



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA18/04998

Date and time of decision: 16 November 2018 17:37:00
R Adolphe, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicant claims to be a Tamil from the Eastern Province of Sri Lanka. He arrived in Australia [in] November 2012, as an unauthorised maritime arrival. On the 28 September 2017 he lodged a valid application for a Class XE, Subclass 790 Safe Haven Enterprise Visa (SHEV).
2. A delegate of the Minister for Immigration refused to grant the visa on 16 May 2018. The delegate accepted the applicant was a Tamil Hindu from the Eastern Province, however, the delegate was not satisfied the applicant was a person in respect of whom Australia has protection obligations.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. On 9 July 2018 the applicant's legal representative provided a written submission to the IAA. To the extent that the submission reiterates information already before the delegate and argues with the delegate's decision, I am satisfied it is not new information and I have had regard to it.
5. The submission also provides new information, namely the Department of Foreign Affairs and Trade (DFAT) Country Information Report Sri Lanka¹ which was published on 23 May 2018, which was after the delegate made his decision on the visa application. The submission argues that the earlier 2017 version of the same report was relied upon by the delegate in his decision and as the 2018 report contains crucial and supporting information for the applicant's case. Noting the reliance placed on the previous version of the report and that it provides a more current view of the situation in Sri Lanka, I am satisfied that it could not have been provided to the delegate before the decision was made and that there are exceptional circumstances to justify the consideration of the new information.
6. On 31 October 2018 the IAA received an additional submission from the applicant's legal representative informing of recent political events in Sri Lanka which it argues is relevant to the applicant's circumstances. It provides reference to the following articles which report on the political climate in Sri Lanka:
 - "Sri Lanka's Tamils are at imminent risk after Rajapaksa's return", Al Jazeera, 29 October 2018;
 - "Sri Lanka crisis: One dead minister's bodyguard fires at crowd", BBC News, 28 October 2018;
 - "Sri Lanka: Political Turmoil puts Rights at Risk", Human Rights Watch, 27 October 2018;
 - "Sri Lanka crisis: Fears of a 'bloodbath' in power struggle", BBC News, 30 October 2018;
 - "Media Release: Freedom from Torture response to Rajapaksa attempt to seize power", Freedom from Torture, 29 October 2018.

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

7. I am satisfied that the articles and the recent political information regarding Sri Lanka post-date the delegate's decision and could not have been provided before a decision was made. I am also satisfied that significant changes to the political landscape in Sri Lanka are particularly relevant to the review applicant who has presented claims of political opinion and that these are exceptional circumstances to justify their consideration. I am satisfied s.473DD is met.

Applicant's claims for protection

8. The applicant's claims can be summarised as follows:
- He was detained, threatened and beaten for [number] months by the LTTE after the 2004 tsunami disaster because he had refused to join.
 - He worked as an [Occupation 1] for Liberation Tigers of Tamil Eelam (LTTE) and also [did specified work].
 - At the time that the Karuna Group was formed, split from the LTTE and aligned with the government the applicant ceased working for the LTTE as an [Occupation 1].
 - A LTTE member threatened to kill the applicant unless he [did work for the LTTE].
 - The Tamil Makkal Viduthalai Pulikal (TMVP) abducted the applicant and interrogated him about working for the LTTE and wanted him to identify other members. He was beaten and tortured until he lost consciousness. He woke up at a private hospital with his parents.
 - He was often rounded up by the Sri Lankan Army (SLA) and beaten on multiple occasions on LTTE suspicion. He withdrew from his studies.
 - He married his wife and lived with her and her parents in [City 1] to avoid the harassment in [City 2].
 - The TMVP located the applicant in [City 1] and between 2008 and 2012 would come to his house to interrogate him. They showed him photos of a LTTE member the applicant recognised who was shot dead a few days later.
 - He fled Sri Lanka and travelled to [Country 1] [in] June 2012. He was refused immigration clearance at [City 3 in Country 1] upon arrival and was deported back to Sri Lanka.
 - Upon return to Sri Lanka the applicant was held for two or three days and interrogated by the authorities. He told the authorities he had travelled to [Country 1] for a holiday and his family assisted in his release by paying a bribe. He went into hiding.
 - He started working for a Tamil National Alliance (TNA) candidate. He assisted in the election campaign by [doing specified work].
 - [In] August 2012, he was harassed by unknown people who told him not to put up the posters. That same evening, he received an anonymous phone call from a man who threatened to kill him if he continued working for the TNA. He fled to [City 1] and went into hiding.
 - He fled Sri Lanka illegally by boat with the assistance of people smugglers.
 - Since coming to Australia his wife has been questioned many times by the TMVP about the applicant's whereabouts. She has been forced to move residences many times. His mother has been questioned many times by men who may be Criminal Investigation

Division (CID) officers. He has also heard that a fellow TNA campaigner was shot and killed.

- He fears he will be harmed upon return as a person who has sought asylum in Australia.

Factual findings

9. The applicant provided copies of his birth certificate, marriage certificate and Sri Lankan National Identity card to evidence his identity. Personal particulars he has provided about himself including his name, date of birth, place of birth and citizenship has been consistent since the applicant arrived in Australia and I am satisfied the applicant's identity is as claimed. I accept that the applicant is an [age] year old Tamil male from Eastern Province of Sri Lanka, that he is a Sri Lankan national and that Sri Lanka is the receiving country for the purposes of this review.
10. The applicant claims to be married with [children]. His SHEV application form indicated he was married in 2008. He has provided a copy of his marriage certificate together with an English translation which stipulates the date of marriage was [in] 2012 and the location as [City 2]. When this inconsistency was put to the applicant he stated that he was not safe in 2008 so his marriage was not registered, however in 2012 people told the applicant it would be good for him to register the marriage and stated that it was after his child was born he legally married and had the marriage registered. However I note his son was almost [age] years old when he was legally married and I am not convinced his birth is the reason the applicant registered his marriage in 2012. I note his second son was born in [year] which was after the applicant had departed Sri Lanka for Australia. The applicant's written statement indicates, and is also reiterated in the IAA statement that his parents advised him to marry believing that his marital status would cease the interrogation and harassment by the TMVP. This reasoning is contrary to the applicant's claims of choosing an informal relationship from 2008, a period he claimed to be wanted on LTTE suspicion, rather than legally marrying his wife at this time to mitigate his risk. I accept the applicant legally married his wife three months before departing Sri Lanka for Australia and that he has [children]. I am not satisfied that he delayed the registration of his marriage on account of his and/or his wife's personal security or any reasons related to his profile.
11. The applicant claimed to fear harm as a person who was associated with the LTTE. He claimed that after being forcefully recruited by the LTTE in 2004, he worked as an [Occupation 1] until the defection of Colonel Karuna occurred and the paramilitary Karuna Group was formed. He claimed that he has experienced detention, beatings and torture on account of his LTTE links. Although country information indicates that the LTTE engaged in forced labour of Tamil civilians during the war and that those who held profiles of LTTE suspicion were targeted by the Sri Lankan authorities and paramilitary, aspects of the applicant's evidence regarding his own personal experiences raise significant concerns with regards to his credibility.
12. The applicant states in his written statement that whenever the Sri Lankan Army suspected the LTTE had killed someone he would be rounded up, interrogated and beaten many times by the Sri Lankan Army. It was on account of this treatment that he was forced to withdraw from his studies. The applicant's education history does not indicate that he withdrew from his studies but rather he has completed [number] years of school by the age of [age]. The applicant's claims regarding the multiple interrogations and beatings by the Sri Lankan army during his youth were somewhat general in nature and he provided no reasons as to why the Sri Lankan Army would specifically have been targeting him. It is plausible, and I accept, that

as a young Tamil male living in Eastern Sri Lanka during the war, the applicant may have been subjected to occasional questioning by authorities, for example when passing through security checkpoints. However, I am not satisfied the applicant was targeted by the Sri Lankan Army on suspicion of actual LTTE involvement.

13. The applicant claimed that it was after the tsunami occurred on 24 December 2004 that he was approached to join the LTTE. He stated in his written evidence that he refused to join as he was the only one supporting his wife and his father. The applicant claimed that on refusal to join he was detained and kept in a [place] for [a few] months. He was beaten and threatened that if he did not cooperate with them he would be killed and thrown into the forest. He told the delegate that he was refused food and water and the ground in the [place] was uneven. It was on account of these conditions that he eventually agreed to assist the LTTE, however he refused to carry weapons and told them he would not fight so they allocated him as an [Occupation 1] on account of having [relevant qualification]. During the period he worked for the LTTE he would [do specified work] for them. He continued to perform this work until the Karuna Group formed and defected from the LTTE. He told the delegate at interview that after the split the Karuna Group aligned itself with the government and the LTTE fled and he did not have anything to do with them after this time.
14. I found there were a number of anomalies with the applicant's statements. Firstly, the applicant claimed that it was sometime soon after the tsunami in December 2004 that he was approached by the LTTE and refused to work for them. He claimed that he was supporting his wife and father at this time as a fisherman however the applicant's evidence indicates his wife was only [age] years old at the time and he did not claim to have married her in an informal capacity until 2008. Secondly, the applicant claimed that he was detained for [number] months, beaten, deprived of food and water, and threatened due to his refusal to work for the LTTE. Despite this treatment, when the applicant succumbed to the LTTE demands he was able to negotiate his position within the organisation as an [Occupation 1] and opted out of fighting in the war. I am not satisfied that a LTTE prisoner would be in a position to negotiate his role in their organisation nor opt out of combat had the LTTE required him to do this. I find the applicant's claim implausible. Finally, country information indicates that Colonel Karuna broke away from the LTTE in March 2004, which was [number] months before the December 2004 tsunami and before the applicant purportedly joined the LTTE. At interview the delegate put this timeline discrepancy to the applicant who reasoned that the Karuna Group had split from the LTTE in March 2004 but it was not until later that they joined the Sri Lankan government in fighting against the LTTE. The applicant's representative provided the same reasons for the inconsistency in a post interview submission and provided an article from [news broadcaster] in support of these claims². I am not satisfied that the article assists the applicant's claims. It states that it was in 2004 that Colonel Karuna defected and began fighting alongside government forces against the Tigers which is incongruent to the applicant's timeline of claimed events.
15. The applicant has claimed that during the time the LTTE were in combat with the Karuna Group and the Sri Lankan armed forces, he was working as a fisherman near [City 2] and was approached by a LTTE member to assist [in specified work]. He claimed that the LTTE member held a pistol to his head and demanded this assistance of him. He agreed to the demands and [did specified work]. At interview the delegate provided country information to the applicant that the Sri Lankan military defeated the LTTE in the Eastern province in mid-2007. The applicant confirmed that it was prior to this localised LTTE defeat in the east that he had been forced to [do specified work]. It is plausible, and I accept, that as a Tamil

² [Source deleted].

fisherman he was on one occasion prior to mid-2007 forced to [do specified work]. However, for the reasons mentioned above, I find the applicant's claims regarding further LTTE involvement implausible and his timeline incompatible with actual events documented by credible country information. I am not satisfied that the applicant was detained, beaten, tortured and forcefully recruited by the LTTE soon after December 2004. Nor am I satisfied that the applicant worked as an [Occupation 1] for the LTTE.

16. The applicant told the delegate that the incident [had] frightened him and he decided to give up fishing and started to work in [Occupation 2]. Whilst travelling to his [job] he was abducted by [number] TMVP members on motorcycles, taken to an [area]. He was interrogated, beaten and tortured. He lost consciousness and when he woke he was in a private hospital with his parents present. He remained in hospital for about [number] days. The applicant has not provided any other evidence of his stay in the private hospital. At interview he was asked to explain how his parents were able to establish his whereabouts to which he responded that some local people had seen him being abducted and reported this and the location of where he had been taken to his mother. She then went to the location and found him lying in a pool of blood. I am unconvinced by the applicant's responses. There was no suggestion that the abductors were followed and I do not accept that any onlookers to abduction would otherwise have had the knowledge of where the abductors were heading. Given my earlier findings regarding the applicant's LTTE involvement, I consider it highly questionable that the applicant was a person of adverse interest to the paramilitary group. I find the applicant has fabricated his claim of abduction and torture by the TMVP and his subsequent admission to hospital.
17. The applicant's written evidence indicates that he married in [City 1] and lived there with his wife's relatives from 2008 until 2012. He stated that his parents had advised him to marry because he would be at less risk from the TMVP. I consider that had this of been true, the applicant would have married legally and registered the marriage with the state at this time. He has claimed that after he had relocated to [City 1] the TMVP located him and came to his residence and interrogated him many times. He stated that they showed him photographs of LTTE members and asked if he recognised them. He claimed that on one occasion he was taken by the TMVP and questioned about whether he knew the identity of a [man]. The applicant told the TMVP that the man was a LTTE member he recognised from [an] office and a few days later he had heard that this same man's body was found shot dead in a cemetery. He told the delegate that after this incident he went into hiding and stayed at many places. The applicant did not mention in his written statement that he had identified a LTTE member that was later killed. Given he claimed at interview that this was the reason he then fled Sri Lanka for [Country 1] in 2012, I consider it a significant omission. I am unpersuaded by the applicant's evidence and I am not satisfied that the applicant was interrogated in [City 1] by TMVP and that he identified a LTTE member who was later killed.
18. The applicant has claimed that it was on account of this LTTE member who had been killed that he decided to flee Sri Lanka. He obtained a passport in his own name and flew from Colombo to [City 3 in Country 1] [in] June 2012. The applicant was refused immigration clearance in [City 3 in Country 1] and deported back to Sri Lanka. When asked how he had obtained the passport and what was the reason he was refused entry into [Country 1] the applicant became vague and evasive in his answers stating only that he did not know. I find it difficult to believe that the applicant would not recall how he obtained a passport or the reason the [Country 1] authorities had given for his refused entry. The applicant told the delegate that upon return to Sri Lanka he was detained for [number] days in offices some distance away from the airport. He claimed that the only reason he was released after [number] days was because his family members had paid a bribe requested of them by the

CID. There is credible information to indicate that bribery and corruption was prevalent in Sri Lanka³, however despite having given an otherwise detailed written statement the applicant had not previously mentioned that he had been detained by the authorities for [number] days upon return to Sri Lanka or that his family paid a bribe for his release. I consider this a significant omission and found his evidence regarding this event was otherwise unpersuasive. I accept the applicant departed Sri Lanka in June 2012 and was refused entry at the airport in [City 3 in Country 1] and was subsequently deported back to Sri Lanka. I do not accept the claims made at his SHEV interview that he was held for [number] days in a location near the airport and his family paid a bribe to the CID for his release.

19. After his deportation from [Country 1], the applicant claimed he lived in hiding. He told the delegate that upon his return he hid in many places in [City 1]. However, in conduct that does not sit easily with a claim of living in hiding, the applicant also claimed that he sought employment with the government upon return to Sri Lanka as he believed that such positions provided benefits to family members. He spoke to [an office holder], [Mr A] who agreed to assist him obtain employment with the government if he helped campaign for the TNA. Within the first week of performing his [duties] the applicant was threatened by men in a white van and when he returned home he received anonymous phone calls from unknown men threatening to kill him if he continued to campaign for TNA. On account of these incidents, the applicant claimed to have moved to [City 1] that evening, which is in direct conflict to his claim of having already moved after his deportation from [Country 1]. Furthermore, the applicant was unable to provide simple details regarding the party he campaigned for including the name of the party [Mr A] represented. The delegate explained to the applicant that the TNA is a coalition of political parties and is not a party itself and asked if he was able to name any of the parties within the coalition to which the applicant could not. The alleged campaigning for the TNA was mentioned by the applicant at the Arrival Interview in 2012 in which he stated that this political involvement was the reason he feared harm and left Sri Lanka. However, the applicant also stated at arrival interview that he feared harm from [a specified group] which he did not mention during the SHEV application. The applicant provided a letter from [Mr A] in support of his claims. The letter states that the applicant had worked for the victory of the TNA in two election [campaigns]. , I note that the applicant's evidence indicated that the campaign work he had conducted only consisted of [specified work] for one week in August 2012. The letter also stated that unidentified armed groups came to the applicant's house, questioned him, attacked him and tried to abduct him. These events do not align with the applicant's own claims. I am not satisfied the document is reliable and I afford it no weight in the applicant's claims.
20. The applicant provided two statements made by what appears to be a Justice of the Peace in February 2013 and the [Officer] in September 2013 post SHEV interview. The contents of their statements are near identical and declare that:
 - The applicant is a resident of [City 2];
 - He has had a number of confrontations and his life has fallen into danger because of his involvement in a political party;
 - Unidentified persons visited his house and threatened him;
 - He was unable to return to his house and fled the country.
21. I have significant concerns that the two statements allegedly made by two individuals at different times are identical. Further, the statements are extremely general in nature and do

³ International Crisis Group, "Sri Lanka: Tamil politics and the quest for a political solution", 1 November 2012, CIS24515

not appear to indicate that the author has any personal knowledge of the applicant or his circumstances. Critically, the events described in the statements are largely not reflective of the applicant's own claims, I am not satisfied the documents are reliable.

22. Also provided post SHEV interview is an "Extract from the Information Book of [City 2] Police Station" which confirms the applicant's mother attended the police station and lodged a complaint [in] 2017. The complaint states that "unidentified persons are coming in search of him" and that "his family is moving to different places". I note there is some consistency with the applicant's claims and the complaint in that he was being sought after and his family would often relocate residences. However, similar to the applicant's claims regarding being wanted and his family's movements, the information contained within the complaint is extremely vague. Moreover, this appears to be the only complaint made since the applicant departed Sri Lanka, some five years earlier despite having claimed that his mother had been visited by men seeking him out multiple times. I note also that although his mother's complaint was made prior to making his SHEV statement or attending his SHEV interview, the applicant did not otherwise mention that his mother had lodged this complaint in 2017 in either his written or oral evidence which is surprising given the complaint was recent. Given my concerns regarding the timing of the complaint, its lack of detail and the absence of reference to it or the events that may have led to it, I am not satisfied that the complaint reflects actual events.
23. Overall, I am not satisfied the applicant's other evidence is credible. I do not accept the applicant campaigned for the TNA in 2012 and that he was of adverse interest to the authorities, paramilitary groups or any political parties prior to departing Sri Lanka or since he has been living in Australia.
24. I also have substantial doubts that the applicant lived in [City 1] from 2008 to 2012 as he has claimed and suspect he lived in [City 2]. His SHEV application listed his employment history from 2009 to 2012 as an [Occupation 2] in [City 2] for an [employer]. The [City 2 Hospital] is also listed as the place of birth of his first [child] on the birth certificate provided by the applicant. I note that at interview the applicant informed the delegate that he had visited his newborn [child] in the [City 2] hospital on more than one occasion. The marriage certificate dated [in] 2012 also has [City 2] listed as the place of marriage. The delegate had similar suspicions regarding the applicant's residency and claims and reminded him that he had provided conflicting residential and employment history at the interview conducted on Christmas Island in 2012 (Arrival Interview). At this interview the applicant stated he had only ever lived at the one address in [City 2] since birth until departure in 2012. He also stated that he had only ever engaged in employment in [City 2]. An explanation for these inconsistencies (and the omission of his involvement in the LTTE and his problems with the TMVP) was provided in the applicant's written statement. It stated that a fellow asylum seeker on Christmas Island had told him that the Australian government were passing information onto the Sri Lankan government and he was afraid that he would be harmed as a result. At the SHEV interview he stated the non-disclosure of the information at arrival interview was to protect his family from harm in Sri Lanka. However, the applicant had claimed that prior to his departure from Sri Lanka his wife and child were already being targeted by paramilitary groups on account of his adverse political profile and were constantly on the move to avoid detection. I do not accept the applicant's reasons for his non-disclosure of information at arrival interview. I am not satisfied that the applicant resided in [City 1] or was in hiding there. Nor am I satisfied that his wife and children have ever been targeted by the paramilitary and have been forced to change residences on account of any such adverse interest.

25. Given the manner in which the applicant arrived in Australia, I am satisfied that he sought the assistance of people smugglers and departed Sri Lanka illegally by boat in 2012.
26. The applicant claimed in his written statement that plain clothed men he believed to be CID officers had visited his mother's house and questioned her regarding his whereabouts. At the SHEV interview he confirmed these CID visits had occurred many times. The applicant was extremely vague in relation to these purported visits by the authorities to his mother's house. Although the alleged visits are claimed to have occurred whilst the applicant was in Australia, I would expect the applicant to have some information of these events particularly as it directly relates to him and his claimed fear. In light of his evidence, and given my findings as to the applicant's credibility I consider his inability to divulge further details about these incidents is due to the applicant's fabrication of these events. I am not satisfied that the applicant's mother has been visited by the CID or anyone else on account of the applicant's whereabouts as he has claimed.
27. Also in his written statement is the claim that a fellow TNA campaigner named "J" was shot and killed by the TMVP for his political activities. He claimed that his family told him of J's death. The applicant has provided no other evidence to support he had an association with a person named J and that J had been killed and that this was on account of political activity. Nor has he provided any circumstances surrounding his death or when this occurred. Given my findings above regarding the applicant's political involvement and general credibility I am not satisfied that had a person named J been shot and killed for his political opinion that this has any bearing on the applicant's claims for protection.
28. The applicant stated on at least three occasions during the SHEV interview that if he did not receive a positive outcome from his SHEV application and he was forced to return to Sri Lanka that he would commit suicide. Two of the occasions he vocalised suicidal ideations to the delegate was in response to being provided adverse information regarding inconsistencies with his evidence. The applicant informed the delegate that he had met with health professionals and that they thought he had a mental illness. The applicant provided no medical reports or documentation to support this claim. I have had regard to the fact the applicant was, at the time of the SHEV interview and continues to be, incarcerated for committing a criminal offence in Australia. A submission to the IAA argues that the applicant's mental health, as well as his incarceration should have been given greater weight when evaluating his claims. With regard to his mental health, the IAA submission states that the applicant did not know how he could obtain reports from his doctors whilst in prison to present to the delegate for consideration. However, I consider that the applicant has had ample opportunity to provide evidence to support a mental health diagnosis. The applicant's legal representative at primary stage provided the delegate with a range of documentation to support the applicant's claims, yet no evidence relating to his mental health was provided. I note also that he is represented for this review and yet still no supporting documentation regarding his mental health has been submitted. On the evidence before me I am not satisfied that the applicant is suffering from a mental health illness.

Refugee assessment

29. Section 5H(1) of the Act provides that a person is a refugee if, in a case where the person has a nationality, he or she is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or in a case where the person does not have a nationality—is

outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Well-founded fear of persecution

30. Under s.5J of the Act 'well-founded fear of persecution' involves a number of components which include that:
- the person fears persecution and there is a real chance that the person would be persecuted
 - the real chance of persecution relates to all areas of the receiving country
 - the persecution involves serious harm and systematic and discriminatory conduct
 - the essential and significant reason (or reasons) for the persecution is race, religion, nationality, membership of a particular social group or political opinion
 - the person does not have a well-founded fear of persecution if effective protection measures are available to the person, and
 - the person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour, other than certain types of modification.
31. I accept the applicant is a Tamil male from [City 1] in the Eastern Province of Sri Lanka. I accept that as a Tamil fisherman he assisted in [doing specified work] prior to 2007. However, I do not accept that the applicant had any further involvement with the LTTE nor do I accept that he worked for the TNA or held any pro-LTTE, Tamil separatist political profile. I do not accept that the applicant was being targeted by any members of paramilitary groups, political parties or any Sri Lankan civil or military authorities at the time he departed Sri Lanka.
32. Country information states that all persons living in LTTE controlled areas during the war, necessarily had contact with the LTTE and its civilian administration in their daily lives⁴. I accept that the applicant as a Tamil fisherman was forced to [do specified work] prior to 2007 when the LTTE were in combat in the area. The United Nations High Commissioner for Refugees (UNHCR) Guidelines also advised, at the time of the applicant's departure in 2012, that a person originating from an area that was previously controlled by the LTTE did not in itself result in a need for international refugee protection.⁵ More recently, in 2017 the UK Home Office generally assessed that in its opinion, international refugee protection was not necessarily owed to a person who evidenced past memberships or connection to the LTTE, unless they had or were perceived to have a significant role in it; or if they are, or are perceived to be, active in post conflict Tamil separatism and thus a threat to the state.⁶ I am not satisfied that the applicant did have a role of any significance with the LTTE or has been active in post conflict Tamil separatism.
33. The focus of the Sri Lankan government's concern has changed since the end of the civil war in May 2009.⁷ Sri Lankan authorities remain sensitive to the potential re-emergence of the

⁴ United Nations High Commissioner for Refugees (UNHCR), "Eligibility Guidelines for Assessing International Needs of Asylum Seekers from Sri Lanka", 21 December 2012, UNB0183EA8

⁵ Ibid

⁶ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism (version 5.0)", 15 June 2017, OG6E7028826

⁷ Ibid

LTTE throughout the country.⁸ The government is focussed on preventing both a resurgence of the LTTE or any similar Tamil separatist organisation and the revival of the civil war within Sri Lanka.⁹ The applicant had limited involvement with the LTTE, now more than a decade ago, and I am not satisfied he will be perceived as someone who had a significant role in the LTTE or who was engaged in post conflict Tamil separatist activities. Country information does not support that the applicant's residence in Australia in itself has imputed him with any anti-government or Tamil separatist behaviour.

34. The UK Home Office assessed in 2017 that being of Tamil ethnicity would not in itself in its opinion, warrant international protection.¹⁰ Overall, the country information indicates that the situation for Tamil in Sri Lanka has improved significantly since the applicant departed. In 2015, President Sirisena was elected on a platform of reform which included the curtailing of executive power, the reestablishment of independent commissions and the introduction of freedom of information legislation. These confidence building measures were implemented by the government to address grievances of the Tamil community.¹¹ The Tamil population have a substantial level of political influence and their inclusion in political dialogue has increased since the 2015. Tamil political parties are numerous, with the largest coalition of parties operating under the umbrella of the TNA, who currently hold 16 seats in parliament¹².
35. I have had regard to recent political events that have transpired in Sri Lanka regarding President Sirisena's decision to suspend parliament and appoint Mahinda Rajapaksa as the new Prime Minister¹³. These recent commentaries on the change to the federal government suggest that fears have emerged that Rajapaksa Prime Ministership will bring about a return to past abusive practices in the country. It is widely documented that it was under the previous Rajapaksa government that the brutal civil war came to end with military success but at horrendous human cost, attracting wide criticism from the international community.¹⁴ Many human rights violations that occurred under the Rajapaksa government were carried out against Tamil men and women that were perceived to have had links with the LTTE¹⁵. Whilst I accept that the Tamil community may have real concerns regarding the appointment of Rajapaksa to Prime Minister, the assertion that there is a general risk of Tamils being harmed is speculative and I am not satisfied that on the information before me that the applicant faces a real chance of harm as a Tamil male particularly given I have found he has no previous LTTE involvement beyond some brief forced assistance, was not a person of interest to the authorities under the previous Rajapaksa government or in the years following.
36. I am satisfied that when the applicant departed Sri Lanka he was not of adverse interest to the Sri Lankan authorities, paramilitary groups or any other person as a Tamil male from the

⁸ DFAT, "Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064

⁹ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism (version 5.0)", 15 June 2017, OG6E7028826

¹⁰ Ibid

¹¹ Ibid

¹² DFAT, "Sri Lanka – Country Information Report", 23 May 2018, CIS7B839411064

¹³ BBC, "Sri Lanka crisis Fears of a 'bloodbath' in power struggle", 29 October 2018, CXBB8A1DA37570; Human Rights Watch (HRW), "Sri Lanka: Political Turmoil Puts Rights at Risk", 27 October 2018, CXBB8A1DA37520; BBC News, "Sri Lanka Crisis: One dead minister's bodyguard fires at crowd", 28 October 2018; Al Jazeera, "Sri Lanka's Tamils are at imminent risk after Rajapaksa's return", 29 October 2018; Freedom from Torture, "Media Release: Freedom from Torture response to Rajapaksa attempt to seize power", 29 October 2018.

¹⁴ Centre for Land Warfare Studies (CLAWS), "How Sri Lanka Won the Fourth Tamil Eelam War", 20 May 2010, CX6A26A6E14488; Office of the United Nations High Commissioner for Human Rights (OHCHR), "Report of the OHCHR Investigation on Sri Lanka (OISL)(A/HRC/30/CRP.2)", 16 September 2015, CISEC96CF13358;

¹⁵ UN High Commissioner for Refugees, "Sri Lanka: Country of Origin Information Relating to the Targeting of Ex-LTTE members/Combatants", 3 February 2014, UN4E592C010

East. I am also satisfied that since the applicant departed Sri Lanka he has not been sought after by the Sri Lankan civil or military authorities or any associated paramilitary groups. I am not satisfied that either now or in the reasonable foreseeable future there is a real chance the applicant will face any harm on these bases.

37. It may be inferred or determined by the Sri Lankan authorities that the applicant, as a person who will be returning to Sri Lanka on temporary travel documents that he has sought asylum in Australia. Country information indicates that the Sri Lankan authorities follow a standard process for those returning on temporary travel documents irrespective of ethnicity or religion. Furthermore, DFAT understands returnees are not subject to mistreatment during the process¹⁶. Initially police will undertake an investigative process to confirm the identity of returnees. This involves interviewing the returnee, contacting the person's claimed hometown police, contacting the person's claimed neighbours and family, and checking criminal and court records. Once the returnee's identity is confirmed it will be checked against security databases that contain maintained lists of persons of interest by law enforcement agencies that have violated Sri Lankan law.¹⁷ Persons on the 'watch lists' are of interest to the authorities for minor offences or are former LTTE cadres; persons on the 'stop lists' are those who have committed serious crimes, have a warrant outstanding, or perceived to be connected to terrorism.¹⁸ There is no credible evidence to suggest the applicant's name would appear on either security lists.
38. In February 2017, the Sri Lankan Prime Minister stated publicly that failed asylum seekers from Australia would be welcomed back to Sri Lanka and the Sirisena government have publicly encouraged all Sri Lankans living overseas to return. Despite this positive government sentiment, DFAT have also reported that failed asylum seekers may face practical challenges on return to Sri Lanka. There is limited reintegration assistance available for failed asylum seekers and many returnees have difficulty finding suitable employment and accommodation. However, I note the applicant's wife and children as well as several other close family members continue to reside in the Eastern Province and there is no information to suggest that the applicant would not return to his family. I am also not satisfied on the information before me that the applicant would be denied employment upon return to Sri Lanka or that his capacity to subsist would be threatened.
39. Whilst the government has reportedly decreased systematic surveillance of returnees, DFAT is aware of anecdotal evidence of regular visits and phone calls by the CID to failed asylum seekers in the north as recently as 2017.¹⁹ However, the evidence does not suggest that this monitoring is occurring in the applicant's home province of the East. DFAT have also reported that in 2016 UNHCR conducted a survey of returnees to Sri Lanka which indicated only 0.3 per cent had security concerns following their return to Sri Lanka having sought asylum abroad.²⁰ DFAT further states that refugees and failed asylum seekers have reported social stigma from their communities upon return.²¹ The applicant has completed [number] years of education in Sri Lanka and is multi skilled in primary industry (fishing) and [Industry 1] and I am not satisfied as a returning asylum seeker he would be unable to find accommodation or employment in Sri Lanka. Furthermore, I am not satisfied that he faces a real chance of monitoring on return. I am not satisfied that any challenges with reintegration

¹⁶ DFAT, "Sri Lanka – Country Information Report", 23 May 2018, CIS7B839411064

¹⁷ Ibid

¹⁸ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism (version 5.0)", 15 June 2017, OG6E7028826

¹⁹ DFAT, "Sri Lanka – Country Information Report", 23 May 2018, CIS7B839411064

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

²¹ Ibid

the applicant may face as a result of having sought asylum (such as social stigma) constitutes serious harm.

40. I accept that the applicant departed Sri Lanka illegally by boat other than via an approved port of departure such as a seaport or airport and as such has committed an offence under the Immigration and Emigrants Act 1949 (I&E Act).²² Upon return to Sri Lanka it is likely that the authorities will suspect the applicant as someone who has committed this offence and he will be processed, charged and a penalty will be issued.
41. Those charged of illegal departure are transported from the airport to a Magistrate's court to have their matter heard. In certain circumstances where a magistrate is not available, for example, because of a weekend or public holiday, returnees may be held up to two days in an airport holding cell. Penalties for illegal departure under the I&E Act can include imprisonment up to five years and a fine of up to 200,000 rupees. In practice however, penalties are applied on discretion basis and in most cases only a fine is issued (which may be paid in instalments) often to act as a deterrent. According to the Sri Lankan Attorney-General's Department, no returnee who was merely a passenger on a people smuggling venture had been given a custodial sentence for departing Sri Lanka illegally.²³ The applicant has not claimed that he was involved in facilitating a people smuggling venture and as such do not consider that there is a real chance of a custodial sentence. If a returnee pleads guilty, they will be issued a fine (amounts can vary from AUD 25 to AUD 1,670) which can be paid in instalments and will be free to go. Those that enter not guilty pleas will usually be granted bail on the basis of personal surety or guarantee by a family member. DFAT notes that, while the fines issued for passengers of people smuggling ventures are often low, the cumulative costs associated with regular court appearances over protracted lengths of time can be high.²⁴
42. The applicant's wife and other family members in Sri Lanka and there is no evidence before me to indicate that they would not be able to act as his guarantor should he plead not guilty. Nor is there any evidence to suggest that the applicant would not be able to pay the fine or any associated court costs if relevant. I accept the applicant may be questioned and detained at the airport for processing by the CID for up to 24 hours and it is possible he may be further held in an airport holding cell for up to two days. The country information does not support that the enforcement of the I&E Act is discriminatory on its face or that it is applied in a discriminatory manner. I am satisfied that the provisions and penalties of the I&E Act are laws of general application and apply to all Sri Lankans equally. I am also satisfied that the questioning, temporary detention and the imposition of a fine or any associated court costs would not constitute persecution. I am not satisfied that the applicant faces a real chance persecution for his illegal departure in 2012.

Refugee: conclusion

43. 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).

²² Ibid

²³ Ibid

²⁴ Ibid

Complementary protection assessment

44. 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

45. Under s.36(2A), a person will suffer 'significant harm' if:
- the person will be arbitrarily deprived of his or her life
 - the death penalty will be carried out on the person
 - the person will be subjected to torture
 - the person will be subjected to cruel or inhuman treatment or punishment, or
 - the person will be subjected to degrading treatment or punishment.
46. I accept that as a person who has sought asylum in Australia the applicant may initially face some social stigma and reintegration challenges. The evidence does not suggest that there is a real risk the applicant will suffer the death penalty, arbitrary deprivation of life, or torture as a consequence of being a returning Tamil asylum seeker. I am not satisfied that the treatment the applicant may face amounts to pain or suffering that could be reasonably regarded as cruel or inhuman in nature, severe pain or suffering, whether physical or mental, or extreme humiliation, as required in the definitions of cruel or inhuman treatment or punishment or degrading treatment or punishment. I am not satisfied there is a real risk of significant harm on this basis.
47. I accept that upon return to Sri Lanka the applicant may be charged under the I&E Act as someone who has departed the country illegally. I accept that the applicant is likely to be questioned, fined and may possibly be briefly detained in an airport holding cell. If bail applies to the applicant there may be additional associated costs. I am not satisfied that there is a real risk the applicant will suffer the death penalty, arbitrary deprivation of life, or torture as a consequence of his unlawful departure. The evidence does not suggest that the treatment and penalties the applicant may experience for the offence are intended to inflict pain or suffering, severe pain or suffering, whether physical or mental, or are intended to cause extreme humiliation, as required in the definitions of cruel or inhuman treatment or punishment or degrading treatment or punishment. I am not satisfied there is a real risk of significant harm on this basis. I am also not satisfied that this treatment when considered in combination with the treatment he may face as a returning asylum seeker amounts to significant harm.
48. I have otherwise found that the applicant does not face a real chance of any harm as a consequence of being a Tamil male from the Eastern Province. As the real risk standard is the same as the real chance standard, I am not satisfied that the applicant faces a real risk of significant harm on this basis.

Complementary protection: conclusion

49. 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

In this Act, unless the contrary intention appears:

...

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

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

...

cruel or inhuman treatment or punishment means an act or omission by which:

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature; but does not include an act or omission:
 - (c) that is not inconsistent with Article 7 of the Covenant; or
 - (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

degrading treatment or punishment means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:

- (a) that is not inconsistent with Article 7 of the Covenant; or
- (b) that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

receiving country, in relation to a non-citizen, means:

- (a) a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or
- (b) if the non-citizen has no country of nationality—a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.

...

torture means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant; but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

5H Meaning of refugee

(1) For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a refugee if the person:

- (a) in a case where the person has a nationality—is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or
- (b) in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Note: For the meaning of ***well-founded fear of persecution***, see section 5J.

...

5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
 - (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
 - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
 - (c) the real chance of persecution relates to all areas of a receiving country.

Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.

Note: For effective protection measures, see section 5LA.
- (3) A person does not have a well-founded fear of persecution if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country, other than a modification that would:
 - (a) conflict with a characteristic that is fundamental to the person's identity or conscience; or
 - (b) conceal an innate or immutable characteristic of the person; or
 - (c) without limiting paragraph (a) or (b), require the person to do any of the following:
 - (i) alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith;
 - (ii) conceal his or her true race, ethnicity, nationality or country of origin;
 - (iii) alter his or her political beliefs or conceal his or her true political beliefs;
 - (iv) conceal a physical, psychological or intellectual disability;
 - (v) enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
 - (vi) alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.
- (4) If a person fears persecution for one or more of the reasons mentioned in paragraph (1)(a):
 - (a) that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and
 - (b) the persecution must involve serious harm to the person; and
 - (c) the persecution must involve systematic and discriminatory conduct.
- (5) Without limiting what is serious harm for the purposes of paragraph (4)(b), the following are instances of **serious harm** for the purposes of that paragraph:
 - (a) a threat to the person's life or liberty;
 - (b) significant physical harassment of the person;
 - (c) significant physical ill-treatment of the person;
 - (d) significant economic hardship that threatens the person's capacity to subsist;
 - (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
 - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.
- (6) In determining whether the person has a **well-founded fear of persecution** for one or more of the reasons mentioned in paragraph (1)(a), any conduct engaged in by the person in Australia is to be disregarded unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.

5K Membership of a particular social group consisting of family

For the purposes of the application of this Act and the regulations to a particular person (the **first person**), in determining whether the first person has a well-founded fear of persecution for the reason of membership of a particular social group that consists of the first person's family:

- (a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in paragraph 5J(1)(a); and
- (b) disregard any fear of persecution, or any persecution, that:
 - (i) the first person has ever experienced; or

- (ii) any other member or former member (whether alive or dead) of the family has ever experienced;

where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.

Note: Section 5G may be relevant for determining family relationships for the purposes of this section.

5L Membership of a particular social group other than family

For the purposes of the application of this Act and the regulations to a particular person, the person is to be treated as a member of a particular social group (other than the person's family) if:

- (a) a characteristic is shared by each member of the group; and
- (b) the person shares, or is perceived as sharing, the characteristic; and
- (c) any of the following apply:
 - (i) the characteristic is an innate or immutable characteristic;
 - (ii) the characteristic is so fundamental to a member's identity or conscience, the member should not be forced to renounce it;
 - (iii) the characteristic distinguishes the group from society; and
- (d) the characteristic is not a fear of persecution.

5LA Effective protection measures

- (1) For the purposes of the application of this Act and the regulations to a particular person, effective protection measures are available to the person in a receiving country if:
 - (a) protection against persecution could be provided to the person by:
 - (i) the relevant State; or
 - (ii) a party or organisation, including an international organisation, that controls the relevant State or a substantial part of the territory of the relevant State; and
 - (b) the relevant State, party or organisation mentioned in paragraph (a) is willing and able to offer such protection.
- (2) A relevant State, party or organisation mentioned in paragraph (1)(a) is taken to be able to offer protection against persecution to a person if:
 - (a) the person can access the protection; and
 - (b) the protection is durable; and
 - (c) in the case of protection provided by the relevant State—the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system.

...

36 Protection visas – criteria provided for by this Act

...

- (2) A criterion for a protection visa is that the applicant for the visa is:
 - (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee; or
 - (aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or
 - (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (a); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant; or
 - (c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (aa); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant.
- (2A) A non-citizen will suffer **significant harm** if:
 - (a) the non-citizen will be arbitrarily deprived of his or her life; or
 - (b) the death penalty will be carried out on the non-citizen; or
 - (c) the non-citizen will be subjected to torture; or
 - (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
 - (e) the non-citizen will be subjected to degrading treatment or punishment.

- (2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:
- (a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or
 - (b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or
 - (c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

...

Protection obligations

- (3) Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.
- (4) However, subsection (3) does not apply in relation to a country in respect of which:
- (a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.
- (5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:
- (a) the country will return the non-citizen to another country; and
 - (b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.
- (5A) Also, subsection (3) does not apply in relation to a country if:
- (a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country.

Determining nationality

- (6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.
- (7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.