



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA18/05554

Date and time of decision: 5 October 2018 10:40:00
J Maclean, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Tamil Hindu born in the Northern Province of Sri Lanka. In May 2017 he lodged an application for a Safe Haven Enterprise visa (SHEV). A delegate of the Minister for Immigration and Border Protection (the delegate) refused the grant of this Visa on 16 August 2018.

Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act). No further information has been obtained or received.

Applicant's claims for protection

3. The applicant's claims can be summarised as follows:
 - He was born in Vavuniya in [year] and is an unmarried Tamil Hindu and has no children.
 - His father was a member of the Liberation Tigers of Tamil Eelam (LTTE), and the leader of an LTTE unit of [number range] soldiers.
 - In 2007 he witnessed violence by the Sri Lankan Army (SLA), including two of his father's friends in the LTTE being killed, the beating of a person, and an old lady being killed because they believed her to be an LTTE member.
 - His father visited the family, usually at night, and other LTTE members would wait outside the house.
 - In 2009 the war was raging and his father could not come home to see them. After the war his father was only able to return in early 2011 as he had been detained in an army camp.
 - In May 2011 the SLA found some arms buried in front of the family home. The SLA arrested him, his father, and some neighbours and they were taken to the army camp. His father was questioned about his involvement in the LTTE and beaten. He admitted he was involved with the LTTE and was taken away. This was the last time he saw his father. He was detained for one or two days during which he was beaten. He was released after his father confessed.
 - His family approached the army camp asking for his father, but the SLA said they had not arrested anybody.
 - In September 2012 armed men entered his home, threatened he and his mother, and took him in a white van to a location where he was detained in a dark room. He was interrogated about his father, and where bombs and ammunition were hidden, and was beaten and tortured.
 - After three or four days he escaped at night. He returned to his home and his mother took him to a neighbour's house, where he stayed until the following morning when he went to stay at a family friend's house some kilometres away. He did not return to his home, and moved around frequently, living in hiding, until his mother arranged for him to leave Sri Lanka.

- He came to Australia by boat [in] November 2012.
- Since he left Sri Lanka his mother and her neighbours have been questioned a number of times about his and his father's whereabouts. His mother suspects they were from the Criminal Investigation Division (CID).
- His mother moved from the house to avoid interrogation. The family that moved into the house had a [family member] the same age as [one of his family]. [That person] was murdered, and he believes the murder was targeted at his family.
- He fears if he is returned to Sri Lanka authorities will arrest, detain and torture him as a suspected LTTE member. As a person who has spent time abroad they will suspect he wants to reinvigorate the LTTE.

Refugee assessment

4. 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

5. 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.
6. I accept the applicant's consistent evidence that he is a Tamil male of the Hindu religion, who was born in the Vavuniya District of the Northern Province of Sri Lanka, and always resided in that district in Sri Lanka. There is no issue regarding the applicant's claimed identity, and I accept he is a national of Sri Lanka from the Northern Province, and that Sri Lanka is the receiving country for the purposes of the Act.
7. I accept the applicant's consistent evidence regarding his early life in Sri Lanka. He attended school in the Vavuniya District until [grade] in [year], and after finishing school helped in a [business] from time to time, and sometimes helped his [relative] [with a job]. He was also consistent in referring to being displaced from his home and staying in the jungle for short periods of time when he was young and there was fighting in his home area. During the SHEV

interview the applicant said during the wartime they were displaced several times, and moved around, and after the war finished in their area they returned. Although he was not specific about the timing of that displacement, I accept the applicant was displaced with his mother and sister, and after the conflict ended they returned to their home in the Vavuniya District.

8. The applicant consistently referred to his father being involved with the LTTE. The statement of claims refers to his father as being in charge of about [number range] soldiers. During the Screening interview in November 2012 and at the Arrival interview in January 2013 the applicant said he did not know about his father's role with the LTTE. At the Screening interview he said his mother had always told him his father was with them, however at the SHEV interview he said he found out his father was an LTTE member when he was studying [a specified level] in [year range]. The applicant explained that at the time of the Arrival interview he did not have any details about his father's involvement with the LTTE, and his lawyer asked him to obtain further information from his mother, and that his mother said his father was the leader of a group of [number range] people. The applicant's post-SHEV interview submission notes that the applicant was a young man when he left Sri Lanka, and that it is plausible his parents hid the details of his father's involvement with the LTTE to protect him and shield him from harm, and I accept that is a plausible explanation for the applicant's lack of knowledge about his father's involvement. The applicant was consistent in indicating that his father was not living with the family during the civil war, but that he visited the family at night, and brought money from time to time, and at those times other LTTE members would wait outside the house. The statement of claims notes that in 2009 his father could not come home because the war was raging, and after the war he was detained in an army camp, returning home in early 2011. The delegate questioned the applicant about the type of camp his father was in, and the applicant said 'all the people were brought and they were put in a camp', however he said he did not know the name of the camp. When asked about why his father was released the applicant said 'they said the battle is over, the war has finished, and they let him go', and when he was released from the camp they did not know he was an LTTE member. The post-SHEV interview submission suggests the applicant's father was detained as a Tamil civilian, along with many other Tamils.
9. Country information reports that at its peak in 2004 the LTTE had an armed force of approximately 18,000 combatants.¹ Although I accept the applicant's consistent evidence that his father was an LTTE member, and also that he may have been in charge of up to [number] LTTE soldiers, I do not accept such a person could be considered to be high ranking, given the number of people involved as combatants. Country information reports that the end of the conflict resulted in nearly 300,000 internally displaced persons (IDP) were detained in camps, and that approximately 12,000 detainees with suspected LTTE links were screened out to rehabilitation camps.² I accept the applicant's consistent evidence that his father did not return to live at home with his family until early in 2011. Taking into account the country information regarding the substantial numbers of people who were detained in IDP camps at the end of the conflict, I consider it is possible the applicant's father was detained in an IDP camp, but not identified as an LTTE member at that time or sent to a rehabilitation camp, and was released and able to return home in January 2011.
10. The applicant has not claim he was ever an LTTE member, or that he had any involvement with the LTTE, other than through his father's involvement. At the SHEV interview the

¹ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064

² Danish Immigration Service, "Human Rights and Security Issues concerning Tamils in Sri Lanka", 71, 1 October 2010, CIS19345

applicant's said the LTTE invited him to join, but he told them he was going to school. He denied he had ever worked, fought or trained with the LTTE, and I accept that to be the case.

11. In his statement of claims the applicant described violence perpetrated by the army near his house in 2007. He said two of his father's friends in the LTTE were killed, that he saw the army beating a person and dragging their body away. He also saw through the window that the army killed an old lady by shooting her, and they justified the killing because they believed her to be an LTTE member. During the SHEV interview the delegate asked the applicant whether any LTTE members did anything at his house during the war, and the applicant said they came and "accused all of us" of being LTTE members, presumably referring to Sri Lankan authorities, and that they came looking for his father and were shooting everyone, even a very elderly lady got killed saying she was an LTTE member, and the following day in the news they were saying they killed the LTTE members. I consider it significant that the applicant's statement of claims does not link either of these incidents with authorities searching for his father, which was not mentioned until the SHEV interview, and I consider this to be an embellishment to support the applicant's claims. In addition, I consider the suggestion that authorities were looking for his father in 2007 is inconsistent with the applicant's contention that his father was released from the IDP camp because authorities did not know he was with the LTTE. Country information reports that the long civil conflict displaced hundreds of thousands of people and killed tens of thousands of people on both sides.³ Taking that into account, along with the consistent reporting of the incidents in his statement of claims and at the SHEV interview, I accept the applicant may have witnessed the incidents, however I do not accept the incidents were related to authorities searching for his father on suspicion of LTTE links. Given the incidents occurred over 10 years ago, and the applicant did not report that authorities ever questioned or harmed him in relation to the incidents, I am not satisfied the applicant would be at risk of harm on return to Sri Lanka as a result of those events.
12. The applicant consistently referred to an incident in May 2011, when the SLA found buried weapons near his house, and he, his father, and some neighbours, were detained at the army camp. At the SHEV interview the applicant described guns and bombs being found buried right next to their house, however he was unable to provide any information about how they came to be there, how the SLA came to know about the weapons, or whether his father knew about the weapons. The applicant speculated that a lot of people knew his father was in the LTTE around there, and someone probably gave information to the army. The post-SHEV interview submission is critical of the delegate's finding that it is implausible the applicant's father would have been unaware of the weapons right next to his house. It is submitted that it is possible his father recently transferred the weapons to that location and was waiting for the right opportunity to dispose of them, and that it is unreasonable to assert the claim is implausible. Country information reports on army 'search and clear' operations in 2011 resulting in recovery of mines or weapon,⁴ and I accept it is plausible that the applicant and his father were detained by the SLA as described after weapons were discovered near their house.
13. The applicant consistently described his father being beaten and questioned about the weapons, and about whether he was in the LTTE, and that under duress he confessed he had been in the LTTE, and he was taken away. That was the last time the applicant saw his father, and when he and his mother went to the camp asking about his father the SLA said they had not arrested anybody. The applicant was beaten and kicked during the detention, and

³ DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064

⁴ South Asian Terrorism Portal, "Sri Lanka Timeline - Year 2011", 01 January 2011, CIS24555

questioned about his LTTE involvement, and later that day after his father's confession he was taken in a van and pushed out at the junction near his home. I am prepared to accept the applicant and his father were detained and mistreated as claimed after the discovery of weapons, and that the applicant has not seen his father since that time. I do not accept the applicant was released because his father confessed his LTTE involvement, and I consider the applicant would not have been released at this time if he had been suspected of involvement with the hidden weapons, or with the LTTE. Given the applicant was released after questioning and confession of his father, I consider he was not of adverse interest to Sri Lankan authorities at that time in relation to any LTTE involvement, or for any other reason.

14. The applicant referred to a further incident in about September 2012, when unknown armed people entered his house and trained guns on him and his mother. The applicant was taken in a white van with his hands tied behind his back. He was detained, tortured and questioned about the location of weapons, and about his father. After about three or four days the applicant was able to escape at night when the sentries were on rounds of the camp. He escaped through a hole high up on the wall, that was used for the sentries to keep watch and to throw food through. The Screening interview transcript indicates the applicant to have said he was released at the junction near his house after being detained in September 2012, and he went to his house and remained inside his house. The delegate questioned the applicant about the inconsistency regarding whether he was released, or escaped from detention. The applicant said when he first arrived in Australia he was too scared to say he had escaped from the government, because he feared what would happen to him if he was sent back to Sri Lanka. When asked why he would fear telling the Australian authorities the truth when he came to Australia specifically to seek safety, the applicant reiterated that he was scared he would be sent back to the government from which he escaped, and that he did not know what to say as he was confused. The delegate asked the applicant why he would be kept in a room where there was an obvious way out. The applicant did not answer the question, but provided what appeared to me to be a prepared response, that when they took him they were not in uniform, nobody knew he was there, they kill people, and nobody will question if they kill him. When the delegate asked again why they would keep him in a room having an obvious way out, and not guard the cell, the applicant said he had previously tried to escape, but they were patrolling, and if he stayed there he would have been killed.
15. The post-SHEV interview submission suggests it is plausible the applicant's father might have escaped after being taken by the SLA, especially taking into account the SLA continuously visiting the applicant's house and questioning him about his father's whereabouts and finally taking him away for questioning. The delegate questioned the applicant as to whether anything happened to his family between the time he was released (in May 2011) and the next time he was captured in September 2012. The applicant said nothing happened, but that people were coming at night looking for his father. When asked who was looking for his father he said he did not know who they were, and when they look outside they would be waiting outside looking. When asked how many times they came looking for his father the applicant repeated what appeared to be a prepared response that in September 2012 they came and said "where is your Dad?", accused him of hiding him, and told him to tell the truth. When asked again how many times he was questioned before September 2012 the applicant said they questioned his mother, and they were having a look from outside, standing there and looking from outside. The applicant's evidence on this issue was vague and unconvincing. Taking into account the inconsistency between the Screening interview and the applicant's later evidence, which I do not accept resulted because the applicant was scared or confused, but rather because the applicant was not recounting events that genuinely occurred, and the nature of the applicant's evidence on a number of occasions which appeared to be reciting a prepared response, I do not accept the applicant was

continuously questioned about his father's whereabouts, or for any other reason, after he was released in May 2011. I have not accepted the applicant's father had a leadership role of any significance with the LTTE, and I consider it implausible that approximately 15 months after being detained by the SLA in May 2011 and then subsequently released, that the applicant would have been of interest to any group because of his father involvement with the LTTE. In addition, I find the description of the applicant being able to escape from detention in September 2012 is far-fetched. As I have not accepted the applicant was detained, I also do not accept that he escaped detention. I do not accept the applicant was of adverse interest to Sri Lankan authorities, or any other group, after being detained in May 2011. It follows that I do not accept the applicant was in hiding prior to departing for Australia, that authorities questioned or threatened his mother at this time, or that he left Sri Lanka as a result of the purported interest in him.

16. In his statement of claims the applicant states that since he left Sri Lanka his mother and neighbours have been questioned about his and his father's whereabouts, and harassed a number of times. His mother does not know who the people are as they do not identify themselves and wear civilian clothes, but his mother suspects they are CID. They have also been similarly questioned by the SLA. His mother has moved from the house to avoid interrogation. During the SHEV interview the applicant described his mother being tortured and questioned when people came looking for him, which appears to be an embellishment on the evidence provided in the statement of claims. In any event, having not accepted the applicant was of interest to Sri Lankan authorities, or any other group, at the time he left Sri Lanka, or that the family were being questioned about the applicant's father's whereabouts at that time, I also do not accept the applicant's mother was questioned about the applicant after his departure, or that she moved from the family home as a result.
17. In his statement of claims the applicant referred to a family moving into his mother's house, and to their [family member] being murdered. He believes his family were the target of the murder. During the SHEV interview the applicant said this incident happened in 2016, and that the [person] was killed because they were living in his family's house and they thought it was his [relative]. The delegate asked who killed [that person], and the applicant said they did not know who really killed [that person]. Although I am prepared to accept the applicant's evidence that a [person] was killed whilst living at his mother's house, the applicant was unable to provide any information about who killed [them], nor has he suggested his [relative] was ever of interest to authorities. I consider it is mere conjecture that there is any connection between that incident and his [relative].
18. After the SHEV interview the applicant's representative provided a submission, which indicates the applicant fears being persecuted in Sri Lanka as a result of:
 - his Tamil ethnicity;
 - his real or imputed political opinion in support of the LTTE resulting from a combination of his father's high ranked role with the LTTE and resulting arrest, the repeated harassment and threats against him in suspicion of supporting the LTTE as well as the interrogation and questioning he was subjected to from Sri Lankan authorities about his father's role with the LTTE and whereabouts, the attempts to harm him and his family by Sri Lankan authorities, including being detained twice and beaten, and the discovery of weapons by the SLA buried near the family home; and
 - for having fled Sri Lanka and sought asylum in Australia.

19. In relation to the applicant's fear of harm as a result of his Tamil ethnicity, and his real or imputed political opinion in support of the LTTE, the 2017 UK Home Office report notes the focus of the Sri Lankan government has changed, and the focus is now not so much on identifying anyone with past LTTE links. The government's present objective is to identify those who pose a threat to the government or a unified Sri Lanka, through involvement with Tamil separatist activities in the country or through links to the Tamil Diaspora. Those former LTTE members that are most at risk are persons perceived to have a significant role, such as the LTTE's former leadership (either combat or civilian) and former members suspected of committing serious criminal acts during the conflict. The UK Home Office and DFAT have more recently confirmed the UNHCR position that simply being of Tamil ethnicity, or a Tamil from an area formerly under LTTE control, no longer gives rise to a need for international protection, the rationale being that almost every Tamil who resided in those areas during the conflict had some sort of connection with the LTTE.⁵
20. Credible country information reports that the LTTE in Sri Lanka is a spent force, and there have been no terrorist instances since the end of the civil war.⁶ The LTTE no longer exists as an organised force in Sri Lanka. However, DFAT confirms Sri Lankan authorities remain sensitive to the potential re-emergence of the LTTE throughout the country, and are likely to maintain intelligence on former LTTE members and supporters, and that high-profile former LTTE members would continue to be of interest to the authorities and subject to monitoring. Further, DFAT assesses that close relatives of high-profile former LTTE members who remain wanted by Sri Lankan authorities may be subject to monitoring. DFAT assesses that, while monitoring of Tamils in day-to-day life has decreased significantly under the current government, surveillance of Tamils in the north and east continues, particularly those associated with politically sensitive issues.⁷ The country information does not indicate that Tamils are currently at risk of persecution in Sri Lanka purely on account of their race, nor when they originate from, or reside in, an area previously controlled by the LTTE. Those reports no longer support a finding that Tamil ethnicity of itself imputes LTTE membership or a pro LTTE opinion, even when combined with other factors such as gender, age or place of origin.
21. Although virtually everyone agrees there has been progress towards alleviating the climate of fear in Sri Lanka, opinions differ markedly about the extent of that progress.⁸ The UN Special Rapporteur on Torture, in his December 2016 report on Sri Lanka, noted the fragility of the reform process and that the country is at a critical moment in its history in terms of setting up the necessary mechanisms to remedy its past large-scale human rights violations and prevent their recurrence.⁹ The country information provided by the applicant is critical of the human rights situation in Sri Lanka, and suggests the applicant remains at risk of mistreatment by Sri Lankan authorities, in particular as a result of the continued use of torture for those arrested, held or detained under the Prevention of Terrorism Act. The 2018 DFAT report refers to allegations by several local and international organisations regarding torture by Sri Lankan military and intelligence forces, mostly from the period immediately following the conflict and involving people with imputed links to the LTTE. Reports have been made by credible

⁵ UK Home Office, "Country Policy and Information Note. Sri Lanka: Tamil separatism. Version 5.0", 15 June 2017, OG6E7028826; DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064

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 UK Home Office, "Country Policy and Information Note. Sri Lanka: Tamil separatism. Version 5.0", 15 June 2017, OG6E7028826

⁹ United Nations, "Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Sri Lanka A/HRC/34/54/Add.2", 22 December 2016, CIS38A80123313

sources such as Freedom from Torture and the International Truth and Justice Project, and other sources reported in DFAT and UK Home Office reports, such as Amnesty International and Human Rights Watch, of ongoing arrests and mistreatment amounting to torture perpetrated by security forces and police in Sri Lanka, predominantly affecting Tamils, and I have had regard to this information.¹⁰ The applicant's submission refers to the ITJP July 2017 report, and as suggests that family members of LTTE members are routinely tortured, and that even grown-up children of former LTTE cadre have been deliberately targeted. That report is based on sworn testimony from 24 victims of torture who have fled abroad to Europe, predominately the UK, and the cases relate to abduction, illegal detention, torture and/or sexual violence by Sri Lankan security forces from 2016/17. According to the testimony, the interrogations in 2016/17 focused on Sri Lankan authorities' concerns that the suspects were involved in regrouping the LTTE, including using foreign funds from the diaspora.¹¹ The human rights abuses described in the country information have primarily affected Tamils with a real or perceived LTTE profile or anti-government or political activist profiles and refer to a very small number of people.

22. The United States State Department reported in 2016 that arbitrary arrests and detention had decreased from 2015 and that the use of force against civilians by officials, although remaining a problem, was increasingly rare.¹² The HRCSL report from October 2016 to the UN Committee Against Torture reported that torture is 'routine [and] practiced all over the country, mainly in relation to police detentions'.¹³ The UK Home Office reported in 2017 that since the current government has come into office the number of torture complaints has reduced. It notes however, that new cases continue to emerge of the police mistreating Tamils in order to extract confessions in criminal investigations, and was more prevalent in questioning of suspected LTTE members or supporters.¹⁴ Consistent with this, DFAT states that recent publications indicate torture continues to be perpetrated primarily by police against Tamils, but notes that local sources have indicated this is primarily due to outdated policing methods rather than being ethnically based, that the message from senior officials prohibiting the use of torture has been slow to filter down, and relevantly assessed that overall there is a low risk of Tamils being tortured.¹⁵ I am satisfied torture in Sri Lanka, perpetrated by either military, intelligence or police forces, is not presently systemic or state-sponsored, and that the risk of torture from military and intelligence forces has decreased since the end of the civil conflict, and that the risk of the applicant being tortured in Sri Lanka is remote.
23. With regard to the risk of detention under the Prevention of Terrorism Act (PTA), country information reports the PTA is currently suspended, but still in legal force. Under the PTA suspects can be held without charge for three-month periods, not exceeding a total of 18 months. Human Rights Watch reported in January 2018 that the PTA had not been used in 2017, and DFAT understands that fewer individuals are currently detained under the PTA than during the conflict. According to the Bureau of the Commissioner General of Rehabilitation, by November 2017, 12,882 people, primarily former LTTE, had completed

¹⁰ Freedom from Torture, "Sri Lanka – Update on torture since 2009", 6 May 2016, CIS38A8012881; International Truth & Justice Project Sri Lanka ("ITJP"), "Silenced: survivors of torture and sexual violence in 2015", 7 January 2016, CIS38A801275; UK Home Office, "Country Policy and Information Note. Sri Lanka: Tamil separatism. Version 5.0", 15 June 2017, OGD6E7028826

¹¹ ITJP, "Unstopped: 2016/17 Torture in Sri Lanka", 26 July 2017, CISED50AD4849

¹² United States ("US") Department of State, "Country Report on Human Rights Practices 2016 – Sri Lanka", 03 March 2017, OGD95BE926876

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

¹⁴ UK Home Office, "Country Policy and Information Note. Sri Lanka: Tamil separatism. Version 5.0", 15 June 2017, OGD6E7028826

¹⁵ DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064

rehabilitation, however only one centre with eight inmates remained open in December 2017. Of note, DFAT reports the Sri Lankan government claims no returnee from Australia has been charged under the PTA, however DFAT cannot verify this claim.¹⁶ The applicant's submission refers to the July 2018 report from the United Nations Special Rapporteur on the promotion and protection of human rights while countering terrorism, which expresses concerns about the continued sporadic use of the PTA to arrest suspects, and the continuing use of torture for those arrested, held or detained under the PTA, and the inhumane conditions of detention.¹⁷ I consider the small number of detainees, who are ex-LTTE combatants, reflects there is no longer a systemic practice of detaining those suspected of any involvement with the LTTE, and only those with significant links to the LTTE are now at risk of detention under the PTA. Of note, the applicant remained in Sri Lanka for over 15 months after his father was identified as an LTTE member. I consider Sri Lankan authorities had the opportunity to detain the applicant had they wished to do so, however they did not, which is indicative that the applicant did not have a profile of interest at that time. I do not accept the applicant has a profile such that he would be at a real risk of detention under the PTA.

24. The applicant's submission refers to three media articles, from February and April 2018, regarding the political situation in Sri Lanka, noting in particular the February 2018 local elections in Sri Lanka, in which former President Rajapaksa and his party won a large number of votes, and to the suspension of parliament. It is contended that because Rajapaksa is associated with Sinhalese nationalism and anti-Tamil and anti-LTTE views and actions there may be a rise in violence against imputed LTTE supporters, including Tamil people, and that ongoing political instability in Sri Lanka may lead to further targeting of people such as the applicant for their imputed opinion. I consider the applicant's contention is at best speculation, and no more recent information has been provided to support that there has been a rise in violence, or that the situation regarding political instability is ongoing. I do not accept the applicant is at risk of being targeted for this reason.
25. Considering the applicant's circumstances and profile – as a Tamil male who resided in an area formerly under LTTE control, and who had no direct involvement with the LTTE; his father was the leader of a group of up to [number] LTTE cadre; he was detained by Sri Lankan authorities on one occasion being suspected of involvement with the LTTE and weapons hidden near his home, and was released without being charged with an offence; he has resided outside Sri Lanka for an extended period of time; he has not indicated he has participated in any Tamil diaspora activities in Australia, or suggested he would engage in activities which are politically sensitive, or could be considered to constitute post conflict Tamil separatism on return to Sri Lanka – I am not satisfied the applicant was of adverse interest to Sri Lankan authorities, or any other group, at the time he left Sri Lanka, or that there is a real chance he would be of interest to Sri Lankan authorities, or any other group, because of any actual or perceived links with the LTTE, or any resulting imputed political opinion in support of the LTTE. Accordingly, I am not satisfied there is a real chance the applicant would be at risk of harm on return to Sri Lanka for those reasons.
26. The applicant claims to fear harm for having fled Sri Lanka and sought asylum in Australia, and the associated imputed political opinion against Sri Lanka. I accept the applicant's consistent evidence that he departed Sri Lanka for Australia, by boat in November 2012. I accept that if the applicant returns to Sri Lanka he would do so as a failed asylum seeker, and

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

¹⁷ Office of the High Commissioner for Human Rights, "Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism - Mission to Sri Lanka", 23 July 2018, CIS7B839411830

that he would be identified by Sri Lankan authorities as someone who departed Sri Lanka illegally.

27. The applicant originates from the Vavuniya District, and I accept it is very likely he would return to the Northern Province, where his mother and sister continue to reside. DFAT reports that despite positive government sentiment, refugees and failed asylum seekers face practical challenges to successful return to Sri Lanka, and many have difficulties finding suitable employment and accommodation. DFAT assesses that reintegration issues are not due to failure to obtain asylum, but rather due to the employment and accommodation difficulties they may face. A UNHCR survey in 2015 reported that 49 per cent of refugee returnees in the north had received a visit at their homes for a purpose other than registration, with almost half of those visits from the police. The UNHCR also interviewed refugee returnees in 2016, and only 0.3 per cent indicated they had any security concerns following their return. While 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. In addition, refugees and failed asylum seekers reported social stigma from their communities upon return.¹⁸ It is possible the applicant, as a returning asylum seeker, may be monitored for a period of time on return to the Northern Province, and experience some social stigma, however, I am not satisfied this treatment would amount to serious harm.
28. Entry and exit from Sri Lanka is governed by the Immigrants and Emigrants Act 1949 (the I&E Act). Under the I&E Act it is an offence to depart other than via an approved port of departure. Information from DFAT indicates all involuntary returnees undergo checks on arrival in Sri Lanka, including by the Department of Immigration and Emigration, the State Intelligence Service and the CID. For those travelling on a temporary travel document, as would be the case for the applicant, investigation is undertaken to confirm identity, which often includes an interview, contacting authorities in their home area, and neighbours and family, and checking criminal or court records, a process that can take several hours. According to DFAT all returnees are treated according to standard procedures irrespective of ethnicity, and are not subject to mistreatment during processing at the airport. Most returnees are questioned upon return (usually at the airport), and where an illegal departure from Sri Lanka is suspected they can be charged under the I&E Act. Those who are charged are, at the earliest opportunity after investigations are completed, transported to the closest Magistrate's Court, after which custody and responsibility shifts to the court or prison services. The magistrate then makes a determination as to the next steps for each individual, and individuals can remain in police custody at the CID's Airport Office for up to 24 hours after arrival. Should a magistrate not be available before this time – for example, because of a weekend or public holiday – those charged may be detained for up to two days in an airport holding cell.¹⁹
29. Those charged under the I&E Act are required to appear in court in the location where the offence occurred, which may involve legal and transport costs. Penalties for leaving Sri Lanka illegally can include imprisonment of up to five years and a fine of up to 200,000 Sri Lankan rupees, which may be paid by instalment. In practice no returnee who was merely a passenger on a people smuggling venture has been given a custodial sentence, and the usual result is a fine which can be paid by instalments. 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. Given the applicant

¹⁸ DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064

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

has not claimed to have been involved in people smuggling, it is likely if he pleads guilty he will be granted bail by the Magistrate on the basis of personal surety or guarantee by a family member. Although DFAT was unable to obtain any data in support, it reports there is anecdotal evidence that most passengers of people smuggling ventures spend many years on bail, and that most are free to go after paying a fine. Bail is usually granted to voluntary returnees, however bail conditions are discretionary, and can involve monthly reporting to police at the returnee's expense.²⁰

30. I accept that given his mode of departure from Sri Lanka the applicant may be questioned and detained for up to two days in an airport holding cell, and that he will be subjected to the processes and penalties imposed under the I&E Act described above, including a fine, and associated process costs. The evidence before me does not indicate the I&E Act processes and penalties the applicant may face are discriminatory in nature or in its application or enforcement. I am not satisfied such treatment amounts to systematic and discriminatory conduct. I am also not satisfied on the evidence before me that the treatment amounts to serious harm for this applicant. On that basis, I am not satisfied there is a real chance of persecution on account of the applicant having departed Sri Lanka illegally.
31. Overall, I am not satisfied the applicant has a well-founded fear of persecution.

Refugee: conclusion

32. 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

33. 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

34. 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.
35. I have found the applicant does not face a real chance of any harm on the basis of his Tamil ethnicity, for any actual or imputed connection to the LTTE, including as a result of his place of origin and residence in a former LTTE-controlled area, his father's involvement with the

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

LTTE, because of any prior interaction with Sri Lankan authorities, or for having spent an extended period of time outside Sri Lanka. For the same reasons, I am also not satisfied there is a real risk of any harm, including significant harm.

36. I accept the applicant will be identified on return as a person who departed illegally, and on arrival he will be subject to the processes and penalties resulting from application of the I&E Act, and he may be detained for up to two days in an airport holding cell and receive a fine for departing Sri Lanka illegally, and may be subject to associated costs. I am not satisfied such treatment constitutes significant harm. There is no evidence to indicate the applicant faces the death penalty for any reason, and I do not accept there is a real risk the applicant will be arbitrarily deprived of his life or tortured during or as a result of this process. The evidence does not suggest that in the imposing such penalties and treatment there is any intention to inflict pain or suffering, severe pain or suffering, or cause extreme humiliation. I am not satisfied the treatment and conditions the applicant may face as a consequence of his illegal departure, amount to cruel or inhuman treatment or punishment or degrading treatment or punishment.
37. There is a possibility the applicant, as a returning asylum seeker, may face monitoring for a period and possibly social stigma, however I have found this would not amount to serious harm. I am also satisfied such treatment would not amount to significant harm. I am not satisfied it amounts to the death penalty, arbitrary deprivation of life or torture. I am also not satisfied any monitoring or social stigma the applicant may experience amounts to pain or suffering that is cruel or inhuman in nature, severe pain or suffering, or extreme humiliation for the purposes of the definition of cruel or inhuman treatment or punishment, or degrading treatment or punishment. I am otherwise not satisfied that he face a real risk of significant harm as a consequence of the data breach.
38. I do not accept the treatment the applicant may face as a returning asylum seeker and a person who departed illegally amounts to significant harm for the purposes of s.36(2A).

Complementary protection: conclusion

39. 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.