



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA17/03804

Date and time of decision: 18 May 2018 15:42:00
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 a referred applicant, or their relative or other dependant.

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Tamil Hindu who was born in the Jaffna District of the Northern Province of Sri Lanka. The applicant arrived in Australia as an unauthorised maritime arrival on 25 September 2012. On 27 September 2016 he lodged an application for a Class XE 790 Safe Haven Enterprise Visa (SHEV).
2. A delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the Visa on 20 October 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. On 15 November 2017 the IAA received a submission, in the form of a statement from the applicant, dated 14 November 2017. For the most part the submission reiterates the applicant's claims and takes issue with the findings of the delegate, and to that extent it is not new information and I have had regard to it.
5. The submission also contains new claims, which were not before the delegate, and are new information. The applicant claims if he is forced to return to Sri Lanka he will not be able to earn a livelihood, and that he will also be prevented from going overseas for work, due to continued harassment from Sri Lankan authorities, and therefore he will suffer significant economic hardship that threatens his capability to subsist. I note the applicant did not make these claims in either of the statements provided during the protection visa process, or during any of the three interviews. I consider he had sufficient opportunity to do so, and the fact that he did not leads me to believe he does not genuinely hold these beliefs, and the claims are being made now simply to bolster his claim for protection. There is nothing to indicate these newly claimed fears are the result of any change in circumstances since the delegate's decision. I am not satisfied there are exceptional circumstances to justify considering the new claims.
6. The submission also references a number of additional country information reports which were not before the delegate and are new information. The reports pre-date the delegate's decision, and no explanation has been provided as to why they could not, or were not, provided prior to the delegate's decision. The documents do not contain information that could be described as personal information. The applicant has not satisfied me either of the matters in s.473DD(b) are met with regard to the documents.
7. The submission also indicates that the applicant is willing to provide any further information requested by the IAA regarding the submission, and requests he be invited for an interview to discuss his claims. The applicant was advised at the SHEV interview he may not have another chance to provide information to support his claim. I am satisfied the applicant has had an opportunity to present his claims, including in his submission. I am not satisfied in the circumstances of this application that an interview is required.

Applicant's claims for protection

8. The applicant has provided two statements in relation to his claims for protection, the first (undated) was lodged with the Department of Immigration on 29 September 2013, and the second, dated 20 September 2016, which was submitted with his SHEV application. The applicant's claims can be summarised as follows:

- He is a Tamil male and a Hindu, born in the Jaffna District of Sri Lanka.
- He is from an area that was a very strong base for the LTTE during the peace process. His family did not support the LTTE, however they gave them food and they were required to attend meetings.
- In mid-2006 the LTTE were forced out of the area by the Sri Lankan Army (SLA). The SLA were suspicious of all Tamils in the area because of the strong LTTE presence there. Also because he and his family had supported the LTTE with food he believes the SLA and CID were even more suspicious of him and that is why he was targeted for beatings and interrogations many times from mid-2006.
- The first time he was taken for interrogation was in January 2007. He was taken by four SLA officers, held for three to four hours, beaten, and asked to identify photographs of LTTE members. He could not identify any of them and he was released.
- In approximately April 2007, he was again taken. He was beaten, asked to identify LTTE members and released.
- At this time there were regular roundups of young Tamils males and he heard of Tamil people in the area disappearing and being killed. Due to fears for his safety his parents assisted him to obtain a passport through an agent, and he left to work in [Country 1] in September 2007. He returned to Sri Lanka in October 2009 when his two year visa expired. He did not have any problems re-entering to Sri Lanka.
- In December 2009 he was stopped in the street and his ID was checked. He believes the person was a CID officer in civilian clothes. He was slapped and allowed to go.
- From December 2010 until mid-2012 he was taken from his home by the CID on four occasions, during which time he was interrogated and beaten.
- In May 2012 four CID members took him from his home to [Town 1] CID camp. He was questioned about his knowledge of people involved with the LTTE and released after about three hours.
- The SLA and CID would leave messages for him to report to their camps in the months leading up to his departure to Australia. In September 2012 he went to Colombo to organise to leave Sri Lanka, and he departed Sri Lanka for Australia [in] September 2012.
- In October 2012 the CID went to his family home looking for him on suspicion that he was helping the LTTE. His parents told them he had gone to Australia and the officers threatened that if he returned to Sri Lanka they would arrest him.
- In March 2013 his father lost his leg after stepping on a landmine. He believes the landmine was placed there on purpose by the CID or SLA, and that they harmed his father to make life difficult for his family, and also so he would not have anyone to help defend him from the CID or SLA if he returned to Sri Lanka.

- In May 2013 his mother received a call from an unknown caller who said that what happened to his father would happen to him, and he would be killed if he came back. His mother passed away in about March 2014.
- In April 2015 his brother-in-law was taken and interrogated by the CID for a few hours. They asked him about where the applicant was, and accused the applicant of being with the LTTE.
- He fears being imprisoned, assaulted or killed by the CID or SLA if he returns to Sri Lanka because of his Tamil ethnicity and being imputed with a political opinion in support of the LTTE. He also fears harm as a result of having sought asylum in a Western country, for being a returned failed asylum seeker, and because he originates from the Northern Province of Sri Lanka.

Refugee assessment

9. 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

10. 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.
11. The applicant claims to be Tamil Hindu who was born in Thunnalai West in the Northern Province of Sri Lanka. A number of documents were provided to support the applicant’s identity, including a Sri Lankan National Identity Card, Sri Lankan Driving Licence, and Sri Lankan Birth Certificate. I am satisfied the applicant’s identity is as claimed. I accept the applicant is a Tamil Hindu, and a national of Sri Lanka. I find Sri Lanka is the receiving country for the purposes of the Act.
12. The applicant provided a report from Mental Health Social Worker, [Ms A], dated [in] July 2017. [Ms A] notes the applicant attended 12 counselling sessions between [July] 2016 and [February] 2017 following an expression of self-harm. She is of the opinion the applicant has

symptoms of PTSD and consistent with reported torture and trauma experiences of frequent arrests, interrogations, threats and physical assaults. She describes him as a vulnerable man who isolates and avoids when he is distressed and becomes emotionally numb and confused when discussing stressful past events, and is of the opinion the applicant is likely to experience difficulty in being able to express himself adequately in interview. Although I accept the applicant may have suffered psychological trauma as a result of his experiences in Sri Lanka, evidence from a medical practitioner has not been provided to support he has a psychiatric or medical condition as a result, or that he is currently taking medication or being treated for any such condition.

13. The applicant's first statement, which was prepared with the assistance of [a law agency], states that he fears returning to 'Afghanistan' because he will be persecuted for his ethnic background and religious beliefs. During the Entry interview the applicant indicated he had only ever travelled to [Country 1] prior to coming to Australia. I consider the reference to Afghanistan is an error in the document. I also note that the applicant has not subsequently claimed to have suffered any harassment, discrimination or violence as a result of his Hindu religion, or to fear harm on that basis, and accordingly I do not accept the applicant holds such fears.
14. In his second statement the applicant claims that, from approximately 2005 to 2006 towards the end of the peace process and the rise of the conflict, the LTTE held meetings in his area, and although his family did not support the LTTE movement they were required to attend the meetings, and they gave them food. They were told that if they did not attend or help them there could be problems for them. At the SHEV interview the applicant said he was not directly involved with the LTTE, however during the peace period he helped them, such as by supplying food and clothes. He said that because he was the eldest son he was asked to attend propaganda meetings to recruit LTTE members. The delegate specifically asked whether anyone else in his family helped the LTTE, and the applicant said 'no'. I note the applicant does not refer to providing support to the LTTE, or being required to attend meetings, in his first statement. The failure to do so, along with the inconsistency regarding whether it was only him, or also his family, who attended meetings and provided support to the LTTE, leads me to consider the applicant's evidence is not reliable on this issue. I do not accept the applicant or his family attended LTTE meetings, or that they provided support to the LTTE in the form of food and clothing.
15. According to his second statement, in about mid-2006 the LTTE were forced out of his home area by the SLA. The applicant claims in his first statement that he experienced constant fear and harassment from the SLA because of his Tamil background. He said there was an SLA camp by his house that caused him many difficulties. In January 2007 the applicant reported being taken from his home by the SLA, being beaten and questioned about whether he knew any LTTE members, or if he had seen any LTTE coming into the village, however 'he didn't know any one'. They showed him photos of people they suspected and asked him to identify them, and eventually released him. The applicant consistently described the January 2007 incident, and the regular round up and questioning of young Tamils. In his first statement he also described being required to report once a month until May 2007, when he was no longer required to report. In his second statement, he described the round ups of young males occurring for about six to 12 months in the period before he left for [Country 1] in September 2007, and that it happened every couple of months. In that statement he also said he had to report to the CID camp near [Town 1] approximately three to four times. During the SHEV interview the applicant said that after he was detained in January 2007 there were round ups every month, and for several months he was taken, presented to 'an identifier' and afterwards released. I

accept the applicant's consistent evidence regarding being detained in January 2007, being subjected to round ups, and also about being required to report until May 2007.

16. The applicant consistently claimed, and I accept, that in September 2007 he left Sri Lanka to work in [Country 1] for two years, returning in October 2009. At the SHEV interview he said he obtained a passport with the assistance of an agent, and that he did not have any problems leaving or returning through the airport. In his second statement the applicant said he believes the agent may have paid bribes to officials to facilitate his exit and re-entry to Sri Lanka, however he is unsure if this occurred. I consider it is pure speculation on the applicant's part as to whether bribes were paid, and I do not accept that was the case. I consider his trouble-free exit and re-entry is indicative of not having a profile of interest to authorities.
17. After his return from [Country 1] the applicant described further incidents where he was detained by authorities. The written record of the Arrival interview, which was conducted on 1 October 2012, indicates the applicant to have said he left Sri Lanka because he was afraid of the army who had interrogated him two times on suspicion of links with the LTTE, on an unknown date 'maybe three years ago', that he was taken to the CID office in [Town 1], and released after three to four hours. At the Entry interview, held on 11 January 2013, the applicant said he left Sri Lanka as he feared for his life because of harassment from the army personnel and because the army camp was close to his house. He said that in 2004 and 2005, during the war time, there were a lot of problems, and that is why he left (for [Country 1]), and after he came back they were harassing people like him. When asked why he was harassed the applicant said it was because he is a Tamil and they thought he was with the LTTE movement, however he said he was not with the LTTE. When asked about the last time he was harassed the applicant said he was arrested in 2002 for one day, that he was kept and released the following day.
18. In his first statement the applicant indicated that at the Entry interview, on 11 January 2013, he was asked to provide his claims in a brief form, which is why not all of his claims were given at that stage. In his second statement the applicant indicates he only provided a summary of his claims for protection at that interview, and he was not made aware at that interview the information would be used for the purposes of assessing his claims for protection. When the delegate questioned the applicant at the SHEV interview about his failure to mention problems with the authorities beyond 2009 at the Entry interview, the applicant noted the Entry interview was a short interview and due to fear and tension he omitted that information. I note the Entry interview was conducted over the phone, and both the interviewer and the interpreter were in different locations to the applicant. I also note the phone was disconnected on one occasion, and during the interview the delegate warned the applicant he needed to answer the questions asked or the interview would be stopped. The interviewer also told the interpreter not to engage in a conversation with the applicant, but to put the questions to the applicant and interpret the responses. Having listened to the Entry interview, I am of the opinion the applicant understood the interpreter, as evidenced by the generally appropriate responses to the delegate's questions posed to him through the interpreter, and I do not accept the applicant would have been unaware of the importance of the interview in terms of his application for protection. Although the delegate did not provide a detailed explanation of the reason for the interview at the start of the interview, she did warn the applicant that he was expected to give true and correct responses, and the applicant indicated he would do so. Nevertheless, I consider it is possible the applicant experienced some stress as a result of the particular circumstances of this interview, and I accept this may have resulted in him not fully particularising his claims at that interview.

19. In his statements and at the SHEV interview, the applicant described an incident in December 2009 when he was stopped by a person in civilian clothing who he believes may have been with the CID. His ID was checked and he was slapped and allowed to go. The applicant also described in his statements and at the SHEV interview four incidents, occurring from December 2010 until May 2012, when he was detained and questioned. In his first statement he said that in December 2010 two men who said they were from the CID came to his home and took him to the [Town 1] CID camp for questioning. They interrogated him about why he went to [Country 1] and said they suspected him of being an LTTE member, and indicated they knew about the previous times the SLA had questioned him. They beat him and released him after four hours telling him he must come whenever they call. []In January 2012 three unidentified people took him from his home, told him to get on their motorbike and drove for about an hour to a house he did not know. He was interrogated about what he had said to the Army and CID previously, and hit and kicked. He was released after about three hours and taken home. In March 2012 the same people came to his home and took him to the same house and detained him for about four hours. They asked him to identify LTTE members from pictures, however he could not do so and he was beaten. In May 2012 four CID officers came to his home and took him to [Town 1] CID camp where he was questioned about people who may be in the LTTE, and released after about three hours. At the SHEV interview the applicant's account of the January 2012 incident was slightly different, indicating it was two men who took him rather than three, and that they drove for 30 minutes rather than an hour. At the SHEV interview the applicant also described an additional incident in December 2010 when he was stopped on his way home from work by the army and questioned his ID was checked and he was hit. The applicant did not mention this incident in either of his statements.
20. With his SHEV application the applicant provided an Affidavit from his father, dated 6 September 2013. He indicates that Sri Lankan security forces and the 'intelligent group' came home in search of his son on many occasions, and that in order to save his life he went to Australia. The document also refers to his injury a few months after his son's departure as a result of a land mine blast.
21. Taking into account the small but significant variations in the applicant's evidence over time, I have significant doubts about whether all of the incidents described after his return from [Country 1] actually occurred. In particular, I note the applicant's failure to mention, prior to the SHEV interview, the incident in December 2010, when he was stopped and his ID was checked, which leads me to believe this incident has been fabricated to bolster his claim for protection. I do not accept that incident occurred. With regard to the four incidents between from December 2010 to May 2012, I find it surprising that authorities would wait for over a year after his return to Sri Lanka to question him about his travel to [Country 1], and a further year before he was questioned again in January 2012 about his involvement with the LTTE. I note that at the Arrival interview the applicant specifically referred to only two incidents when the army interrogated him about 'three years ago'. Although I find it surprising that he would not also have mentioned other incidents that had occurred more recently, if those incidents had actually occurred, taking into account the circumstances of the Arrival interview, and country information supporting that monitoring, harassment and detention of Tamils was common during the war, I am prepared to accept the applicant was interrogated and beaten on four occasions between December 2010 to May 2012.
22. The applicant claims he was subjected to a requirement to report to authorities prior to his departure for Australia. In his first statement he said the SLA and CID would constantly leave messages for him to report to their camps. In his second statement he noted the CID would come to his house every two weeks in the months leading up to his departure for Australia, and that he went to sign in at the camp every two weeks. However, at the SHEV interview he

said he was asked by the CID to sign in once a month, that he would go to the CID camp at [Town 1], that he did this for the three months prior to coming to Australia, and that when he signed they would indicate the next day to come. I consider the inconsistency regarding the frequency of reporting, and how he was notified about the requirement to report is extremely significant, and I consider the applicant is not recalling events that genuinely occurred. I do not accept the applicant was required to report to authorities during the months prior to his departure for Australia in 2012.

23. I have accepted the applicant was taken from his home by the SLA in January 2007, questioned about LTTE members, and beaten. I also accept that as a young Tamil male he may have been subjected to round ups around this time, and also that he was required to report to the CID camp on three or four occasions until May 2007. I note that the applicant was not required to report to the CID camp after May 2007. I have also accepted the applicant was stopped and his ID checked in December 2009, and he was interrogated and beaten on four occasions from December 2010 until May 2012. I consider this treatment of the applicant resulted from his being a Tamil male, rather than any specific security threat he posed. I note the applicant was able to obtain a passport in 2007 and leave Sri Lanka legally soon after, and return to Sri Lanka legally in 2009 using that passport, without experiencing any difficulties at the airport on either occasion. I consider if the applicant was a person of interest to authorities he would not have been issued with a passport, and he would have been detained and questioned at the airport, rather than being permitted to leave. Country information reports that during the civil conflict many Tamils, particularly in the north and east, reported being monitored, harassed, arrested and/or detained.¹ I consider the monitoring, harassment and questioning the applicant described is consistent with the troubling but routine treatment of Tamils at that time described in the country information, rather than resulting from any specific security threat posed by the applicant. Although the applicant was interrogated and detained on a number of occasions about any links with the LTTE, he was never arrested or sent for rehabilitation, and each time he was detained or required to report he was permitted to return home. Other than the claim that he provided food and clothing to the LTTE, until about 2005, and that he attended some meetings organised by the LTTE, claims I have not accepted, the applicant has not claimed to have had any other involvement with the LTTE. I consider if the authorities suspected the applicant of having any significant involvement with the LTTE they would not have released him at that time, but he would have been sent to rehabilitation or arrested. Taking into account the country information, and my findings on the evidence, I do not accept the applicant had a profile of interest to Sri Lankan authorities as a result of any imputed LTTE links, or for any other reason.
24. About one month after his departure from Sri Lanka, in approximately October 2012, the applicant claims the CID went to his family home looking for him on suspicion that he was helping the LTTE. He said his parents told them he had gone to Australia and they threatened that if he returned to Sri Lanka they would arrest him. If this incident had indeed occurred I consider the applicant's father would have noted it in his Affidavit dated in September 2013, referred to above. That Affidavit refers to the incident in which the applicant's father was injured, which occurred in early 2013, but does not indicate the CID searched for the applicant after his departure. I do not accept this incident in about October 2012 occurred.
25. In his second statement and at the SHEV interview the applicant consistently referred to an incident in about March 2013 when his father was injured by a landmine and lost his leg. His father was working clearing land in an area that had been cleared of landmines. The applicant believes the landmine was deliberately placed by the CID or the SLA. With his SHEV application

¹ DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105

the applicant provided an article from [a newspaper] dated [in] February 2013, and English Translation, regarding the applicant's father losing his foot to a land mine. The article notes the applicant's father was one of more than ten people who were clearing the land, which was considered to be in a high security zone from 1996 to 2011. I accept the applicant's father was injured by a land mine, however I consider it fanciful on the part of the applicant that the CID or SLA planted the landmine, or that the applicant's father was deliberately targeted in this way.

26. The applicant also claimed that, in approximately May 2013, his mother received a call from an unknown caller suggesting that what happened to his father would happen to the applicant if he returned to Sri Lanka, and that the applicant would be killed. I have found that the applicant was not a person of interest to Sri Lankan authorities when he departed Sri Lanka in September 2012, and taking that into account, along with my finding that the applicant's father was not deliberately targeted, I do not accept the applicant's mother was contacted and threatened as claimed in about May 2013.
27. In his second statement and at the SHEV interview the applicant claimed that in about April 2015 his brother-in-law was taken and interrogated by the CID. They enquired about the applicant's whereabouts and were looking for him on suspicion of involvement with the LTTE. His brother-in-law told them the applicant had gone to Australia, and they said the applicant would be in trouble if he came back to Australia. They also questioned him about his LTTE links. I find it entirely implausible that over two and a half years after the previous purported enquiry by the CID occurred, which I have not accepted, that the applicant's brother-in-law would be questioned about the applicant. I do not accept Sri Lankan authorities continued to be interested in the applicant in April 2015. The applicant did not mention any further incidents where his family were contacted by authorities at the SHEV interview in April 2017, which supports that he is not of continuing interest. I do not accept the applicant has been of interest to Sri Lankan authorities since his departure from Sri Lanka.
28. In his second statement the applicant referred to his brother being physically disabled due to an injury to his shoulder. He believes his brother has not been targeted by the CID because they do not view him as a physical threat, and because the applicant is the oldest man in his family who is physically well he will be targeted if he is returned to Sri Lanka. The applicant provided a report from [a medical centre], dated [in] October 2001, regarding his brother being treated for a dislocated right shoulder. Of note, the report indicates the patient should avoid physical activity and sports practice till full recovery. There is no evidence before me to support the applicant's brother is physically disabled, or that such injury would shield him from the attention of Sri Lankan authorities. I do not accept this claim.
29. The applicant's representative submitted at the conclusion of the SHEV interview that if the applicant is returned to Sri Lanka he will have no support from his family because the other two males, his father and brother, are disabled. I accept the applicant's father has an injury and he may no longer be able to work, however no evidence has been provided regarding the applicant's brother's capacity to work. Moreover, I note the applicant reported in his SHEV application that he worked doing construction work in the Jaffna District from 2009 until his departure to Australia in September 2012. There is no information before me to indicate the applicant would not be able to obtain employment and support himself on return to Sri Lanka, or that his capacity to subsist would be threatened.
30. On 10 April 2017 the applicant's representative provided a number of brief news articles, dated from 2014 to 2017, to support the applicant's claim for protection. The articles come from a variety of sources, and relate to a number of issues, including protests by relatives of

disappeared people in Jaffna, Jaffna University students killed by police, reports that Sri Lankan forces continue to operate with impunity, protests over redemption of land, reports of continuing white van kidnappings, and the Chief Minister for the Northern Province warning Sri Lankan Tamil returnees may be arrested on return. Although I have had regard to those articles, some of which post-date the January 2017 DFAT report, I consider the DFAT report is an authoritative and credible document providing current and cogent information on the situation in Sri Lanka, based on on-the-ground knowledge and discussions with a range of sources in Sri Lanka.

31. Country information indicates that during the conflict any alleged association with the LTTE appears to have been grounds for arrest. However, presently the focus of Sri Lankan authorities has changed to identify a more limited group who are subject to risk. Those at highest risk played a significant role in the LTTE's former leadership (combat or civilian) and/or former members of the LTTE who were suspected to have committed terrorist or serious criminal acts during the conflict, or to have provided weapons or explosives to the LTTE. Although DFAT confirms Sri Lankan authorities remain sensitive to the potential re-emergence of the LTTE throughout the country,² the country information that was before the delegate does not indicate that Tamils are currently at risk of persecution in Sri Lanka purely on account of their race, nor when they originate from, or reside in, an area previously controlled by the LTTE. Those reports no longer support a finding that Tamil ethnicity of itself imputes LTTE membership or a pro LTTE opinion, even when combined with other factors such as gender, age or place of origin. In the UK Home Office's opinion, simply being Tamil does not give rise to a well-founded fear of persecution or serious harm warranting international protection. Neither, in general would a person who evidences past membership or connection to the LTTE, unless they have or are perceived to have a significant role in it, or they are perceived to be active in post-conflict Tamil separatism and are a threat to the state.³ I have not accepted the applicant had any involvement with the LTTE, therefore, the applicant does not fit this profile.
32. DFAT assesses that monitoring and harassment of Tamils in day-to-day life has decreased significantly under the Sirisena Government. The Sri Lankan police are now responsible for civil affairs across Sri Lanka. While a sizeable (and largely idle) military presence remains in the north and east, armed forces personnel are generally restricted to their barracks. While some cases of monitoring continue to be reported, such as the military or police observing public gatherings or NGO forums, the overall prevalence of monitoring has greatly reduced. 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. DFAT further assesses that Sri Lankans of all backgrounds generally have a low risk of experiencing official discrimination as there are currently no official laws or policies that discriminate on the basis of ethnicity, including in relation to access to education, employment or access to housing. 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.⁴

² DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105

³ UK Home Office "Country Policy and Information Note Sri Lanka: Tamil separatism", Version 4, 31 March 2017, CISED50AD3779

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

33. Although most country information supports that there has been progress towards alleviating the climate of fear in Sri Lanka, opinions differ markedly about the extent of that progress. The UN Special Rapporteur on Torture, in his December 2016 report on Sri Lanka, noted the fragility of the reform process and that the country is at a critical moment in its history in terms of setting up the necessary mechanisms to remedy its past large-scale human rights violations and prevent their recurrence.⁵ I am satisfied the situation for Tamils in Sri Lanka has significantly improved since the applicant departed in 2012, and that the Sirisena government is taking steps to address past discrimination and violence against Tamils, and the security situation in the North of Sri Lanka is greatly improved. I am not satisfied there is a real chance the applicant faces harm on his return to Sri Lanka based on his ethnicity or origins in the Northern Province, or on the basis of any imputed association with the LTTE.
34. The applicant was consistent in the claim that he departed Sri Lanka illegally in September 2012, with the assistance of a people smuggler, and I accept that to be the case. The delegate considered the chance of the applicant suffering harm on his arrival at Colombo airport or afterwards on account of him being a Tamil who has lived for periods abroad and returning as a failed asylum seeker who departed the country illegally.
35. Entry and exit from Sri Lanka is governed by the Immigrants and Emigrants Act 1949 (the I&E Act). Under the I&E Act it is an offence to depart other than via 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, which may be paid by instalment. In practice no returnee who was merely a passenger on a people smuggling venture has been given a custodial sentence, and the usual result is a fine which can be paid by instalments.⁶
36. Information from DFAT indicates all involuntary returnees undergo checks on arrival in Sri Lanka, including by the State Intelligence Service and the CID. For those travelling on a temporary travel document, as would be the case for the applicant, investigation is undertaken to confirm identity, which often includes an interview, contacting authorities in their home area, and neighbours and family, and checking criminal or court records, a process that can take several hours. According to DFAT all returnees are treated according to standard procedures irrespective of ethnicity, and are not subject to mistreatment during processing at the airport. DFAT acknowledges they are aware of a small number of allegations of torture or mistreatment raised by asylum seekers who have returned to Sri Lanka, however the reports cannot be verified as many of the allegations were made anonymously, often to third parties, and sometimes long after the torture is alleged to have occurred. Since 2009 thousands of asylum seekers have been returned to Sri Lanka, from countries including Australia, and there have been relatively few allegations of torture or mistreatment. Therefore, DFAT assesses the risk of torture or mistreatment for the majority of returnees is low, and continues to reduce.⁷ The country information in the referred material indicates those returnees who are mistreated are predominantly people suspected of having substantial links to the LTTE, rather than relating to being a failed Tamil asylum seeker.⁸
37. I accept the Sri Lankan authorities may infer the applicant sought asylum in Australia due to the manner of his return. I accept some asylum seekers with actual or perceived links to the LTTE may be at risk of harm during arrival processing. I have found the applicant would not be

⁵ 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

⁶ DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

⁷ DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

⁸ Freedom From Torture, "Sri Lanka – Update on torture since 2009", 6 May 2016, CIS38A8012881; International Truth and Justice Project, "Silenced: survivors of torture and sexual violence in 2015", 7 January 2016, CIS38A801275

of adverse interests to authorities on his return to Sri Lanka, and I do not consider the applicant faces a real chance of harm for being a Tamil who sought asylum in Australia, or because he spent a period of time in Australia.

38. I accept that given his mode of departure, the applicant will be detained for a short period at the airport and face questioning. There is also a possibility he may be detained for up to several days in a prison. However, even 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,⁹ I do not consider a few days detention would constitute serious harm for the applicant, even taking into account the applicant's history with regard to any potential psychological vulnerability. I am also satisfied there is a real chance the applicant may incur a fine, however I do not consider imposition of a fine that can be paid by instalments, in this case amounts to serious harm. I do not consider a brief period of detention in the conditions described and the possible imposition of a fine, and questioning, together amount to serious harm.

39. Separately, I also note the country information does not indicate the processing and penalties the applicant may face as a result of his return and contravention of the I&E Act is discriminatory in nature or in its application. I am not satisfied it amounts to systematic and discriminatory conduct. On that basis also, I am not satisfied there is a real chance of persecution on account of him having departed Sri Lanka illegally.

Refugee: conclusion

40. I am not satisfied there is a real chance the applicant will suffer persecution, now or in the reasonably foreseeable future, as a result of his ethnicity as a Tamil, for originating from the Northern Province, due to any actual or imputed LTTE connection, as a result of his illegal departure from Sri Lanka, or because he claimed asylum in Australia, or any combination of these factors.

Complementary protection assessment

41. 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

42. 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.

⁹ DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105, p 30

43. I am satisfied the applicant will be identified on arrival in Sri Lanka as having departed illegally and he may be questioned, detained for a short period, and he may be fined. If the applicant is detained, it is possible that this may be in a Sri Lankan prison and he may be subject to poor prison conditions. I have taken into account the opinion of the applicant's social worker that the applicant is a vulnerable man, however, 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 his life or tortured during or as a result of this process. The evidence does not suggest that in the imposing such penalties and treatment there is any intention to inflict pain or suffering, severe pain or suffering or to cause extreme humiliation. I am not satisfied the treatment and conditions the applicant may face as a consequence of his illegal departure amount to cruel or inhuman treatment or punishment or degrading treatment or punishment.
44. I have otherwise found there is not a real chance the applicant faces any harm now or in the reasonably foreseeable future as a Tamil male from a former LTTE controlled area, or for his seeking asylum in Australia. As a 'real chance' equates to a 'real risk', I am also not satisfied there is a real risk of any harm, including significant harm for these reasons.

Complementary protection: conclusion

45. 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.