



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA17/03909

Date and time of decision: 30 July 2018 17:54:00
J Maclean, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Tamil Hindu, who was born in the Jaffna district of the Northern Province of Sri Lanka. He arrived in Australia as an unauthorised maritime arrival on 1 May 2013, and applied for a Safe Haven Enterprise Visa (SHEV) on 14 February 2017. A delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the Visa on 8 November 2017.

Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
3. On 4 December 2017 the IAA received additional information on behalf of the applicant, including a submission. To the extent the submission restates the applicant's claims, and engages in legal argument regarding the delegate's decision, it is not new information and I have considered it. The applicant argues that the delegate refused his application on 'grounds of his personal opinions and assumptions that he does not believe my claims'.
4. Also on 4 December 2017, the IAA received additional information on behalf of the applicant, being a copy of a United Nations High Commission for Refugees (UNHCR) card, and a Sri Lankan Tamil Refugees Organisation of [Country 1] card, in the applicant's name. Those documents were previously before the delegate, having been provided with the applicant's SHEV application, and are not new information.
5. I note the applicant received assistance from a solicitor/Registered Migration Agent to prepare his SHEV application and statement of claims. At the start of the SHEV interview the delegate advised the applicant of the importance of telling the truth and providing the department with complete and accurate protection claims during the interview. The delegate also referred to an information sheet titled "Important Information About Your Protection Visa Interview", which was provided to the applicant prior to the interview. When asked if he had read and understood the information sheet the applicant said 'yes'. The applicant's representative also provided a written submission after the SHEV interview.
6. The submission refers to two online media articles from The Guardian describing torture by the Sri Lankan police and security services, which were not before the delegate and are new information. Copies of the articles were provided with the submission.¹ The first article is dated 14 July 2017, prior to the delegate's decision. No explanation has been provided as to why this article could not have been provided prior to his decision, nor any explanation to support that this general country information about police behaviour may be considered credible personal information. The applicant has not satisfied me either of the matters in s.473DD(b) are met with regard to the first article. The second article is dated 9 November 2017 and, as the date of publication is after the delegate's decision, I am satisfied it could not have been provided before his decision. The article reports on claims by some Tamil asylum seekers in Europe of torture by the Sri Lankan authorities. Beyond noting the reports relate to Tamil men who said they were accused of working with the Tamil tigers, the article provides little detail of their

¹ Guardian (Australia edition)"Torture by Sri Lankan police routine, says human rights lawyer", 14 July 2017, CXC90406610469; The Guardian, " 'I want the world to know' - Tamil men accuse Sri Lanka of rape and torture ", 9 November 2017, CXC90406617359

circumstances. The article does not contain any specific reference to the applicant. There is other material that was before the delegate, dealing with the claims of continuing torture in Sri Lanka including during this period, and including a number of articles submitted with the post-SHEV interview submission. I am not satisfied there are exceptional circumstances to justify considering the second article.

7. Also provided with the submission is what is described as a 'Google Map image' of a road junction in the applicant's home village. The applicant refers to the Eelam Peoples Democratic Party (EPDP) and its leaders being very active in operation in the village, and the EPDP leader, [holding] an office in the [area] there. It is not apparent to me from the image when the photograph was taken, or the significance of the image to the applicant's claims for protection. The applicant made claims during the Arrival interview, in his SHEV application, and at the SHEV interview, that the EPDP were active in his home area, and that he was harassed and ill-treated by them. During the SHEV interview he noted that the EPDP had a camp in the village, but he did not suggest it was at the [particular location]. I do not consider the image materially adds to the applicant's claims, The applicant has not satisfied me either of the matters in s473DD(b) are met. In addition, I am not satisfied there are exceptional circumstances to justify considering the image.
8. The submission also contains a request for an interview so the applicant can 'explain everything again'. He is of the opinion the delegate failed to take into consideration most of his claims. Section 473DB(1) of the Act provides that subject to Part 7AA, the IAA must review a fast track reviewable decision without accepting or requesting new information and without interviewing the referred applicant. Section 473DC(2) further provides there is no obligation on the IAA to get, request or accept any new information including new information from an applicant in the form of an interview, although there is a discretion to do so. 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 the submission made after the SHEV interview. I am not satisfied in the circumstances of this application that an interview is required. Accordingly I have not invited the applicant to attend an interview.

Applicant's claims for protection

9. The applicant's claims can be summarised as follows:
 - He is a Sri Lankan citizen of Tamil ethnicity and Hindu religion, born in the Northern Province of Sri Lanka.
 - During 2002 to 2003 students at his school were taken for protests organised by the Liberation Tigers of Tamil Eelam (LTTE), and because he was [an active student] he was forced to be at the front.
 - The Sri Lankan Army (SLA) started to stop him on the way to and from classes, and questioned him about whether he was an LTTE supporter. He told them he did not have any links with the LTTE, but they refused to believe him.
 - His father was suspected of being an LTTE supporter. The SLA tortured his father severely in early 1990, and as a result he had problems which led to his death in 2004.
 - His brother and sister-in-law were LTTE members who left the LTTE when they married. His sister-in-law's siblings were LTTE members, two of whom were killed in combat.

- While studying he worked part-time in a [shop]. The shop did work for people whose children had been LTTE members and had died, [providing service for] the dead LTTE members. In 2005 the SLA found out the shop had been doing this, and came to the shop and questioned him, and took him to an army camp nearby. They told him not to do this work in the future. The applicant agreed he would not, and later was released with a warning.
- The LTTE continued to push him to do their [work], and the EPDP also ordered him to do work for them. Once he was also called to the SLA camp to do [more] work for them. The LTTE warned him not to do work for the SLA or EPDP.
- A couple of months later the shop was destroyed by EPDP members. He reported the incident to the local police who took no action, so the applicant approached the LTTE for help. The LTTE detained one of the people who destroyed the shop, who was the brother of an EPDP member. After this the EPDP harassed him, threatened to kill him, and would beat him badly. If any bombings happened in the area they threatened him.
- He feared for his life and asked his brother to send him overseas. His brother organised for him to go to [Country 1] through an agent, and he left Sri Lanka [in] May 2006. The agent took his passport and did not return it.
- He registered with the UNHCR as a refugee, attended one interview, and was granted refugee status in 2007.
- He left [Country 1] by boat in April 2013, and travelled to [another country] before leaving by boat to Australia.
- He fears if he is returned to Sri Lanka he will be abducted, tortured or killed by the EPDP or SLA, because of his ethnicity as a Tamil, his origin from a former LTTE-controlled area, because he is suspected of being an LTTE supporter, because of his and his families association with the LTTE, and because he is a failed asylum seeker. In addition, he will be forced to go through the rehabilitation process, where he would suffer significant harm.
- He will be unable to seek protection from the Sri Lankan authorities because it is the SLA he fears, and because police did not previously take any action against the SLA or EPDP, and Tamils are not protected in Sri Lanka.

Refugee assessment

10. 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

11. 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.
12. The applicant is an unmarried male who claims to be a Tamil Hindu born in the Jaffna District of the Northern Province of Sri Lanka. There is no issue regarding the applicant's identity, and I accept he is a Sri Lankan national from the Northern Province, and Sri Lanka is the receiving country for the purposes of the Act.
13. The applicant provided a consistent narrative about his early life in Sri Lanka. He lived in the Jaffna District of the Northern Province of Sri Lanka. Until he was [age] years of age he lived on an island off the north west coast of Sri Lanka. His father was [an occupation] who owned a [factory] there, and was an important man in the area. At the SHEV interview he described the Indian Army being in the area in 1987, and his father's factory and their home being burnt by the Indian Army and the SLA, and an incident during which his father was tortured by the SLA and the EPDP in the early 1990s, because he was suspected of being an LTTE supporter. When the family lived on the island his father provided financial support and food to the LTTE, as did other people in the area. His father was not able to work much after the incident. The applicant claims that his father died in 2004 as a result of nerve damage caused by being hit on the head with an axe during the incident, however his death certificate does not reflect that. When the applicant was [age] years old, in about 1991, because of the issues with the SLA, he moved with his family to a town on the mainland (M), about ten kilometres north of Jaffna City. At the Arrival interview the applicant described being displaced to [Town 1] during 1997 to 1998, however in his SHEV application, and during the SHEV interview he referred to that occurring in 1995, and moving back to M in 1996. I make no adverse finding regarding the differing dates regarding displacement of the applicant and his family, given the young age of the applicant at the time, and the distance in time, and I accept the applicant's account of his early life in Sri Lanka. I accept the applicant's father provided some support to the LTTE, and that he suffered torture by the SLA and/or EPDP. I also accept that he died in 2004, however in the absence of medical evidence to support the contention, I consider it is speculation on the applicant's part that the cause of death was related to the torture he suffered in the 1990s.
14. The applicant was consistent in claiming his brother and sister-in-law were LTTE members. At the SHEV interview he described his brother joining the LTTE while the family was in [Town 1] in about 1995, and to his brother doing [work] with the LTTE, and meeting his wife there. The applicant was unable to provide any details about his brother or sister-in-law's involvement with the LTTE, and noted he was very young at that time, and that his brother was only with the LTTE for a short period. In his statement of claims he notes both his brother and sister-in-law left the LTTE when they got married. The applicant was also consistent in claiming his sister-in-law's siblings were LTTE members, and that two of them were killed in combat. I accept the applicant's brother and sister-in-law, and his sister-in-law's siblings, were associated with the LTTE, and two of his sister-in-law's siblings died in combat. There is no credible information before me to support any of those family members held a high rank in the LTTE, or that they were other than ordinary LTTE members.

15. In his statement of claims the applicant described, during 2002 to 2003, school students being taken to protests organised by the LTTE, and because he was [an active student] he had to lead the class and be at the front. At the SHEV interview he described the LTTE people holding demonstrations regarding removing armed groups from the Jaffna Peninsula, and also because they did not want the army camp to be near the school. He indicated the LTTE put the school children on the frontline to act as a shield, and they would block to road, and also that the army and EPDP took photographs of him at the protests, and he has been stamped as an LTTE supporter. Because of his involvement with these activities the applicant claims the SLA and the EPDP started to give him problems in his daily life, stopping him for questioning on his way to and from school and work.

16. The applicant described a number of incidents involving the SLA and/or the EPDP. In his statement of claims he describes working part-time in a [shop], part-owned by his brother, while he was studying. The applicant was in charge of the shop, which employed a number of casual workers. Families of LTTE members came to the shop and asked him to [do work for] the dead LTTE members. He would [do certain work], as instructed to do so by the LTTE. After leaving school in 2003 the applicant worked full-time at the [shop]. In 2005 the SLA found out his shop had been [doing work for LTTE], and came to the shop and questioned him. The applicant was taken to the army camp and told not to do the [work] in the future, and later that evening the 'Grammer Sevagar' (GS), village officer, came and he was released with a warning. At the SHEV interview the applicant referred to the EPDP and the army giving him more trouble after December 2005. He said they took him to a camp, accused him of being an LTTE supporter, warned him not to [do such work], and kicked and pushed him, and that he was released after the GS was called. The applicant consistently described in his statement of claims, and at the Arrival and SHEV interviews, that the LTTE continued to push him to do their [work], the EPDP started ordering him to do their work, and once he was called to the SLA camp to do [work] for them. His statement of claims refers to an incident a few months after his release from the army camp when the EPDP destroyed his shop and he made a report to the local police, and when they took no action he reported to the LTTE. One of the people who destroyed the shop was the brother of an EPDP member, and the LTTE detained him, and after the incident the EPDP harassed him and threatened to kill him if there were any incidents, such as bombings, in the area. At the SHEV interview the delegate questioned the applicant about what he meant when he said the shop was destroyed, and the applicant said all the glass and everything was smashed on the last time they came. At the Arrival interview the applicant described two incidents when the EPDP stole from the shop, two to three months apart, but was otherwise generally consistent in describing the LTTE making it public that it was the EPDP leader's brother who had stolen from the shop, and because that person's name was ruined the EPDP threatened the applicant and he had to leave Sri Lanka. At the Arrival and SHEV interviews the applicant also referred to playing LTTE songs at the shop, and decorating vehicles on Remembrance Day.

17. At the SHEV interview the applicant described a further incident prior to the incident described above when he was taken to the army camp. The LTTE detonated a bomb or hand grenade at the junction near his shop, which was near the army camp, and the army fired their weapons. He and many other people who were in the area lay down in the street and 40 to 45 people were arrested and taken to the army camp. Most of the people were released within an hour, however the applicant and about seven other people, who were known supporters of the LTTE, were held for six or seven hours. During the detention the applicant was forced to kneel on the ground, and he was hit with the butt of a gun, he received a bruise, was unable to walk, and it 'had to be cut out'. At the Arrival interview the applicant described being taken for questioning if a bombing happened, and being beaten on the back and requiring an operation because of blood clotting.

18. Country information reports that after the 2002 ceasefire agreement the LTTE was allowed to re-open its political offices in Jaffna and in other government-controlled areas of the north and east, and that the LTTE and government structures operated side-by-side until at least 2006 when conflict resumed and LTTE offices in government-held areas were closed once more.² The applicant was roughly consistent in his description about his involvement with LTTE protests and doing [work] for them, and as a result coming to the attention of the SLA and the EPDP, and I accept that was the case. Taking into account the country information reports of monitoring, harassment arrest and/or detention of Tamils, particularly in the north and east,³ and the applicant's consistent reports of being subjected to questioning whilst he was in Sri Lanka, by the SLA and also by the EPDP, I am prepared to accept he was questioned on a number of occasions by Sri Lankan authorities during this period, or the paramilitary group, the EPDP. I also accept the applicant was mistreated on two occasions, when he was detained after a bomb blast near his shop, and when he was detained by the SLA and the EPDP on another occasion in 2005. I note there is no evidence to suggest the applicant was ever detained for more than a short period of time, or that he was ever charged with any offence, which I consider would have been the case if he had been suspected of having any significant involvement with the LTTE.
19. With regard to the applicant's claims regarding the EPDP, during the Arrival interview he was asked about the EPDP threatening him, and he said they came to the shop on numerous occasions and 'only threatened me they didn't do anything'. In his statement of claims the applicant said that after the LTTE detained the person who destroyed the shop 'the EPDP was harassing me. They would have threatened to kill me. They would beat me badly'. However, at the SHEV interview the applicant said they threatened his mother when he was not at home, and when asked if they harmed him he said 'before they do something to me I left that place'.
20. Country information describes the EPDP as being involved in political and paramilitary activities during the period 2002 to 2011, and that the paramilitary wing was reportedly involved in tit-for-tat killings and other acts of violence.⁴ The applicant claims he feared harm from the brothers of the person the LTTE detained and shamed, and from the EPDP, however that they could not harm him during the peacetime because the LTTE were in the area at the time. I reject that contention. The EPDP allied itself with the government and operated as a paramilitary outfit, supporting and working in coordination with the Sri Lankan military forces against the LTTE.⁵ The applicant described the EPDP being involved when he was detained by Sri Lankan authorities in 2005, which supports that the EPDP were active in the area, and had the support of the SLA, and is inconsistent with them being unable to take action against the applicant because of LTTE presence in the area. Although I accept the EPDP may have harassed the applicant, the applicant's evidence regarding the EPDP beating him was vague and inconsistent, unlike some of his other evidence, and I do not accept the applicant was beaten by the EPDP, other than on the occasions referred to above and in conjunction with the SLA. I do not accept that the brothers of the person who stole from his shop were prevented from taking any action against the applicant because of the presence of the LTTE. Given the brother's had an association with the EPDP, and taking into account the harassment the applicant describes from the EPDP, I consider those people had the opportunity to harm the

² Centre on Conflict, Development and Peacebuilding (CCDP) - Graduate Institute of International and Development Studies, Geneva, "An Institutional History of the Liberation Tigers of Tamil Eelam (LTTE)", CCDP Working Papers, 01 November 2014, CISA447F082828

³ DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105

⁴ Office of the United Nations High Commissioner for Human Rights, "Report of the OHCHR Investigation on Sri Lanka (OISL) (A/HRC/30/CRP.2)", 16 September 2015, CISEC96CF13358

⁵ Austrian Centre for Country of Origin & Asylum Research and Documentation (ACCORD), "Sri Lanka: COI Compilation", 31 December 2016, CIS38A80123251

applicant if they had wanted to do so, however they did not, which leads me to believe he was not risk of serious harm at that time. In addition, I do not accept the EPDP would have visited the applicant's mother and threatened her in circumstances where they knew where the applicant worked and, according to the applicant, had visited his shop on a number of occasions and harassed him there. I do not accept the EPDP, or people associated with it, visited the applicant's mother, or that they continued to attend his work premises.

21. The applicant reported a further incident during the Arrival interview that was not repeated in his statement of claims or during the SHEV interview. He said the EPDP came to his shop on numerous occasions and threatened him, and that the EPDP had a rule that the public should buy the [newspaper] because it heavily criticised the LTTE, however the LTTE said the public should not buy the paper. The applicant said he refused to buy the paper because his brother and sister-in-law, whose home he was staying in at the time, had purchased it, and the EPDP came to the shop and threatened him with a gun and forced him to buy all the newspapers, which he paid for from his salary. In the submission provided after the delegate's decision the applicant noted that some of the incidents were not repeated in his statement of claims because he explained it all at the Arrival interview, and a full repetition of everything cannot be expected. The applicant was not specific about when this incident occurred. I find it quite surprising the applicant did not mention this incident in his statement of claims, or during the SHEV interview, particularly in the circumstances where he was warned at the commencement of the interview of the importance of providing all information in support of his claims to the delegate. Nevertheless, taking into account the country information above about the EPDP operating with the support of the SLA, and having already accepted the applicant was subjected to harassment by the EPDP, I am willing to accept the applicant was subjected to the incident of extortion described.
22. Although I am satisfied the applicant was subjected to instances of detention and harassment by Sri Lankan authorities, I consider this was as a result of the troubling, but routine treatment of Tamils at that time, rather than resulting from any specific security concerns relating to the applicant. I note the applicant was able to leave Sri Lanka using his Sri Lankan passport, which I consider he would not have been able to do had he been of adverse interest to Sri Lankan authorities. Taking into account the country information, and the information before me, I am not satisfied the applicant was of interest to Sri Lankan authorities when he departed Sri Lanka. Although I accept there may have been instances where people associated with the EPDP harassed the application, I am not satisfied he was the subject of harassment by the EPDP at the time he departed Sri Lanka in 2006.
23. The applicant claims to fear harm from the SLA and the EPDP if returned to Sri Lanka. At the SHEV interview he said the EPDP are with the army at the moment, and they will arrest him and take revenge on him. When asked if he thinks they are still interested in him as a result of the incidents some years ago the applicant said people continue to ask his sister-in-law about him, and noted the last time was two to three months ago. He said the person who is angry with him has three brothers joined with the EPDP, and now there is no LTTE to protect him.
24. The 2010 Danish Immigration Service (DIS) report describes the EPDP as a pro-government paramilitary group that fought alongside the Sri Lankan Army against the LTTE. A leading human rights defender in Sri Lanka informed the DIS delegation the EPDP were the only paramilitary group operating in Jaffna at that time and that their activities were reduced after the security situation greatly improved in the aftermath of the elections in April 2010.⁶ The

⁶ Danish Immigration Service, "Human Rights and Security Issues concerning Tamils in Sri Lanka", 71, 1 October 2010, CIS19345

2015 report of the Office of the High Commissioner for Human Rights, indicated the EPDP continued to be active at that time, however it had become more politically oriented and won a number of parliamentary seats in the 1994 elections, becoming well established in the Jaffna District.⁷ The country information supports that there are no longer any active paramilitary groups operating in Sri Lanka, but acknowledges that some former members may be involved in criminal activities, including extortion and violence. The Sri Lanka senior analyst at the International Crisis Group noted the lack of hard evidence, and is of the opinion such activities do not appear to be the work of clearly identifiable groups.⁸

25. The applicant's evidence is that the EPDP, or people associated with the EPDP, have continued to make enquiries about him, even though he has not been in Sri Lanka since April 2006, over 12 years ago. Taking into account the nature of the incident the applicant described, that is reporting theft from, and damage to, his shop, and public shaming of a person, I am not convinced the EPDP, or those associated with them, would sustain the level of interest in the applicant over this period of time as a matter of revenge. I do not accept the EPDP continue to make enquiries about the applicant with his sister-in-law, or that the applicant is at risk of harm from the EPDP on return to Sri Lanka, now or in the reasonably foreseeable future.
26. With regard to the applicant's interactions with the UNHCR, the applicant consistently referred to registering with the UNHCR, and being interviewed whilst he was in [Country 1]. He provided copies of a UNHCR card (untranslated) showing his assigned UNHCR number, and a card from the Srilankan Tamil Refugee Organization of [Country 1], showing the date of issue of [October] 2012 with expiry date of [October] 2013. The applicant claims he was granted refugee status in 2007, however no documentation has been provided to support that, nor regarding the basis on which the assessment was made. I am prepared to accept the applicant's evidence that he applied for and was granted status as a refugee by the UNHCR in [Country 1], however I consider that has no material bearing on the current decision, which must be made taking into account the material before me.
27. The applicant did not claim to have suffered any discrimination or adverse treatment as a result of his Hindu religion, however the delegate considered whether the applicant was at risk of harm in Sri Lanka for the reason of his religion. DFAT reports a strong correlation between religion and ethnicity, with most Tamils being Hindu. The Sirisena Government has publicly declared its commitment to religious (as well as ethnic) reconciliation, and the constitution provides for freedom of religion. Religious holidays are recognised for a number of religions, and school students are able to study a number of religions, including Hindu. DFAT assesses that most members of religious groups in Sri Lanka are able to practise their faith freely. However, the risk of harassment or violence increases where practitioners attempt to proselytise/convert others.⁹ There is no information before me to indicate the applicant has ever engaged in activities such as proselytization or attempted any religious conversions, or that he intends to do so if returned to Sri Lanka. Taking into account the country information and the applicant's evidence, I do not accept there is a real chance the applicant will suffer harm as a result of his Hindu religion on return to Sri Lanka.
28. After the SHEV interview the applicant's representative provided a submission indicating the applicant fears if he is forced to return to Sri Lanka he is at risk of detention under the Prevention of Terrorism Act (PTA) because he will be perceived as an LTTE supporter, and

⁷ Office of the United Nations High Commissioner for Human Rights, "Report of the OHCHR Investigation on Sri Lanka (OISL) (A/HRC/30/CRP.2)", 16 September 2015, CISEC96CF13358

⁸ Austrian Centre for Country of Origin & Asylum Research and Documentation (ACCORD), "Sri Lanka: COI Compilation", 31 December 2016, CIS38A80123251, p 47

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

because he comes from an LTTE family, and that he will be forced to go through the rehabilitation process where he will suffer significant harm. In addition, due to his profile he will be harassed by authorities and will suffer significant economic hardship that threatens his capacity to subsist, and will be denied access to basic services. Along with the submission a number of media articles were provided which report on continuing abductions and torture perpetrated by Sri Lankan security forces, and the current security and human rights situation in Sri Lanka.

29. Credible sources, such as Freedom from Torture and the ITJP, and other sources reported in DFAT and UK Home Office reports, such as Amnesty International and Human Rights Watch, of ongoing arrests and mistreatment amounting to torture perpetrated by security forces and police in Sri Lanka, predominantly affecting Tamils, and I have had regard to this information.¹⁰ Such human rights abuses have primarily affected people with a real or perceived LTTE profile or anti-government or politically activist profile and refer to a very small number of people. The United States State Department reported in 2016 that arbitrary arrests and detention had decreased from 2014 and that the use of force against civilians by officials, although remaining a problem, was increasingly rare.¹¹ The HRCSL report from October 2016 to the UN Committee Against Torture reported that torture is 'routine [and] practiced all over the country, mainly in relation to police detentions'.¹² The UK Home Office reported in 2017 a number of sources indicating there had been an overall decline in torture; that violence to extract confessions was reported to be common in criminal investigations but was more prevalent in questioning of suspected LTTE members or supporters; the report also indicated that descriptions of torture were loose and varied from forceful questioning or threats to severe ill-treatment, particularly in PTA arrests, with the severity increasing in correlation to the perceived threat to national security.¹³ I take note of the DFAT assessment in the 2017 report, that the improvements in the security situation had resulted in a decrease in Tamils held in detention, and that under the more conciliatory Sirisena government torture in Sri Lanka, perpetrated by either military, intelligence or police forces, is not presently systemic or state-sponsored, and that the risk of torture from military and intelligence forces has also decreased since the end of the civil conflict. I am satisfied the DFAT report is an authoritative and credible document providing current and cogent information on the general situation in Sri Lanka at the current time.¹⁴
30. 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

¹⁰ Freedom from Torture, "Sri Lanka – Update on torture since 2009", 6 May 2016, CIS38A8012881; International Truth & Justice Project Sri Lanka ("ITJP"), "Silenced: survivors of torture and sexual violence in 2015", 7 January 2016, CIS38A801275; UK Home Office, "Country Policy and Information Note, Sri Lanka: Tamil separatism" version 4.0" March 2017, OGD6E7028822, citing Human Rights Commission Sri Lanka

¹¹ United States ("US") Department of State, "Sri Lanka – Country report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320

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

¹³ UK Home Office, "Country Policy and Information Note, Sri Lanka: Tamil separatism" version 4.0" March 2017, OGD6E7028822

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

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.¹⁵

31. In relation to the applicant's fear of harm resulting from any links to the LTTE, the March 2017 UK Home Office report notes that the focus of the Sri Lankan government has changed, and the focus is now not so much on identifying anyone with past LTTE links. The government's present objective is to identify those who pose a threat to the government or a unified Sri Lanka, through involvement with Tamil separatist activists in the country or through links to the Tamil Diaspora. Those former LTTE members most at risk are persons perceived to have a significant role, such as the LTTE's former leadership (either combat or civilian) and former members suspected of committing serious criminal acts during the conflict. The UK Home Office and DFAT have more recently confirmed the 2012 UNHCR position referred to in the DFAT report that simply being of Tamil ethnicity, or a Tamil from an area formerly under LTTE control, no longer gives rise to a need for international protection, the rationale being that almost every Tamil who resided in those areas during the conflict had some sort of connection with the LTTE.¹⁶
32. Credible country information reports the LTTE in Sri Lanka is a spent force, and that there have been no terrorist instances since the end of the civil war.¹⁷ DFAT also assesses the LTTE no longer exists as an organised force in Sri Lanka, and that any former LTTE members within Sri Lanka would have only minimal capacity to exert influence on Sri Lankans. However, DFAT confirms Sri Lankan authorities remain sensitive to the potential re-emergence of the LTTE throughout the country, and are likely to maintain intelligence on former LTTE members and supporters, and that high-profile former LTTE members would continue to be of interest to the authorities and subject to monitoring. Further, DFAT assesses that close relatives of high-profile former LTTE members who remain wanted by Sri Lankan authorities may be subject to monitoring.¹⁸
33. I am satisfied the situation for Tamils in Sri Lanka has significantly improved since the applicant departed in 2006, and continues to improve. I am satisfied the Sirisena government is taking steps to address past discrimination and violence against Tamils, and the security situation in the Northern Province is greatly improved. I accept Sri Lankan authorities remain sensitive to the potential re-emergence of the LTTE, and former members may be at risk of arrest, detention, prosecution, rehabilitation and/or monitoring by authorities. However, I note that during the SHEV interview the applicant indicated his brother, who according to the applicant is an ex-LTTE member, albeit for a short period of time, did not have any problems as a result of that involvement, such that he needed to leave Sri Lanka, and he continues to live in the Northern Province where he has a small shop doing [work]. I consider this is indicative that people with low level involvement with, and links to, the LTTE, such as the applicant, are not presently at risk of harm in Sri Lanka. The applicant has not indicated he was ever an LTTE member, and I am not satisfied any of his or his sister-in-law's relatives were ever high profile LTTE members. The applicant's own level of engagement with the LTTE was limited to forced

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

¹⁶ UK Home Office, "Country Policy and Information Note. Sri Lanka: Tamil separatism. Version 4.0", 31 March 2017, OG6E7028822; DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105

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

¹⁸ DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105

participation in protests, activities relating to Remembrance Day, and doing [work] for them. His encounters with the SLA and EPDP do not indicate he was considered to be a security threat. I consider the applicant's profile in relation to his LTTE links is very low,

34. With regard to the risk of detention under the PTA, country information reports that since the end of the armed conflict in April 2009, former LTTE combatants and LTTE members and many others suspected of having links with the LTTE have been demobilized and have gone through a "rehabilitation" programme. Under the Prevention of Terrorism Act (PTA) suspects can be held without charge for three-month periods, not exceeding a total of 18 months. DFAT reported that, at the time of publication, only one rehabilitation centre remained in operation, and that it housed approximately 50 ex-LTTE combatants.¹⁹ I consider the small number of detainees, who are ex-LTTE combatants, reflects there is no longer a systemic practice of detaining those suspected of any involvement with the LTTE, and only those with significant links to the LTTE are now at risk of detention under the PTA. I do not accept the applicant has such a profile.
35. With regard to the applicant's claim that due to his profile he will be harassed by authorities and suffer significant economic hardship that threatens his capacity to subsist, and he will be denied access to services, although I accept the applicant, having been absent from Sri Lanka for over ten years may face a period of re-adjustment on return to Sri Lanka, taking into account the country information before me, I am not satisfied he will be monitored or harassed, or that he would be prevented from earning a living, or that he will be discriminated against in relation to access to services, including as a result of any prior links to the LTTE or for being a returning Tamil. There is no suggestion in the information before me the applicant was unable to earn a living prior to his departure from Sri Lanka, despite the harassment he encountered from the SLA and EPDP. I also note the applicant's brother, who was an LTTE member, currently operates a shop in Sri Lanka. I am not satisfied the applicant would be unable to earn an income and sustain himself because of any harassment from authorities if he returns to Sri Lanka. There is no information before me to support a finding that the applicant would be denied services or that his capacity to subsist would be threatened. Overall, I do not consider there is a real chance the applicant will be subjected to harm on return to Sri Lanka, including monitoring and harassment, as a result of any family links to the LTTE, his ethnicity, or his residence in the Northern Province.
36. The applicant was consistent at the Arrival and SHEV interviews, and in his statement of claims, that he departed Sri Lanka legally in May 2006, using a Sri Lankan passport, and travelled to [Country 1]. In April 2013 he left [Country 1] by boat, and travelled to Australia. In the submission provided after the SHEV interview the applicant's representative states the applicant is at risk of harm on return to Sri Lanka, as a failed asylum seeker who departed Sri Lanka illegally. Taking into account the applicant's consistent evidence regarding his departure from Sri Lanka, I do not accept he departed illegally as stated in the submission but conclude he left Sri Lanka legally using a valid Sri Lankan passport.
37. 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

¹⁹ DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105

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. DFAT assesses the risk of torture or mistreatment for the majority of returnees is low, and continues to reduce.²⁰ The country information in the referred material indicates those returnees who are mistreated are predominantly people suspected of having substantial links to the LTTE, or to separatist activities such as criticising the government, rather than relating to being a failed Tamil asylum seeker.²¹

38. In the post-SHEV interview submission the applicant's representative notes that Tamils who return to Sri Lanka from overseas are under surveillance, and at risk of detention, especially those who were associated with the LTTE in the past or have a political opinion against the authorities. DFAT assesses that Sri Lankan authorities may monitor any member of the Tamil diaspora returning to Sri Lanka, depending on their risk profile. For example, individuals on the 'watch list', the electronic database including names of individuals Sri Lankan security services consider are of interest, including due to separatist or criminal activities, are not likely to be detained, but are likely to be monitored.
39. 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 am not satisfied the applicant would be viewed now as a person with links to the LTTE that would attract interest. I am satisfied the applicant's profile is such that the risk of him being monitored on return is remote. In addition, I do not consider the applicant faces a real chance of any harm for being a Tamil who sought asylum in Australia, or because he spent a period of time in Australia.

Refugee: conclusion

40. I am not satisfied the applicant has a well founded fear of persecution.
41. 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

42. 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

43. Under s.36(2A), a person will suffer 'significant harm' if:
- the person will be arbitrarily deprived of his or her life

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

²¹ 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

- 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.

44. I have found the applicant does not face a real chance of any harm now or in the reasonably foreseeable future because of his status as a Tamil Hindu who originated from the Northern Province, because of any association with the LTTE, for seeking asylum and residing 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.

45. .

Complementary protection: conclusion

46. 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.