve the same standard.²² For the same reasons, I am also not satisfied the applicant would face a 'real risk' of significant harm.

Complementary protection: conclusion

47. 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.

²² *MIAC v SZQRB* [2013] 210 FCR 505.

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

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.