



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA

IAA reference: IAA18/04340

Date and time of decision: 18 April 2018 14:22:00
Michael Simmons, Reviewer

Decision

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

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Tamil from Sri Lanka. On 6 February 2017 he lodged an application for a Safe Haven Enterprise Visa.
2. The delegate refused to grant the visa on 6 February 2018. The delegate accepted that he is a Tamil Hindu from the Northern Province, that he was forcibly recruited to the Liberation Tigers of Tamil Eelam (LTTE), and that he departed the country unlawfully. The delegate was not satisfied the applicant faced a risk of harm due to his ethnicity, originating from an LTTE controlled area, because of his involvement with the LTTE, or because he would return to Sri Lanka after having departed illegally and sought asylum.

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. The applicant's representative made submissions to the IAA on 2 March 2018 comprising a statement from the applicant witnessed by his representative. To the extent this statement contains legal arguments responding to the delegate's decision and reasserts claims that were before the delegate, I consider this does not constitute new information and I have considered it.
5. The statement also refers to media reports which were not before the delegate, dated 5 February 2018 and 1 March 2018.
6. In relation to the 1 March 2018 media report, the video notes that there are ongoing allegations of torture in Sri Lanka, and reports on two Tamils who were accused of being LTTE members that claimed to have been tortured in Sri Lanka since Sirisena came to power. The video was published after the delegate's decision and I am satisfied s.473DD(b)(i) is met. The information in this report reflects that contained in more detailed reports from various sources already before me, including reports specifically prepared for protection status determination purposes.¹ The report does not provide additional insight into the situation in Sri Lanka beyond what can already be ascertained from the information before me. As such I am not satisfied that there are exceptional circumstances that justify considering it.
7. The Practice Direction has not been complied with in relation to the 5 February 2018 report, as a copy of this report was not provided. The statement referring to this report was prepared with the assistance of a legal practitioner and migration agent who would be aware of the requirements of the Practice Direction. In these circumstances I have not accepted the report pursuant to s.473FB(5). In any event, even if I were to accept it, I am not satisfied that s.473DD(a) is met. The 5 February 2018 report appears to concern a gesture made by a Sri Lanka Officer in London. The applicant refers to the first media report as evidence of the "mentality of the Sri Lankan authorities". Based on what can be ascertained about this report, I am not satisfied that it is corroborative of such matters. It appears to be general in nature, and

¹ These include: International Truth & Justice Project Sri Lanka (ITJP), "Silenced: survivors of torture and sexual violence in 2015", 07 January 2016, CIS38A801275; DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED850AD105; UK Home Office, "Country Policy and Information Note, Sri Lanka: Tamil Separatism", version 4.0, March 2017, OG6E7028822.

not particular to the applicant's circumstances, I do not consider there to be exceptional circumstances to justify consideration of this report.

Applicant's claims for protection

8. The applicant's claims can be summarised as follows:

- The applicant is a Tamil Hindu. He has never married, and originates from [the] Northern Province of Sri Lanka. His parents and one [sibling] remain in Sri Lanka. His [other siblings] are residing in [various countries], his brother was found to be a refugee in [a certain country]. The applicant's cousin, who was an LTTE cadre, was accepted as a refugee in [another country]. During the war the applicant's family were displaced from [their hometown] due to fighting. The resided in [certain town] from 1997 to 2001.
- In 2007 the applicant was recruited to the LTTE. He was then assigned to [a] branch of the weapons manufacturing division. In this role he [details deleted]. Due to the diminishing number of cadre, in 2008 he was required to take part in combat in [District 1].
- In January 2009 the applicant returned to his parents who were also in [District 1]. In February 2009 they were captured by the army and taken to a [refugee camp].
- After around one month in the camp the applicant identified himself as belonging to the LTTE and surrendered to the authorities. He disclosed his LTTE membership and was transferred for rehabilitation.
- While in the rehabilitation centre he did not provide details about his role in the LTTE, saying instead that he was in a team which dug bunkers. He was interrogated about his involvement with the LTTE and subject to torture. He was repeatedly asked to identify other LTTE members. He was also questioned about the location of LTTE weapons stores. Other people detained with the applicant informed him that they had been shown his photo and asked whether he was a Tiger.
- The applicant was moved around a number of different rehabilitation centres. While in the [rehabilitation centre] he met 'K', a former member of his team in [a certain] branch. K advised the applicant that he had not told the authorities that he worked for the weapons manufacturing division, and that their former team leader, 'M', had been identified and killed.
- The applicant was released from rehabilitation in September 2011 due to pressure from the United Nations High Commissioner for Refugees (UNHCR). He went to live with his [parents]. The authorities continued to monitor him after his release. He had to report to the army camp regularly. The CID came to his house a number of times to question him, asking about question about arms dumping groups and other LTTE members.
- The applicant began working at a [location] near to his house. He was frequently stopped and questioned on the way to work.
- During this time the applicant met some former LTTE cadre who had also been through rehabilitation – 'AM', 'AL', 'P' and 'N'. They told the applicant that they were also being monitored and harassed by the authorities. They were shown they applicant's photo when they were being interrogated.
- The applicant's family decided it was not safe from him to remain in Sri Lanka and they made arrangements for him to depart. Following his departure the CID visited his parents' house, and they advised that the applicant was in Australia.

- After he left Sri Lanka, the applicant's parents told him that K was identified by the authorities and was taken away and had not been seen since. The applicant communicated with N through Facebook who told him that he had escaped to [another country]. N informed him that P and AL were killed by the authorities. Since arriving in Australia the applicant has tried to contact AM but has been unable to reach him, and fears he was also taken by the authorities.
- If he returns to Sri Lanka, the applicant fears he will be tortured, imprisoned, or killed by the authorities including the army and the CID. He is on the government Stop and Watch List, and he may be detained without reason under the Prevention of Terrorism Act (PTA).

Factual findings

9. The applicant has claimed throughout the protection visa process, and I accept, that he is a Tamil Hindu and from the Northern Province of Sri Lanka. As supported by the documentary evidence provided by the applicant, including his birth certificate and national identity card, I find that he is a Sri Lankan national and that Sri Lanka is his receiving country.

LTTE involvement and rehabilitation

10. I accept that the applicant was recruited to join the LTTE as claimed. The circumstances of the applicant's recruitment have been consistently reiterated and align with the country information before me, which notes the LTTE engaged in forced recruitment to bolster numbers, particularly towards the end of the war.² I accept that the applicant received training [and] that he worked in [a] branch of the weapons manufacturing division. The applicant was able to provide detailed and articulate responses when questioned about his role in the LTTE, and I accept that he was providing a truthful account. I also accept that towards the end of the war he engaged in combat for the LTTE as was required of him.
11. Sources including DFAT report that towards the end of the conflict a large number of LTTE members were arrested and detained by security forces following their surrender or capture, the majority of who were sent to government-run rehabilitation centres.³ The applicant has provided documentation to support his claim to have been subject to the rehabilitation program. This includes a Detention Attestation from the ICRC and a Reintegration Certificate from the Commissioner General of Reintegration. Both documents indicate he was released on 30 September 2011. In light of the information before me, I accept the applicant was detained, surrendered, subject to rehabilitation and was released as claimed.
12. The applicant alleges various instances of torture and abuse while in the rehabilitation centre. He provided a detailed account of his mistreatment to the delegate at interview. In 2012 the UNHCR reported on various sources that noted military intelligence and other security personnel were subjecting detainees in the north and east to interrogation, frequently including torture. These detainees were mostly persons suspected of LTTE connections.⁴ Sexual violence, including but not limited to rape, against Tamil men in detention was reported by

² Austrian Centre for Country of Origin & Asylum Research and Documentation (ACCORD) "Sri Lanka: COI Compilation", 31 December 2016, CIS38A80123251.

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

⁴ UNHCR, "Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012.

numerous sources, including cases perpetrated in the immediate post-conflict period.⁵ The US department of state noted that several released former combatants reported torture or mistreatment, including sexual harassment and abuse by government officials while in rehabilitation centers and after their release.⁶

13. The applicant's medical reports from his time in Australian immigration detention are before me. They do not indicate any disclosure of past torture or trauma. However, in a Mental State Examination Assessment conducted in April 2013, it is noted that the applicant indicated that he prefers not to focus on past issues and to look forward and not back, that he did not want to discuss any past torture and trauma issues, and he did not indicate that he had suffered any. The applicant indicated at the protection visa interview that he did not feel comfortable disclosing this past mistreatment at that time as he did not want to tell anyone that he was in the LTTE. I consider this to be a plausible explanation, particularly while the applicant was held in immigration detention. No subsequent evidence of support or treatment for any conditions purportedly relating to this mistreatment have been provided.
14. I have listened to the recording of the delegate's interview. The applicant presented as confident, articulate, had sound recollection of most aspects of his story and was forthcoming with detailed, relevant responses to the delegate's questions. Overall I found his oral evidence to be generally consistent and persuasive and I consider him to be a generally credible witness. He discussed many traumatic past events, including his experience of war and displacement, while remaining seemingly composed. However, I note that there was a significant contrast when he discussed his time in the rehabilitation centre. The applicant became noticeably emotional and upset when the delegate started this line of questioning. He struggled to provide detail about his mistreatment and requested that the interpreter and his representative leave the room before disclosing certain details to the delegate.
15. Country information indicates there was widespread torture and abuse in the rehabilitation centres, and the applicant has evidence that he was held in such centres for approximately 2.5 years. I accept the applicant was subject to torture as claimed. Particularly in the context of the applicant's otherwise persuasive and detailed oral evidence, I consider that the difficulties he had disclosing and discussing his mistreatment are consistent with the behaviour that may be expected from someone who is recounting past trauma.
16. The applicant suggests in his statement of claim that he did not disclose the true extent of his involvement in the LTTE while subject of interrogation in the rehabilitation centre, telling the authorities that he was a low level LTTE member responsible for digging bunkers. He also indicated that around 2 months before his release he met K, who told the applicant that their former team leader at the [branch] had been identified and killed, and that the two agreed not to tell the authorities the truth about their role in the LTTE.
17. I do however find it difficult to accept that during 2.5 years in the rehabilitation centres the authorities would not learn about his role in the [branch], particularly as have I accepted that the applicant was tortured and that he identified himself as an LTTE member for fear that his former colleagues would disclose his role in the organisation. DFAT assesses that the rehabilitation process was used to screen LTTE members through interviews, information provided by informants and other relevant information that demonstrated the depth of involvement, period of involvement and activities conducted.⁷ I note that in his statement of

⁵ UNHCR, "Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012.

⁶ US Department of State, "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320

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

claims the applicant indicates he was questioned about the location of LTTE arms dumping grounds while in the rehabilitation centre and following his release. This suggests that authorities had reason to believe he would have knowledge of LTTE weapons supplies. I consider that during the rehabilitation process the authorities had or acquired some knowledge of his role in the weapons manufacturing branch of the LTTE. Either due to disclosure from the applicant or his former colleagues, noting the coercive interrogation tactics used and their extensive intelligence gathering efforts. Reports indicate that at the time of the applicant's detention the UNHCR was monitoring the rehabilitation process, conditions in the rehabilitation centres and the number of releases.⁸ In these circumstances I am prepared to accept that his release may have been at least in part due to pressure from international bodies including the UNHCR.

Post release harassment and monitoring, dealings with LTTE acquaintances

18. The applicant claims to have been subject of monitoring and harassment by the authorities following his release from the rehabilitation centre. He was required to report to a nearby army camp, and the CID visited him at home and would stop in him the street. Country information indicates that released rehabilitees were subject of a regime of regular and tight surveillance and some were pressured to act as informants.⁹ Rehabilitated persons were under surveillance for years after their release, were frequently harassed and threatened, and often forced to report to a police station or military post at regular intervals, where they were frequently threatened and ill-treated.¹⁰ There were also reports of the re-arrest of some ex-detainees in the period after the war.¹¹ Reports suggest that the extent of monitoring was determined by the local commander's personal discretion, but may include home visits, reporting to camps and summoning to meetings.¹² I accept that the applicant was subject to monitoring and harassment after his release, including being questioned and beaten by the CID. The applicant has provided a consistent and plausible narrative on this matter which accords with the country information before me.

19. I am prepared to accept that as part of the ongoing harassment and monitoring he was asked about the location of LTTE weapons. However, I am not satisfied that the CID officers asked him to perform an illegal weapons transaction for the Karuna group in order to 'trap' him and arrest him again. During this time country information indicates that the CID and certain paramilitary groups frequently acted outside of the law.¹³ In the east and north particularly, intelligence and other security personnel, sometimes working with paramilitary groups, were responsible for undocumented detention and interrogation of civilians accused of LTTE connections.¹⁴ In this context, it would seem unnecessary to concoct such a scheme in order to arrest the applicant. The applicant has did not indicate how he knew this was their intention, and in light of all the evidence I do not consider such a scheme plausible.

⁸ Danish Immigration Service "Human Rights and Security Issues concerning Tamils in Sri Lanka", 1 October 2010, CIS19345.

⁹ International Crisis Group, "Sri Lanka's North : The Denial of Minority Rights, Asia Report No 219, 16 March 2012, CIS22742.

¹⁰ 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', Office of the United Nations High Commissioner for Human Rights, 22 December 2016, CIS38A80123313.

¹¹ Landinfo, "Sri Lanka: Human rights and security issues concerning the Tamil population in Colombo and the Northern Province", 1 December 2012, CIS25286.

¹² Landinfo, "Sri Lanka: Human rights and security issues concerning the Tamil population in Colombo and the Northern Province", 1 December 2012, CIS25286.

¹³ ACCORD, "Sri Lanka: COI Compilation", 31 December 2016, CIS38A80123251.

¹⁴ US Department of State, "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320.

20. The applicant indicated that after his release he was contacted by a number of former LTTE members known to him, AM, AL, P and N. These people had also been through the rehabilitation process, including some who were held in [Prison]. They advised that they were shown the applicant's photo during interrogations and asked to identify him. I am prepared to accept this occurred as the applicant has consistently reiterated this claim, and country information indicates rehabilitees were frequently asked to identify other LTTE members.
21. As I consider the applicant to be generally credible, it is plausible and I am prepared to accept that the applicant learned that K, P and AL were detained and killed by the authorities after he left Sri Lanka. In light of this I consider that there is a real possibility that further information about the applicant's involvement in the LTTE has become known to the authorities since his departure.

Illegal departure

22. I accept that the applicant left Sri Lanka by unofficial means as claimed, contrary to Sri Lankan law including the *Immigrants and Emigrants Act 1949* (I&E Act). I am satisfied that the Sri Lankan government may assume that, due to his mode of departure, the applicant sought asylum from Sri Lanka in Australia. I find that if he were to return to Sri Lanka he may be identified as a returning asylum seeker.
23. The applicant indicated at the protective visa interview that following his release he was regularly required to report to a nearby army camp, and that he was frequently called for questioning. He also gave evidence at interview that the authorities told him not to leave the country because they are monitoring him. Reports before me indicate that rehabilitated persons were monitored by the government, sometimes for years after their release, and often forced to report at regular intervals.¹⁵ In light of this, I am prepared to accept that by leaving Sri Lanka the applicant breached his reporting obligations and contravened instructions not to depart the country.

Refugee assessment

24. 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

25. 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

¹⁵ 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', Office of the United Nations High Commissioner for Human Rights, 22 December 2016, CIS38A80123313.

- 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.
26. On the situation in Sri Lanka generally, the US Department of State reported in 2015 of continuing human rights problems including harassment, arbitrary arrest, detention and torture of civil society activists, journalists, and certain LTTE sympathisers. However, both the US Department of State and more recently DFAT, identify more recent positive developments for Tamils in Sri Lanka, both politically and socially. These include decreases in monitoring and harassment of Tamil civilians, less restrictions on internal movement, the removal of checkpoints in the north and east, the return of land occupied by the military, increased Tamil participation in the police forces, greater representation for Tamils in all levels of government. DFAT also observed that there were no official laws or policies that discriminate on the basis of ethnicity, including in respect of education, employment or housing. It nevertheless has indicated that certain persons remain at risk.
27. In January 2017, DFAT assessed that those at highest risk of monitoring, arrest, detention or prosecution by authorities include high profile former LTTE members, including persons suspected of having provided weapons or explosives to the LTTE and people closely linked to such individuals.¹⁶ I have accepted that the applicant worked in [a] division of the weapons manufacturing branch of the LTTE and I accept that he was privy to sensitive information concerning LTTE weapons supplies and stores. I consider that the nature of his work and his access to sensitive information means that his role will be viewed as above that of an ordinary LTTE cadre. In accordance with DFAT's assessment, the applicant's involvement in the LTTE weapons supply chain means he will be of a higher profile of interest to the Sri Lankan authorities.
28. Country information indicates that the rehabilitation process was used to screen high-profile from low-profile LTTE members through interviews, information provided by informants and other relevant information that demonstrated the depth of involvement, period of involvement and activities conducted.¹⁷ The length of time the applicant spent in the rehabilitation program suggests he was of considerable interest to the Sri Lankan authorities. Reports before me suggest generally it was a one year program.¹⁸ I have accepted that the applicant was subject to rehabilitation from May 2009 to September 2011 as claimed, a period of approximately 2.5 years. I note that he did complete the rehabilitation program and was issued a reintegration certificate.
29. In 2016, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment expressed concern that rehabilitated persons continue to be kept under surveillance by government agents years after their release, and are frequently harassed and threatened. They are often still forced to report to a police station or military post at regular

¹⁶ DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105.

¹⁷ DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105.

¹⁸ UK Home Office, "Country Policy and Information Note, Sri Lanka: Tamil Separatism", version 4.0, March 2017, OG6E7028822; The Country Report on Terrorism 2015 by the United States Department of State, extracted in ACCORD, "Sri Lanka: COI Compilation", 31 December 2016, CIS38A80123251; Danish Immigration Service "Human Rights and Security Issues concerning Tamils in Sri Lanka", 1 October 2010, CIS19345.

intervals, where they are frequently threatened and ill-treated and, in some instances, arbitrarily detained and subjected to torture, including sexual torture.¹⁹ Subsequently, DFAT reported in January 2017 that monitoring of Tamils generally had diminished under the Sirisena Government, however it did not comment specifically on the monitoring of rehabilitees.

30. While the UK Home Office maintains that generally, past LTTE connection would not warrant protection unless the person is perceived to have a significant role in relation to post-conflict separatism, it nonetheless indicates that there were recent reports that security personnel continued to be responsible for the detention and abuse of civilians accused of LTTE connections and that perceived LTTE-sympathisers continue to be intimidated, harassed, arrested, detained and tortured.²⁰ There have also been reports of arrests of ex-LTTE members returning to Sri Lanka from abroad, despite having already undergone rehabilitation and been released.²¹
31. While DFAT assesses that incidence of torture have reduced over recent years, it also notes that torture may still be used by police as part of regular criminal investigations, particularly when the accused is a perceived threat to national security. This would appear to encompass those former LTTE members who remain of concern. DFAT also notes that numerous organisations reported on the ongoing use of torture in recent years, notably in relation to police investigations and detention.²²
32. DFAT reports that upon arrival returnees to Sri Lanka are processed by agencies including the Department of Immigration and Emigration, the State Intelligence Service and the CID, who check travel documents and identity information against immigration databases, intelligence databases and the records of outstanding criminal matters. As a rehabilitee, the applicant's name will very likely be on a watch list.²³ As the applicant departed Sri Lanka without a passport, it is probable any return travel to Sri Lanka would be undertaken on a temporary travel document. Country information indicates a returnee using a temporary travel document is very likely be questioned upon return, that his family may be contacted and that checks may be undertaken with police in his home area. I am satisfied that in the course of these investigations there is a real chance the authorities will be alerted to the applicant's involvement with the LTTE, in particular his role in [a] branch of the weapons manufacturing unit where he was privy to sensitive information, and that he was subject to rehabilitation for around 2.5 years.
33. The UK Home Office policy summary notes that while each case must be considered on its own facts, a person who is known to the authorities, including for being on a 'watch' list, is likely to be at risk of ill-treatment whilst in custody which may amount to persecution or serious harm.²⁴ In considering the circumstances of this particular applicant, I am satisfied on that he may be regarded an LTTE member with a significant profile, given he worked for the weapons

¹⁹ 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', Office of the United Nations High Commissioner for Human Rights, 22 December 2016, CIS38A80123313.

²⁰ UK Home Office, "Country Policy and Information Note, Sri Lanka: Tamil Separatism", version 4.0, 19 March 2017, OG6E7028822.

²¹ UK Home Office, "Country Information and Guidance. Sri Lanka: Tamil separatism", version 4.0, 19 March 2017, OG6E7028822.

²² DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105.

²³ UK Home Office, "Report of a Home Office Fact-Finding Mission Sri Lanka: treatment of Tamils and people who have a real or perceived association with the former Liberation Tigers of Tamil Eelam (LTTE)", 31 March 2017, OGD7C848D112.

²⁴ UK Home Office, "Country Information and Guidance Sri Lanka: Tamil separatism", version 4.0, 19 March 2017, OG6E7028822.

manufacturing unit and handled information concerning weapons supplies. Noting that DFAT assess the authorities continue to pursue persons involved with the supply of weapons, I am satisfied that any information about his role obtained after his departure from Sri Lanka exposes him to a chance of further adverse attention. I consider it relevant that he was subjected to an extended period of rehabilitation and considerable monitoring post release. He continued to be of adverse interest to the authorities at the time of his departure, noting the CID enquired about him at his family home after he left. It also appears that he departed while subject to ongoing reporting obligations, and in contravention of instructions not to leave the country. His illegal departure in these circumstances will give further cause for scrutiny and retribution by the authorities on return. In light of his significant LTTE profile, I consider that the status as of his brother and cousin as refugees within the Tamil diaspora will contribute to heightened interest in the applicant. Considering these factors cumulatively, I am satisfied that there is a real chance he will face additional questioning, interrogation and prolonged detention by the Sri Lankan authorities on his return beyond the standard procedures which apply for returnees.

34. Having regard to the country information concerning the mistreatment of certain Tamils with real or suspected LTTE connections while in custody, including after returning to Sri Lanka from overseas I am satisfied that the applicant faces a real chance of significant physical mistreatment during detention or interrogation on return. I find that this constitutes serious harm as defined in s.5J(5) of the Act. I find that the conduct of the authorities in inflicting such harm is systematic and discriminatory for the reasons a political opinion imputed to him because of his actual or suspected connections with the LTTE.
35. I am satisfied that there is a real chance that the applicant will be subject to treatment that amounts to serious harm. I am satisfied that this harm would be inflicted on the applicant for the essential and significant reason of his political opinion. As the harm would be inflicted by the Sri Lankan authorities who control the entirety of the country, the real chance of harm relates to the whole of the receiving country.
36. As the real chance of persecution is from the authorities who exercise control over all of Sri Lanka, effective protection measures are not available to the applicant. I find that in the circumstances of this matter, the applicant could not take reasonable steps to avoid the real chance of persecution. The qualifications in s.5J(2) and s.5J(3) do not apply.
37. I am satisfied the applicant has a well founded fear of persecution pursuant to s.5J(1).

Refugee: conclusion

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

Decision

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

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

Applicable law

Migration Act 1958

5 (1) Interpretation

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly

...

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.