



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA18/05299

Date and time of decision: 22 October 2018 10:09:00
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 male from the Northern Province of Sri Lanka. He arrived in Australia [in] October 2012, as an unauthorised maritime arrival. On the 9 March 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 6 July 2018. The delegate accepted the applicant was a Tamil Hindu from the Northern Province, however the delegate was not satisfied the applicant was a person in respect of whom Australia has protection obligations for the purposes of s.36 of the *Migration Act 1958* (the Act).

Information before the IAA

3. I have had regard to the material given by the Secretary under the Act.
4. No new information has been obtained or received.

Applicant's claims for protection

5. The applicant's claims can be summarised as follows:
 - The applicant is a Tamil Hindu male from [Town 1], Northern Province of Sri Lanka.
 - His brother was killed by the Sri Lankan Army (SLA) in 1984.
 - Due to the civil war, he fled by boat with family members to India where he lived in a displacement camp from 1990 to 1992. He was taken from the camp by men he assumed were the Central Bureau of Investigation (CBI) and was interrogated and mistreated before being turned over to the police. He was released with reporting requirements.
 - Upon return to Sri Lanka he was stopped by the SLA who [attacked him].
 - He was arrested by the People's Liberation Organisation of Tamil Eelam (PLOTE) on a few occasions and was detained and mistreated over a number of days.
 - In 1997 his brother in law was shot and killed by the Criminal Investigation Division (CID) on suspected links to the Liberation Tigers of Tamil Eelam (LTTE).
 - From 2007 until 2011 the applicant worked [for] [Employer 1 providing a service] to those that were living in displacement camps.
 - There was an attack on a SLA camp in 2007 near the office of [Employer 1] and the CID suspected the applicant of involvement and interrogated him. He feared being harmed and so ceased working for [Employer 1] in July 2011.
 - Eight or nine months later the CID visited his house. His wife answered the door and the applicant escaped out of the back of the house.
 - He made a complaint to the Human Rights Commission of Sri Lanka regarding being threatened by the CID.

- He was forced into hiding on account of the visit by the CID. He stayed at a friend's house for three or four months located [a certain distance] from his home. During the day he would travel [to] visit his family.
- The applicant engaged people smugglers and fled Sri Lanka by boat.
- After the applicant had left Sri Lanka the CID visited his home in search of him.
- On the advice of a lawyer the applicant's wife reported that her husband was missing so that the CID would stop coming to his family home.
- He is concerned the Sri Lankan authorities have accessed his details for asylum in a data breach by the Department of Immigration.
- He attended [an] [event] in [City 1] in 2016.
- In February 2017 he attended a protest in [Suburb 1] regarding [an issue] in Sri Lanka.

Factual findings

6. The applicant has provided copies of his birth certificate, passport, National identity card and drivers licence. I am satisfied with the applicant's identity, nationality and ethnicity as claimed. I accept that the applicant is [an age] year old, Tamil male of Hindu faith from [Town 1], Northern Province, Sri Lanka and that Sri Lanka is the receiving country for the purposes of this review.
7. Information provided by the applicant regarding his brother's death has been consistent since the applicant arrived in Australia. He told the delegate that his brother had been travelling [for] work and the SLA had taken all the men off the [vehicle] and killed them. I accept that the applicant had an older brother who was killed in an attack on Tamil men travelling [in] the Northern Province in 1984.
8. The applicant has claimed that he fled Sri Lanka for India in 1990 with family members on account of the civil conflict and lived in a displacement camp in Tamil Nadu. He has provided residential history both in his SHEV application and when he arrived in Australia that is consistent with this claim. The applicant claimed that whilst in India the Tamil community were being blamed for the assassination of the Indian Prime Minister. He claimed that he and another man were taken from the displacement camp by the CBI and were tortured and severely beaten for a few days before being handed over to the Sri Lankan police. He claimed that he was released back into the camp by the police with twice daily reporting requirements. When questioned at interview as to the reason he would have been of interest to the CBI, he told the delegate that it was because he taught marching to the children and this caused them to be suspicious of him. He told the delegate that the CBI had taken him to an unknown place and that after a few days he was turned over to the police because of protests regarding his detention that were made by other Tamil refugees who lived in the displacement camp. I am unconvinced by the applicant's evidence regarding this incident. I found the applicant's responses to the delegate's questions at interview to be vague and the reason he provided as to why he had been targeted is not plausible. I accept that the applicant and his family fled to India in 1990 and lived in a displacement camp for approximately two years. I accept that after the Indian Prime Minister was assassinated there may have been an increased level of security by the Indian authorities and the applicant, as a young Tamil male living in a displacement camp; he may have been subjected to questioning. However, I do not accept that the applicant was targeted by the Indian authorities nor was he taken by the CBI who tortured and beat him for a period of a few days.

9. The applicant claimed to have returned to Sri Lanka legally in 1992. Soon after his return he claimed he was stopped by the SLA. He stated that the officers had instructed him to run, however the applicant refused as he was of the view that if he did this the officers were going to shoot him in the back. After refusing to run, the officers [attacked] the applicant wounding [him]. At interview the delegate asked the applicant why he believed the SLA wanted to shoot him to which he responded it was because of his Tamil ethnicity. Other than this incident the delegate asked if anything else had happened with the SLA officers, to which he told her that it had not. I am willing to accept that the applicant was subjected to a violent attack perpetrated by a SLA officer on account of his Tamil ethnicity that occurred on the streets of [Town 1] in 1992 and resulted in [wounds] to the applicant's [body]. I find that other than being Tamil, the applicant was not a target of the SLA and consider the lack of interest in the applicant and absence of any subsequent issues with SLA both immediately after this incident and in the proceeding years supports this finding.

10. The applicant has also claimed that soon after his return from India, the PLOTE organisation detained the applicant. In his written evidence he claimed that this occurred on two occasions by different members and divisions of the organisation each time. He stated that he was taken to a dark room and was tied in chains for two and three days respectively. He stated that the PLOTE members had questioned him regarding his whereabouts in the years he had been living in India. His written statement explains that after the members had sought permission from high ranking officials he was released. At interview the applicant provided various pieces of contradicting information. Firstly, he told the delegate that he had been detained by the PLOTE on three occasions. He stated that on the first instance he had asked to see a doctor and then had told the doctor to inform his family of his detention. He stated that once his family received the information from the doctor that they came to the location he was being held and the PLOTE members allowed for him to go free. When questioned about the second incident he stated that he was not held in a dark room but rather a location that had a kitchen. He told the delegate that the PLOTE members suspected him of being involved in the LTTE and questioned him accordingly. The third time he stated he was taken after playing [sport] and that he was released the next day. The delegate put to the applicant that he had not mentioned being detained by PLOTE members in his entry interview and that she had concerns regarding the inconsistencies and the credibility of this claim. The applicant informed the delegate that it was on account of his long journey to Australia that he had forgot to mention this incident and also mentioned the passage of time having claimed the event occurred in 1992. He stated that his mother had reminded him of the incident after his entry interview. I do not accept these explanations. I am not satisfied that the applicant was unable to recall being chained up for three days on two or more occasions by the PLOTE members when he first arrived in Australia and that he required his mother to remind him of such an event. While the claimed events were said to have taken place some twenty years prior, the applicant had mentioned the PLOTE organisation during his entry interview but did not mention he had been detained and tortured by its members. I also do not agree with the post interview submission regarding this omission which was provided by the applicant's representative at the time who stated that the applicant had misinterpreted the question that was asked at entry interview and as the event had taken place many years earlier it was not in the forefront of the applicant's mind. The applicant was provided opportunity to inform of any times he may have been harmed or threatened and unlike the incident with the PLOTE he provided information of the [attack] incident which occurred in the same time period of 1992/1993. I am not satisfied by the applicant's evidence and consider the inconsistency of his own statements is indicative of someone who has fabricated his protection claim. I do not accept that the applicant was detained, interrogated and harmed by PLOTE members on one or more occasions in 1992/1993.

11. The applicant has claimed that in 1997 he had two family members who were shot by the CID as they were suspected of being involved with the LTTE. He claimed that his brother in law (sister's husband), was shot and killed on a street in [Town 1]. The CID had suspected him of [doing certain work]. He stated that his younger brother had also assisted in [doing the work] and a month after his brother in law was killed, his younger brother was also shot and sustained serious injuries. The delegate asked the applicant if he or any of his family were former members of the LTTE or had ever assisted them to which he responded "No". He was also asked if there were any other family members other than his brother and brother in-law who were suspected by the authorities of having links to the LTTE to which he also responded in the negative. I accept that neither the applicant nor his family members were involved with the LTTE. Despite the absence of any LTTE association, I accept that he had a brother in law and a brother who were imputed with LTTE [involvement]. I accept that these brothers were shot with his brother in law was killed on account of such suspicion. Critically I note that the applicant has not claimed that he has ever had any issues or incidents arising from these relatives and his association to them.
12. The applicant's employment history has consistently indicated that he was an employee of the [Employer 1]. He has claimed that he worked as [an occupation] and his duties involved [going] to displacement camps in LTTE controlled areas in the North and East of Sri Lanka. In his written statement he described [the duties]. He described having to pass through SLA and CID checkpoints on his journey to these camps and having his identification verified by the authorities each time. His written evidence states that the SLA would check the contents of the vehicle and that he experienced interrogation almost every day. He told the delegate that [Employer 1] had Field Officers whom accompanied him to the [camps]. He provided copies of his employee identification as well as a Certificate of Employment from [Employer 1] in support of his claims. The certificate briefly described the applicant's duties and is consistent with his claims. The certificate from [Employer 1] indicates that the applicant's tenure was from [January] 2008 until [January] 2011 however the applicant's written evidence states that he began working for [Employer 1] in January 2007 and at interview he told the delegate that his employment started around 2006. At interview the delegate asked the applicant about the discrepancy with his start date and he explained that for at least one year prior to the start date indicated in the letter he had worked as a casual employee. The applicant's employee identification cards support these claims and indicate that he worked in a casual capacity for a period in 2007. The letter states the reason the applicant's contract of employment was terminated was due to lack of funding. I am satisfied that the applicant worked [for] [Employer 1] from January 2007 until [July] 2011 and that his employment ended on account of the financial constraints of [Employer 1] which operated as a Non-Government Organisation (NGO). I accept in his capacity as [an occupation] he was questioned, his identification checked and his vehicle checked by the SLA and the CID as he passed through various checkpoints.
13. Although I accept the applicant was employed by [Employer 1], I have significant doubts regarding the credibility of the applicant's claims that this employment imputed him with an adverse profile and do not accept he ceased his employment out of a fear of harm.
14. The applicant claimed that in close proximity to one of [Employer 1's] offices [there] was an attack on a SLA camp. The applicant claimed he was in the area at the time and the CID had wanted to question him regarding the attack, however one of the overseas workers would not permit the officers to question him. I am unconvinced this claim is credible. It is not plausible that had the CID had suspicions that the applicant was involved in an attack on one of their camps, that an overseas employee from [Employer 1] would have been able to prevent officers of the CID from questioning the applicant. The applicant provided no further

explanation as to why he would have been suspected of such an attack other than he was an (Tamil) employee of [Employer 1] who was in the area at the time. I am not satisfied that the applicant was a suspect in an attack of an army [camp].

15. The applicant claimed that he was scared of working for the NGO and that a colleague from [Employer 1] had been shot and [killed]. He also stated that he had heard of other NGO workers that had been killed by the authorities. Although I accept that there may have been incidents of NGO workers being harmed by the authorities in Sri Lanka during and immediately after the war and this may have caused the applicant some anxiety as an NGO employee, he continued to work for [Employer 1] and as noted earlier his employment was only terminated when [Employer 1] ended the employment agreement due to financial constraints.
16. The applicant's employment ceased with [Employer 1] [in] July 2011 and his evidence indicates he operated a [store]. The applicant alleged that eight or nine months after he had ceased his employment with [Employer 1], he was pursued by the CID. In his written application he claimed that men who he believed were CID officers came to his house in search of him. The applicant claimed that he was at home with his wife when he saw an unmarked white van arrive at his residence and men with their faces covered approached the house. He stated that he was scared so he had his wife answer the door whilst he escaped out the back of the house. He recalled that his wife had told him they had asked about his whereabouts and she had told them that he was out and was unsure of when he would return. I am unconvinced by the applicant's evidence regarding the CID visit. The applicant had seemingly lived and operated a [store] in [Town 1] without incident for eight or nine months prior to the purported CID visit. I also find it surprising that the applicant would have his wife answer the door to masked men he thought had come to cause harm whilst he fled out the back of the house. He claimed that a week after the incident he and his wife attended the office of the Human Rights Commission of Sri Lanka and made a complaint of the incident. He has provided a document in support of this claim. The document indicates it is a receipt of a complaint made [in] June 2012 in the applicant's name to an office in [Town 1] of the Human Rights Commission. The document does not provide any details of the complaint made and I consider it of limited probative value.
17. The applicant stated that after the alleged incident he went into hiding for three or four months until he departed Sri Lanka for Australia. He stayed with a friend who lived [a certain distance] away from his family home. The delegate asked him if he was able to visit his family to which he responded that he visited them during the day, travelling [to] his home and then returning to his friend's house. He claimed that he did this because he was aware the CID only performed their searches at night. Again, I have real doubts about the applicant's ability to evade the CID for three or four months whilst living in close proximity to his family home and travelling around the neighbourhood [and] regularly visiting family members when he was apparently of interest to them. The delegate asked the applicant why he believed he was of interest to the CID to which he reasoned that they suspected he had provided goods to the LTTE and referred to his time working for [Employer 1] [almost] one year earlier and added that everyone who worked for the NGO were suspected of being LTTE supporters. I am not convinced this is true. The applicant's own evidence was that he did not hand out goods or perform the duties of a Field Officer. Additionally, at a time when the civil conflict intensified, the war ended and those suspected of being involved with the LTTE were questioned and often rehabilitated¹ the applicant worked for [Employer 1] and frequently

¹ United Nations High Commissioner for Refugees (UNHCR), "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka", 21 December 2012, UNB0183EA8

interacted with the authorities when he passed through multiple check points in the course of performing his [job]. Furthermore, almost one year had lapsed since the applicant ceased working for [Employer 1] and I consider that had the applicant been a person the CID suspected was associated to the LTTE on account of this employment they would have acted on such suspicions prior to the purported event.

18. The applicant told the delegate that his wife had informed him that the CID had come to his house in search of him again after he had left for Australia. He stated that the CID again wore masks and that after his wife informed them the applicant was not at home they recorded the names of his sons. I do not consider it plausible that masked men the applicant alleges were CID came to the applicant's home, three months after the first purported visit and over a year after the applicant had ceased working for the NGO. He claimed that after this visit his wife was advised by a lawyer to report that the applicant was a missing person to the police as a means of preventing further visits. The applicant has provided no other evidence to support he has been reported as a missing person and I find it difficult to believe that a legal representative would advise the applicant's wife to engage in intentionally misleading behaviour. I do not accept that the CID visited the applicant's house after the applicant's arrival to Australia, nor do I accept that a legal professional advised the applicant's wife to provide false information to the Sri Lankan authorities.
19. Overall, I am not satisfied with the applicant's credibility and I am unconvinced by his evidence that he was a person who had come to the adverse attention of the CID. I find the applicant has contrived this claim for the purposes of his protection application. I do not accept that the CID visited the applicant's house in search of him. I do not accept that the applicant went into hiding for months prior to departing Sri Lanka. Furthermore, I do not accept the applicant was a person who had been imputed with an association to the LTTE on account of having worked for a NGO.
20. The applicant claimed that whilst living in Australia he attended [specified] events in 2016 and in 2017 in [Suburb 2] and he marched in [Suburb 1] in 2017 regarding [an issue in Sri Lanka]. The applicant told the delegate at interview that he helped set up some of the commemorative features at the [events] in [Suburb 2]. He stated that he went to these events with friends. The post interview submission states that the applicant attended these events due to his ethnic identity, long standing political opinion and community in Australia. I consider that it is plausible the applicant attended these events in 2016 and 2017 for these reasons. I am willing to accept that he attended [the events] in 2016 and 2017 and provided some assistance with the setting up of the event. Similarly, I accept the applicant attended a march in [City 1] regarding land occupation by the Sri Lankan military. I am satisfied the applicant's participation in these events was not undertaken for the sole purpose of strengthening his protection claim.
21. The applicant stated in his written claims that he was concerned his personal details were published online by the Department of Immigration and that the Sri Lankan authorities had accessed his details. Information before the delegate (Departmental systems) confirmed that the applicant was not a person who was affected by the data breach. The applicant has not provided any evidence to the contrary. I am satisfied that the applicant's personal details were not been inadvertently published by the Department of Immigration.

Refugee assessment

22. 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

23. 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.
24. I accept the applicant is a Tamil male from the Northern Province of Sri Lanka and he is of Hindu faith. I accept that he has family members who were killed and injured during the civil conflict some time ago. I accept that the applicant was injured by a SLA officer approximately twenty-five years ago. I accept that he worked for a NGO [for] four years from 2007. However, I do not accept that this employment led to him being targeted or the adverse consequences he claims and I am not satisfied that when the applicant departed Sri Lanka he was of adverse interest to the CID or the SLA or anyone else.
25. The applicant did not claim to fear harm on account of his religion although the delegate nevertheless considered the matter. Religion plays a significant role in daily life in Sri Lanka and strongly correlates with ethnicity: most Sinhalese are Buddhists and most Tamils are Hindu.² Department of Foreign Affairs and Trade (DFAT) assessed recently that while no laws of official policies discriminate on the basis of religion, adherents of religions other than Buddhism face a low risk of official discrimination from local government authorities, which can affect their ability to practise their faith freely.³ The government has publicly declared its commitment to religious and ethnic reconciliation and the UN Special Rapporteur was informed that the incidence of violent crimes motivated by religious intolerance and hate speech has significantly decreased since the new Government took office.⁴ The applicant has

² Department of Foreign Affairs and Trade (DFAT), “DFAT Country Information Report Sri Lanka”, 23 May 2018, CIS7B839411064

³ DFAT, “DFAT Country Information Report Sri Lanka”, 23 May 2018, CIS7B839411064

⁴ DFAT, “DFAT Country Information Report Sri Lanka”, 23 May 2018, CIS7B839411064; UN Human Rights Council, “Report of the Special Rapporteur on minority issues on her mission to Sri Lanka A/HRC/34/53/Add.3”, 31 January 2017, CISED50AD346

not claimed any incidents on account of his religion or suggested that his family are unable to practise their faith in their home town of [Town 1] in the north of Sri Lanka. I am not satisfied that the applicant does face a real chance of suffering any harm for reason of religion.

26. The applicant has not claimed that he or any of his family were former LTTE members or had a history of assisting the LTTE. I accept that the applicant's brother and a brother in-law were killed and that another brother sustained serious injuries twenty years ago in the civil conflict. I accept that at the time these family members may have been imputed with a LTTE association. However, the applicant has not claimed that any such perceived LTTE association caused the applicant himself any concerns.
27. When the applicant departed Sri Lanka the United Nations High Commissioner for Refugees (UNHCR) indicated that people with certain profiles may give rise to a need for international protection.⁵ I am not satisfied that the applicant had any such profile. Furthermore, the country information indicates a significant change in circumstances since that time. According to the UK Home Office in 2017 the LTTE in Sri Lanka itself has not held any military power or political authority since the end of the civil war in 2009. It assesses only those that are perceived to be a threat to the State through having or being perceived to have a 'significant role in relation to post-conflict Tamil separatism within the Diaspora and/or a renewal of hostilities within Sri Lanka are likely to be at risk of persecution on the basis of political opinion. Furthermore, a person who evidences past membership or connection to the LTTE, unless they have or are perceived to have had 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 would in itself warrant international protection.⁶
28. I accept that the applicant worked for a NGO during the height of the war and immediately after its end. DFAT reported that, under the previous Rajapaksa government, NGO's and their staff, especially those working on human rights issues, risked official harassment, including arrest or abduction, while performing their duties. Additionally, Sri Lanka's state-run media regularly accused NGO's and civil society activists of being traitors, LTTE sympathisers or supporters. More recently however, DFAT has stated that despite restrictions to activities which involve politically sensitive issues, particularly in the north and east, NGOs operate freely.⁷ The evidence does not support that former employees of NGO's, such as the applicant, are imputed with an adverse profile.
29. I have accepted that the applicant played a minor role in assisting with the preparations or set up for two [events] held in [Suburb 2] in 2006 and 2007 and also attended a protest march regarding Sri Lankan land issues in 2016. Country information reports that after the conflict came to an end in May 2009, security forces were directed to demolish and desecrate war hero's grave yards of the LTTE.⁸ The International Truth and Justice Project report also noted witness testimony of surveillance of diaspora events, and witnesses who believed they had been abducted because of participation in commemorations in Sri Lanka in 2015 and 2016⁹ However, I other credible sources note the Sirisena Government has prioritised human rights and reconciliation and has made significant progress in recent years. Symbolic changes have

⁵ United Nations High Commissioner for Refugees (UNHCR), Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012, UNB0183EA8

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

⁷ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064

⁸ Asian Tribune, "Good Governance allows the Martyrs Day – 'Maveerar Naal' celebrations on the sly?", 26 November 2017, CXC90406618275

⁹ International Truth and Justice Project, "Unstopped: 2016/17 Torture in Sri Lanka", 14 July 2017, CISED50AD4849

occurred such as the name change in 2015 of the day commemorating the end of the conflict from 'Victor Day' to 'War Heroes Remembrance Day' and for the first time gave official approval for memorial events to take place in the north and east.¹⁰ It was reported in late 2017 that it is now generally believed, that Sri Lanka's 'Good Governance, led by President Sirisena, has allowed celebrations of the LTTE leader Prabhakaran, as well as the Martyrs day celebration.¹¹ The applicant's participation and attendance constitutes a minor role in a diaspora event. I am not satisfied that his activities, even if known, will be perceived as that of a person who had a significant role in a pro-Tamil separatist event. I am satisfied that the authorities would perceive the applicant as a person who would be involved in a resurgence of Tamil separatism or be regarded as a threat to the State of Sri Lanka.

30. The UK Home Office assessed in 2017 that simply being of Tamil ethnicity does not of itself give rise to a well-founded fear of persecution or serious harm in Sri Lanka and the country information before me suggests that, overall, the situation for Tamils has improved since the applicant's departure in 2012 and since the election and change of government in 2015.¹² Monitoring of Tamils in day-to-day life has decreased significantly under the current government, and although surveillance is still reported in the north and east particularly with those associated with politically sensitive issues, Tamil community members felt more empowered to question monitoring activities.¹³ The Sirisena government is also credited with taking steps towards improving the human rights situation in Sri Lanka. The Sirisena government commitments of post-conflict reconciliation, transitional justice, good governance, anti-corruption and economic reform have resulted in some promising developments, such as the establishment of the Office of Missing Persons (OMP) and co-sponsored resolutions in the UN Human Rights Council (UNHRC).¹⁴ While the international community have welcomed the government's progress, there has been recent criticism that progress has slowed and the government had not taken steps to end impunity for crimes committed by Sri Lankan authorities and repeal the Prevention of Terrorism Act (PTA) which was described by the UN Special Rapporteur as legislation that reinforces the stigmatisation of the Tamil identity.¹⁵ Amnesty International reported in February 2017 that Tamils suspected of LTTE links continued to be detained under the PTA and that despite promises by the government to replace the PTA this had not been done so.¹⁶ However, the US Department of State have reported that incidents of unlawful arbitrary arrest and detention had decreased compared with 2015.¹⁷ Although the PTA is yet to be repealed, DFAT were advised in 2017 that the operation of the Act had been suspended and replacement legislation was being drafted.¹⁸ There is no other evidence before me to suggest that the

¹⁰ DFAT, "Sri Lanka – Country Information Report", 24 January 2017, CISED50AD105

¹¹ Asian Tribune, "Good Governance allows the Martyrs Day – 'Maveerar Naal' celebrations on the sly?", 26 November 2017, CXC90406618275

¹² DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism (version 5.0)", 15 June 2017, OGD95BE926876; US Department of State, "Sri Lanka 2016 Human Rights Report", 3 March 2017, OGD95BE926876; UNHCHR, "Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Sri Lanka A/HRC/34/54/Add.2", 22 December 2016, CIS38A80123313

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

¹⁴ UNHCHR, "Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Sri Lanka A/HRC/34/54/Add.2", 22 December 2016, CIS38A80123313; DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064

¹⁵ UNHCHR, "Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Sri Lanka A/HRC/34/54/Add.2", 22 December 2016, CIS38A80123313; DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064

¹⁶ Amnesty International, "Amnesty International Report 2016-2017", 23 February 2017, NG2A465F54

¹⁷ US Department of State, "Sri Lanka 2016 Human Rights Report", 3 March 2017, OGD95BE926876

¹⁸ DFAT, "DFAT Cable response: UN Special Rapporteur (Ben Emmerson) on human rights and terrorism in Sri Lanka", 14 August 2017, CISED50AD5239

suspension has been lifted. Furthermore, I am not satisfied that the applicant holds the profile of those that have been detained under the PTA in the past, or that the country information indicates are at risk of detention presently.

31. Overall, I am not satisfied that upon return the applicant, a former NGO worker, a Tamil male from the Northern province with his history and someone who has participated in a commemoration event and a protest march in Australia, will be identified as a pro-Tamil separatist or a person with any LTTE connections or a person of any adverse interest to the authorities or anyone else as a consequence of his and his family's past experiences and activities both in Sri Lanka and Australia. I am not satisfied the applicant faces a real chance of suffering harm on these bases.
32. I accept the applicant does not currently hold a valid passport and would return to Sri Lanka on temporary travel documents. Given the method of his return and the documents he would use to re-enter Sri Lanka, I accept that the authorities may know or infer that the applicant is someone who has sought asylum in Australia. Country information indicates that all returnees are subject to standard procedures, regardless of ethnicity and religion and understands detainees are not subject to mistreatment during their processing at the airport.¹⁹ An investigative process is undertaken at the airport to confirm the returnee's identity which involves interviewing the returnee, contacting the person's claimed hometown police and contacting the person's claimed neighbours and family. Once identity is confirmed the authorities will then carry out the necessary security checks.²⁰ UK Home Office reports that the Sri Lankan airport maintains a list of persons of interest by law enforcement agencies that have violated Sri Lankan law.²¹ There is no evidence to suggest that the applicant would be a person whose name would appear on any court or criminal record search.
33. There are reports from 2015 and 2016 that expressed concern over the treatment of forced returned asylum seekers in Sri Lanka.²² However, more recently in 2018 DFAT reported the Sri Lankan government have expressed publically that failed asylum seekers from Australia would be welcome back to Sri Lanka. Some 2,400 Sri Lankan nationals departed Australia for Sri Lanka since 2008 and many others returned from US, Canada and other European countries. Only 0.33 per cent of returnees interviewed by UNHCR in 2016 indicated they had any concerns following their return.²³ Regardless of this positive sentiment, country information indicates that returnees may face practical challenges to successful return to Sri Lanka. DFAT report that there is limited reintegration assistance for returnees and many have difficulty in finding suitable employment and reliable housing on return.²⁴ However, I note that the applicant's wife and [children] remain in North Sri Lanka and there is no information to suggest the applicant would not be able to find accommodation. I also note the applicant has not claimed any vulnerability that would prevent him from obtaining employment, having been employed in [various] industries. I am not satisfied that he would be denied employment or that his capacity to subsist will be threatened.
34. Whilst there has reportedly been a decrease in systematic surveillance of returnees, DFAT is aware of anecdotal evidence of regular visits and phone calls by the CID to failed asylum

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

²⁰ Ibid

²¹ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism (version 5.0)", 15 June 2017, OG6E7028826

²² Human Rights Watch, "Human Rights Watch World Report 2015", 18 December 2014, CISEC96CF13447; Asylum Research Consultancy (ARC), "Sri Lanka COI Query Response – UPDATE", 11 March 2016, CIS38A8012460

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

²⁴ Ibid

seekers in the north as recently as 2017. DFAT assesses that this surveillance of returnees contributes to a sense of mistrust of returnees within the community. I accept that the applicant as a person from the North who has departed Sri Lanka illegally and sought asylum in Australia he may be subject to some monitoring by the authorities and possibly social stigma from his community, however, I am not satisfied that this treatment amounts to serious harm for this applicant.

35. Under the Immigration and Emigrants Act (I&E Act) it is an offence to depart Sri Lanka other than via an approved port of entry or exit.²⁵ I accept that the applicant engaged people smugglers to depart Sri Lanka and departed via an unauthorised port and consequently committed an offence under the I&E Act. The penalties under the Act can include imprisonment up to five years and a fine of up to 200,000 rupees, however, in practice the penalties are applied to such persons on a discretion basis and in most cases only a fine is issued, which may be paid in instalments. The Sri Lankan Attorney-General's Department, which is responsible for the conduct of prosecutions, claims no mere passenger on a people smuggling venture has been given a custodial sentence for departing Sri Lanka illegally. However, fines are issued to deter people from departing illegally in the future.²⁶ The applicant has not claimed that he was ever involved in organising or facilitating a people smuggling venture and I consider that he was just a paying passenger. I am not satisfied there is a real chance that the applicant will be subject to a custodial sentence.
36. Returnees who are deemed to have committed an offence under the I&E Act are transported to the closest Magistrate Court where a Magistrate (as soon as one is available) makes a determination as to the next steps for each individual.²⁷ If there is a delay in immediately accessing a Magistrate, the individuals are kept in an airport holding cell which usually does not exceed 24 hours but can in certain circumstances, such as over a weekend or a public holiday, take up to two days. If a returnee pleads guilty, they are fined and free to go. In most cases, when a returnee pleads not guilty, they are usually granted bail on personal surety or guarantee by a family member.²⁸ I note the applicant has family members in Sri Lanka. I accept that the applicant will have to pay a fine for his offence under the I&E Act the payment of which may be paid over time in instalments. Country information state that the fine amounts vary from LKR 3,000 (AUD 25) for a first offence to LKR 200,000 (AUD 1,670).²⁹ DFAT assesses that although the fines for illegal departure are low the cumulative costs associated with regular court appearances over protracted lengths of time, can be high.³⁰ The evidence before me does not indicate that the applicant will be unable to pay the fine or associated costs for committing this offence.
37. Country information does not support that the I&E Act is discriminatory on its face or that it is applied or enforced in a discriminatory manner. I am also satisfied that the questioning, temporary detention, imposition of a fine or any other costs associated with the applicant's court appearances does not constitute serious harm in this instance.
38. I am not satisfied that the applicant faces a real chance of persecution.

²⁵ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064

²⁶ Ibid

²⁷ Ibid

²⁸ Ibid

²⁹ Ibid

³⁰ Ibid

Refugee: conclusion

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

Complementary protection assessment

40. 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

41. 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.
42. I accept the applicant departed Sri Lanka illegally and he may be charged for committing an offence under the I&E Act for this departure. I accept that the applicant may be questioned, held at an airport holding cell for a short period time and incur court costs and penalties associated with the offence. I am not satisfied that the treatment the applicant will experience upon return amounts to significant harm. I am not satisfied there is a real risk the applicant will be arbitrarily deprived of his life, be subject to the death penalty, or be subject to torture. Nor does the evidence before me indicate that these processes, or the penalties implemented as a result involve any intention to inflict pain and suffering that is cruel or inhuman in nature, severe pain or suffering or to cause extreme humiliation. I am not satisfied that it amounts to suffer cruel or inhuman treatment or punishment, or degrading treatment or punishment. I am not satisfied the applicant faces a real risk of significant harm for this reason.
43. I accept the applicant, as a person returning from having sought asylum from Australia to the Northern Province of Sri Lanka may be monitored by the authorities for a period and that he may face some social stigma from his community. 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 this. I am not satisfied that this treatment amounts to pain or suffering that is cruel or inhuman in nature, severe pain, 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. Furthermore, I am not satisfied that when this treatment is considered in combination with that which he may face as a result of having departed Sri Lanka illegally, amounts to significant harm.

44. I have otherwise found that the applicant would not face a real chance of harm as a consequence of his religion, ethnicity and origins, his former employment as a NGO worker, his political involvement in commemoration events and a land rights protest march. 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 these bases.

Complementary protection: conclusion

45. There are not substantial grounds for believing that, as a necessary and foreseeable consequence of being returned from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm. The applicant does not meet s.36(2)(aa).

Decision

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

Applicable law

Migration Act 1958

5 (1) Interpretation

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.