



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA18/05573

Date and time of decision: 29 October 2018 13:18:00
M Wei, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Tamil from Vavuniya, Northern Province of Sri Lanka. He arrived in Australia [in] November 2012 and lodged an application for a Safe Haven Enterprise Visa (SHEV), Subclass 790 on 29 August 2016. A delegate of the Minister of Immigration (the delegate) refused to grant the visa on 23 August 2018. The delegate found that the applicant did not have a well-founded fear of persecution and was not at a real risk of significant harm upon his return to Sri Lanka.

Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
3. The applicant provided the IAA with a written submission in September 2018. I have had regard to the relevant submissions, subject to the new information discussed below.
4. The following new claims were raised:
 - He was abducted by the Liberation Tigers of Tamil Eelam (LTTE) when he was in Grade [number]. Among other things, he was forced to work with the LTTE cadres in combat zone and [cemeteries]. Most of the LTTE cadres knew him during that time. He fled the LTTE control and returned home, which was when he was arrested by the Criminal Investigation Division (CID) and kept for [number] days.
 - In respect of the incident in 2007, the CID officers shot his father in anger (his evidence at the SHEV interview was that they aimed at him but shot his father when his father came across in front of him). He was sure the CID was aware that he was in the LTTE. After he returned from [Country 1], the CID and the army were visiting his home and harassing his family members constantly so he decided to flee by boat.
 - In respect of the January 2018 visit, the officers told his parents that he had been a LTTE cadre fighting against the army and they had evidence of [it] and his name was in the wanted list and he would be arrested at the airport on arrival. They beat his father and ordered his father to hand him over if he arrived from India by illegal boat. They threatened to kill his parents if his parents hid him again.
5. It was submitted he did not raise these claims earlier because he was not a learned person to understand what claims he had to state and what claims he should not state and his advisors who prepared his statement of claims failed to explain to him what he had to state in order to secure a favourable outcome. He did not tell anyone in Australia and he feared to tell the Department from the beginning about these matters because he feared that he could be deported back by the Australian government or be held in detention continuously. He read news in Australia and his parents in Sri Lanka told him not to mention his LTTE involvement as the Australian government was working along with the Sri Lanka government to stop the boats. He was told by his friends that if he failed to tell the IAA all the detailed claims, he would not be able to tell these claims in future even to the Courts. He learnt that the IAA would not reject his claims if he genuinely stated all his claims which he failed to provide earlier.

6. This is the first time that the applicant claimed that he worked for the LTTE and was known by other LTTE cadres. The applicant arrived in Australia in November 2012. He attended an entry interview in December 2012, during which he was told to be honest and accurate with information provided about his circumstances. He was asked about if he or any of his family members/relatives were involved in the LTTE. He was invited to apply for a protection visa in February 2016 and his application was lodged in August 2016 with the assistance of a registered migration agent. The applicant was interviewed in May 2018. Prior to the interview, he was provided with an information sheet in Tamil language detailing his responsibility in relation to his protection claims, including telling the truth and providing complete and accurate protection claims and advising that if his application was refused he might not have another chance to provide further information. This information sheet also stated that the information he provided at the interview was protected under Australian law and would be kept confidential and would not be provided to the country against which he was making protection claims. The applicant stated at the SHEV interview that he read and understood this information. These matters were reiterated at the beginning of the SHEV interview. The applicant was specifically asked if he had any involvement with the LTTE. He replied 'no'. The applicant was also on notice towards the end of the interview the delegate had concerns that he did not have a profile to be of adverse interest to the Sri Lanka authorities. He was provided an opportunity to discuss these matters with his migration agent before providing a comment. The applicant was asked again if he had raised all his protection claims before the conclusion of the interview and he was also advised that any information provided before a decision was made would be considered. The decision was not made until three months later. In respect of the additional information relating to the 2006, 2007 and 2018 incidents, the applicant was also given ample opportunities to elaborate and provide further information at the interview.
7. The applicant came to Australia for the purpose of seeking asylum. He had the opportunity of seeking legal advice in respect of his alleged concerns. He was informed constantly through the process to be honest with his claims. I do not accept he did not understand what claims he had to put forward or acted on the advice of his parents. Nor do I accept that his representative, a registered migration agent, failed to explain to him what was required, that he withheld this information because of any fear, or that he was under any misapprehension about the consequences of not putting all information forward to the Department. The applicant has not satisfied me these claims could not have been provided to the Minister before the primary decision. The lateness in making these claims despite the many opportunities he was given earlier also give rise to serious questions as to the reliability of those claims. The applicant has not satisfied me the information is capable of being believed. I am not satisfied there are exceptional circumstances to justify considering this information. Neither s.473DD(a) or (b) is met.
8. The applicant also claimed that a 'week ago', his [Relative A] was arrested by the CID and identified as a LTTE cadre. He was taken to an unknown place. When his father tried to arrange to have him released through an MP, his father was told that the applicant and his cousin were close friends and were LTTE cadres stationed in [Town 1]. His father informed him not to return to Sri Lanka. If true, the information could not have been provided to the delegate. The applicant's evidence before the delegate was that only two of his uncles were involved in the LTTE. He was specifically asked at the SHEV interview and he confirmed that the only family members/relatives who were involved in the LTTE were two uncles. Furthermore, he has given no indication that his [Relative A] previously encountered any problems with the CID or why his [Relative A] would be now, nearly ten years after the end of the civil war, be suspected of LTTE involvement. I also note that in his visa application, he stated that he lived in Vavuniya since [year] before he went to [Country 1] and did not stated

that he was ever in [Town 1]. These matters seriously call into question the reliability of the information. The new information also lacks useful details. I am not satisfied there are exceptional circumstances to justify considering this information under s.473DD(a).

9. The submission also cites Amnesty International's 2018 report on arbitrary arrest, abduction and torture, and argued that the delegate failed have taken this report into account. I note the submission to the delegate prior to the SHEV interview of May 2018 mentioned the report from the Amnesty International though without referring specifically to its content or the year of the report. I do not consider this is new information and have therefore had regard to this information.

Applicant's claims for protection

10. The applicant's claims can be summarised as follows:
 - He is a Tamil and Hindu, born in Vavuniya, an area controlled by the LTTE.
 - He had two uncles who were members of the LTTE. They both were killed and are martyrs.
 - He was arrested and questioned by the Criminal Investigation Division (CID) in 2006 and questioned about his LTTE links. He was released as it was peace time.
 - In 2007 he was rounded up for arrest but he escaped. During the incident he assaulted an officer and his father was shot.
 - He lived in [Country 1] on a work visa from January 2008 to March 2011. He used a recruiting agent and managed to leave Sri Lanka without much scrutiny and detection.
 - The authorities' interest in him arose on his return in 2011. He relocated to [City 1], [City 2] and [Village 1] to avoid constant monitoring from the authorities in his village.
 - The militant groups spied on people like the applicant (young and known families supporting the LTTE), threatened them, intimidated them with consequences about their involvement or for information about others and even negotiated for clearances with army on an agreed payment.
 - The intelligence has visited his family as recent as [January] 2018, inquiring about his whereabouts and directed that he should surrender upon his return.
 - The security forces instil fear on the Tamils by encouraging former militants to engage in violence by regrouping them as 'Macheettee' gangs or Ava groups. They target whom the forces point out to be eliminated.
 - The armed forces and hard line Buddhist monks, with their supporters, are in Tamil areas to take over Tamils.
 - Living overseas would impute him as being an LTTE supporter. He fears of being subject to arbitrary arrest and detention due to his Tamil race, LTTE links and illegal departure.

Factual findings

11. Based on a copy of the passport and the other identification documents provided, I accept that the applicant, a Tamil and a Hindu, was born in [year] in Vavuniya District, Northern Province of Sri Lanka. I accept it is likely that he had lived in an LTTE controlled area at some stage. I find that Sri Lanka is the receiving country for the purposes of the Act.

12. The applicant claimed that two of his uncles were members of the LTTE. At the SHEV interview, he confirmed that apart from these two uncles, he had no connections to the LTTE. He stated that both uncles had been with the LTTE for a long time and were killed in 2009. He did not know their ranks or what they did but stated they were in fighting. The applicant provided a letter from one of his uncle's sister which states that the uncle joined the LTTE in 1990 and died in 2009 during the final stages of the war. The letter does not state the rank or title of the uncle in the LTTE. A photograph was also provided appears to be one of the uncles (the writing at the bottom of the photo was not translated). I accept that two of his uncles were members of the LTTE, who were fighters and died in 2009 in the final stages of the conflict. I am not satisfied however that his uncles were 'well identified members' of the LTTE.
13. The applicant claimed that in 2006 he was detained for [number] days and beaten by the CID. He was questioned about his LTTE links including his uncle's LTTE involvement. He stated in the written statement that he was released as during that period there was a climate of goodwill between the LTTE and the government. At the SHEV interview, he stated that he was released on the proviso that he would be taken again if required. DFAT states that many Tamils, in the north and east, reported being monitored, harassed, arrested or detained by security forces during the conflict.¹ It is plausible, and I accept, that the applicant was arrested, detained and questioned about his LTTE links and was released after [number] days. The applicant was not specific as to which month he was arrested. I do not accept he was released because there was a climate of goodwill between the LTTE and the government at that time. I do not consider it is plausible that if he was arrested and detained in the first place, he would then be released in [number] days because of the goodwill of the authorities. Country information indicates, although the peace agreement was still in places in 2006, large-scale violence resumed in April 2006.² I find the applicant was released because he had no involvement with the LTTE and he was not considered as a person of interest, despite his uncles' LTTE involvement. The applicant did not claim that his father had ever faced any difficulties because of his uncles.
14. The applicant claimed that he was again wanted in 2007. He claimed in his application that he was rounded up for arrest in 2007 after the government withdrew from the ceasefire agreement in 2007 (country information indicates although large scale violence resumed in April 2006, the government officially abrogated the Ceasefire Agreement in January 2008).³ He also stated that he managed to escape however his father was shot in the process. At the SHEV interview, the applicant said it was not a round- up in 2007. Rather, the authorities came to his home about 7pm to arrest him. He hit one of the officers and ran away. They aimed to shot him but his father was hit when his father came across in front of him. When asked what he did next after he escaped, he said that he escaped to the forest and because he already had a passport, and his [Relative A], through an agent, obtained a visa for him to go to [Country 1]. The applicant provided a hospital record claiming to be evidence of the treatment of his father's gunshot wound. According to the document, the date of admission was [in] November 2007 and dated of discharge was [several weeks later]. On the medical evidence provided, I accept his father was treated for a gunshot wound in November 2007.
15. The applicant then left Sri Lanka for [Country 1] [in] January 2008. He returned to Sri Lanka in March 2011. The applicant stated that he did not have any problem when travelling through the airport in 2008 when departing or 2011 on arrival. When it was put to the applicant

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

² UK Home Office, "Sri Lanka March 2012", 07 March 2012, 3523

³ Ibid.

towards the end of the interview that he faced no problem at the airport indicating he was not a person of interest to the authorities either in 2008 or 2011, the applicant responded that he travelled with a group of [number] people organised by the agent, and because of the agent's assistances, he was not questioned at the airport and the agent might have paid money.

16. The applicant also said that he had no problem after he returned to his home in Vavuniya for the first two months. The authorities later made inquiry about him when he was not home. After that he went to difference places. He stated that he stayed in a church in [Village 1] for a month in June 2011 and then went to [City 3], [City 1], [City 2] and [Town 1] staying with friends until he came to Australia in October 2012. The authorities visited his family looking for him when he was in [City 2]. He stated that he also worked in those places for expenses and that he worked to avoid arousing suspicion.
17. The applicant further claimed the CID/police visited his family [in] January 2018. The applicant confirmed at the SHEV interview this was the only time that authorities came looking for him since he came to Australia. When asked what questions they asked, the applicant said that the officers told his parents that the applicant was not home when they visited in 2011 and it had been four year and he was still not home. He said they questioned his parents whether they had hidden the applicant. When it was put to the applicant why authorities would have waited for four years if they were interested in him, the applicant speculated in vague terms that they could have come because his name or files camp up when they searched for someone or something else.
18. I note that aspects of the applicant's evidence have not been consistent over time. He did not claim that he assaulted an officer in the visa application or in the written statement in respect of the 2007 incident. The medical evidence he provided indicates his father sustained the injury on or before [November] 2007 and was hospitalised for [number] days. The applicant indicated in the visa application that he did not leave Sri Lanka until [January] 2008. He did not indicate that he relocated away from his home area during that time. His evidence that he was able to escape to a forest was also vague. Despite he was the target for arrest, he assaulted an officer and his father was shot and seriously injured, he was not caught in the two month period before he left Sri Lanka in January 2018.
19. His evidence at the SHEV interview suggesting that the agent might have paid a bribe in facilitating the group's departure and arrival at the airport was also vague. I do not accept that a bribe was paid so he could go through the airport without any difficulty. I do not accept he did not receive adverse attention at the airport because he travelled with a large group assisted by the agent. I consider, if the authorities were interested in the applicant and have sought to arrest him, it is not plausible that he could remain in Sri Lanka for over two months and was able to travel to the airport from the north, leave Sri Lanka via airport, and returned to Sri Lanka three years late. Country information from 2011 states that returnees were screened on arrival at the airport.⁴ Furthermore, on the applicant's evidence, the authorities did not show any interest in him until two months after he arrived home. His evidence that he went into hiding from June 2011 for over one year until he left Sri Lanka for Australia without being caught, despite the authorities visiting his family is also unconvincing, noting he had worked during this period. I also consider it is implausible, if the authorities were interested in him, that they would have not have made enquires until over four years after his departure from Sri Lanka. On the evidence before me, I do not accept that the authorities sought to arrest the applicant in 2007, made enquiries about him after he

⁴ Canadian IRB: Immigration and Refugee Board of Canada, 22 August 2011, LKA103815.E

returned from [Country 1], visited his family in January 2018 or he was in hiding from June 2011 until he came to Australia in October 2012.

20. The written statement also made vague reference that intelligence monitored Tamils, those released from displacement camps like [Camp 1] and people like the applicant (young and have family links to the LTTE) through militant groups like the Eelam People's Democratic Party (EPDP), threatened or blackmailed them. The statement also stated that the security forces instils fears on the Tamil public by encouraging former militant to engage in violence by regrouping them as 'Macheettee' gangs or Ava groups who target the people as directed by the security forces. The applicant's claims were vague and in general terms without referring to any particular incidents personally. While noting the applicant was displaced in [Camp 1] between 1993 and 1999 as stated in his visa application, I am not satisfied that the intelligence or security forces monitored or targeted the applicant through militants. I do not accept that the authorities had any interest in the applicant after he was released in 2006. While I accept his father had a gunshot injury, I am not satisfied it occurred in the circumstances as claimed.

Refugee assessment

21. 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

22. 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.
23. I accept that the applicant lived in a former LTTE controlled area at some stage of his time in Sri Lanka. Both UNHCR and DFAT reported that the majority Tamil civilian populations in areas controlled by the LTTE were required during the conflict to interact with the LTTE as a matter of course. There is no credible information before me to suggest that merely being a

young Tamil from a previously LTTE controlled area would now be a matter of concern or lead to any perception of LTTE involvement or pro separatist support.⁵

24. I accept the applicant had two uncles who were long term members of the LTTE and were killed in the final stage of the war in 2009. I also accept that the applicant was arrested, detained and questioned in 2006 for his links with the LTTE but was released because he was not considered to be person of interest to the authorities. Although UNHCR indicated in 2012 that persons with family links or who were dependent on or otherwise closely related to former LTTE cadres may have then been in need of protection,⁶ I note that applicant was cleared of having any involvement in the LTTE in 2006 and I have also found that the applicant was not of interest to the authorities after that time. I have not accepted that the applicant's LTTE uncles had a role of any note. Both uncles were killed in 2009. More recent country information does not suggest such a link itself would bring a person to the adverse attention of the authorities.
25. Although the Sri Lankan authorities remain sensitive to the potential re-emergence of the LTTE through the country, the country situation has significantly improved under the current government. The current government is focused on post-conflict reconciliation, transitional justice, and governance and economic reform. Despite of the constraints and challenges faced by the government, some progress have been made since then, including: replacing military governors in the Northern and Eastern Provinces with civilians; returning some of the land held by the military since the conflict-era back to its former owners; releasing some individuals detained under the PTA (for example, 39 PTA detainees were released in August 2016 on bail); committing to reform the PTA; and lifting its terrorist listing for eight Tamil diaspora organisations and 269 individuals in November 2015. DFAT also states that it has been advised by the Sri Lankan government that no returnees from Australia have been charged under PTA (noting the PTA has been suspended since 2016). DFAT cannot verify claims that people have been arrested and detained because of their family connections with former LTTE members, but understands that close relatives of high profile former LTTE members who are wanted by Sri Lankan authorities may be subject to monitoring. DFAT understands that close relatives of high profile former LTTE members who are wanted by the Sri Lankan authorities may be subject to monitoring.⁷ The applicant does not have such a profile.
26. The UK Home Office's June 2017 report on Tamil separatism states that a person being of Tamil ethnicity would not in itself warrant international protection, neither, in general, would 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 active in post conflict Tamil separatism and pose a threat to the Sri Lankan state.⁸

⁵ DFAT, "DFAT Country Information Report - Sri Lanka", 24 January 2017, CISED50AD105; "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064; 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

⁶ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183EA8

⁷ DFAT, "DFAT Country Information Report - Sri Lanka", 24 January 2017, CISED50AD105; "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064; 'DFAT Cable response: UN Special Rapporteur (Ben Emmerson) on human rights and terrorism in Sri Lanka', Department of Foreign Affairs and Trade (DFAT), 14 August 2017, CISED50AD5239

⁸ UK Home Office, "Country Police and Information Note, Sri Lanka: Tamil separatism, version 5.0", 15 June 2017, OG6E7028826

27. The applicant claimed because he was overseas for many years, he would be perceived to have provided financial support to the LTTE or the separatism cause. The applicant does not claim that he was involved in any activities while overseas that could be considered as anti-government or pro-separatism.
28. While there have been reports of Tamils or returnees who have been arrested and detained and faced mistreatment for suspicion of LTTE, pro separatism involvement or criminal offences, recent country information certainly does not support that ordinary Tamils/Tamil asylum seekers in general are perceived to have links to the LTTE or anti- government and face a real chance of being arrested, detained or mistreated on the basis of their Tamil ethnicity, their sex and age, their seeking asylum and time in a Western country like Australia.
29. DFAT reports that thousands of asylum seekers have returned to Sri Lanka since 2009, including from Australia, the US, Canada, the UK and other European countries, with relatively few allegations of torture or mistreatment. The government has consistently said that refugees are welcome to return to Sri Lanka, and announced in 2016 the 'National Policy on Durable Solutions for Conflict-Affected Displacement'. Although some members of the Tamil diaspora played a central role during the conflict, as a source of funding, weapons and other material support for the LTTE, DFAT assesses that high profile leader of pro-LTTE diaspora groups may come to the attention of Sri Lankan authorities because of their participation in public demonstrations. DFAT assesses Sri Lankan authorities may monitor members of the Tamil diaspora returning to Sri Lanka, depending on their risk profile.⁹
30. I have had regard to the country information before the delegate including the information referred to in the submission to the delegate relating to the treatment of Tamils and returned Tamil failed asylum seekers. I note some recent publications suggest that torture in Sri Lanka continues, including against members of the Tamil community and primarily perpetrated by the police. DFAT notes that verification of torture claims is complex as many allegations are made anonymously, often to third parties. They often involve individuals who are outside Sri Lanka and, in some cases, individuals who are in the process of seeking asylum. DFAT assesses that reports of torture carried out by Sri Lankan military and intelligence forces during the conflict and in its immediate aftermath are credible. However, DFAT is unable to verify allegations of torture in 2016 and 2017. DFAT has repeatedly assessed that the risk of torture perpetrated by either military, intelligence or police forces has decreased since the end of the civil conflict and is no longer state-sponsored. Because few reports of torture are verified, it is difficult to determine the prevalence of torture but DFAT assesses that, irrespective of religion, ethnicity, geographic location, or other identity, Sri Lankans face a low risk of mistreatment that can amount to torture. DFAT report also indicates that the government has taken actions against the perpetrators. For example, from January to November 2017, disciplinary action was taken against 33 police officers, and one officer was dismissed for assault and torture. In January 2017, the Supreme Court ruled on a torture incident dating from July 2008. I give significant weight to the DFAT report. It is evident that it has taken in account other open sources report including those from other countries and the human rights organisations.¹⁰ The country information before me overall suggests that the risk of torture faced by Tamils in general is remote unless they were being arrested, detained or interrogated by the authorities for criminal or terrorism related offences including those under the PTA.

⁹ DFAT, "DFAT Country Information Report - Sri Lanka", 24 January 2017, CISED50AD105; "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064

¹⁰ Ibid.

31. DFAT states that systematic abductions using white vans, often leading to enforced disappearances, occurred during the conflict and post-conflict periods. DFAT assesses that reports of a small number of abductions involving white vans in 2016 and 2017 referred to incidents where police did not follow protocol during arrest. DFAT understands that disappearances are no longer common.¹¹
32. According to DFAT, members of the Tamil community in the north and east continue to claim that authorities monitor public gatherings and protests, and practise targeted surveillance and questioning of individuals and groups though some members of the Tamil community reported they felt more empowered to question monitoring activities. DFAT continues to report 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, including missing persons, land release and memorial events. DFAT also assesses that Sri Lankans of all backgrounds face a low risk of official or societal discrimination based on ethnicity, including in relation to access to education, employment or housing. DFAT assesses that there is no official discrimination on the basis of ethnicity in public sector employment. Rather, limited Tamil appointments are a result of a number of factors, including disrupted education because of the conflict and language constraints.¹²
33. Sri Lanka's Constitution entitles any citizen to the freedom to return to Sri Lanka. Entry and exit from Sri Lanka is governed by the Immigrants and Emigrants Act (I&E Act). I accept that upon arrival in Sri Lanka, the applicant's travel documents and identity information will likely be checked against the immigration database, intelligence databases and the records of outstanding criminal matters. The process at the airport can take several hours, primarily due to the administrative process, interview lengths, staffing constraints and returnees are processed en masse. For returnees travelling on temporary travel documents, police undertake an investigative process to confirm identity, which would address whether someone was trying to conceal their identity due to a criminal or terrorist background or trying to avoid court orders or arrest warrants. DFAT assess that returnees are treated according to these standard procedures, regardless of their ethnicity and religion. DFAT further assesses that detainees are not subject to mistreatment during processing at the airport.¹³
34. I have already found above that the applicant was not of any adverse interest to Sri Lankan authorities after he was released in 2006. The applicant does not claim that he is the subject of criminal prosecution or is on bail and that an arrest warrant has been issued in relation to him. I am not satisfied the applicant's name would be on the 'stop' or 'watch' list.¹⁴ The applicant can speak Sinhalese. I am not satisfied that any investigations on arrival in his circumstances would lead to a real chance of him being subject to harm.
35. 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 although only 0.3 per cent of refugee returnees interviewed by UNHCR (including UNHCR-facilitated and voluntary returns) in 2016 indicated that they had security concerns following their return. DFAT reports that refugees and failed asylum seekers face practical challenges to successful return to Sri Lanka. Many returnees have difficulty finding suitable employment. DFAT assesses that reintegration issues are due to the employment and accommodation difficulties they may face on return. I

¹¹ Ibid.

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

accept it is possible that the applicant may be subject to monitoring for a period by the Sri Lankan authorities and face social stigma as a returning failed asylum seeker.¹⁵ I also accept that he may need to re-establish himself in Sri Lanka after his time in Australia. The country information also indicates that the applicant may face a low risk of societal or official discrimination due to being a Tamil. The applicant has high school education. He has not claimed any issues with obtaining housing or employment while in Sri Lanka. He has worked in Sri Lanka and Qatar. I am not satisfied any discrimination would lead to serious harm in his case. I am not satisfied there is a real chance that his capacity to subsist will be threatened. I also accept some of surveillance of Tamils in the north and east continues. In the applicant's circumstance, given the authorities lacked interest in him after he was released in 2006, I consider the chance of the applicant of being subject to arrest, forced disappearance or torture is remote. I am not satisfied that any monitoring or surveillance would lead to a real chance of him of being subject to arrest, detention or mistreatment or other harm that may be regarded as serious harm. I am not satisfied the monitoring or surveillance or any social stigma he may face upon return constitutes serious harm in this case.¹⁶ I am not satisfied that the applicant faces a real chance of serious harm when taking into consideration of his profile as a whole including his past detention, his links to two LTTE uncles and his returning as a Tamil asylum seeker.

36. I am not satisfied the applicant faces a real chance of being targeted by the Sri Lanka authorities, including its security and intelligence forces. I am not satisfied there is a real chance the authorities will target or harm him through militant groups like the EPDP or Macheettee gangs or Ava groups. In respect of the reported criminal activities carried out by the Ava group, I note that DFAT reported that the police had increased their presence in response to this. It is also reported that the group mainly operated around Jaffna areas and a number of gang members has been arrested including the leader of the Ava group.¹⁷ I am not satisfied that the applicant faces a real chance of harm from the Ava group or any other militant groups.
37. In his visa application, the applicant made general reference to 'hardline Buddhist monks', stating that they and the armed force are in Tamil areas and that the government could not stop the monks indirectly encouraging them to manipulate political support. He did not make any claim to fear harm from the Buddhist in his statement of claims provided prior to the SHEV interview. When asked specifically at the SHEV what he feared if he were to return to Sri Lanka, the applicant made no claim of fearing harm from the Buddhists or for reasons of his religion. The applicant did not claim to have encountered any difficulties in the past from the hard-line monks. Country information indicates that Tamils, who are mostly Hindus, comprise 93 percent of the population in the Northern Province. DFAT also assesses that while no laws or 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.¹⁸ Having also regard to the information discussed earlier, I am not satisfied the applicant, in his circumstances, faces a real chance of harm from the Buddhists/monks or for reasons of his Hindu religion and/or Tamil ethnicity.

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

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

¹⁷ DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064; Lanka Business Online, "We will not allow Aava group to raise its head: Law & Order Minister", 17 November 2017, CXC90406617954; Colombo Page, "Sri Lanka police arrest six members, including leader of criminal Ava gang", 7 August 2017, CXC90406611722

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

38. I am not satisfied that the applicant if he were to return to Sri Lanka, faces a real chance of serious harm for reasons of his race, imputed political opinion and religion in his circumstances, as a young Tamil male from Northern Sri Lanka, a failed asylum seeker who had who has spent a number of years abroad, who had some links to the LTTE through two uncles and who was detained for a short period in the past.
39. DFAT reported that most Sri Lankan returnees, including those from Australia, are questioned (usually at the airport) upon return and, where an illegal departure from Sri Lanka is suspected, they can be charged under the I&E Act. Apprehended 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
40. Penalties for leaving Sri Lanka illegally can include imprisonment of up to five years and a fine. In practice, most cases result in a fine and not imprisonment. The 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. Fine amounts vary from LKR 3,000 (approximately AUD 25) for a first offence to LKR 200,000 (approximately AUD 1,670). A guilty plea will attract a fine, which can be paid by instalment, and the defendant is free to go. Where a passenger returnee pleads not guilty, the magistrate will usually grant bail on the basis of personal surety or guarantee by a family member. Where a guarantor is required, returnees may need to wait for the guarantor to come to court. Anecdotal evidence suggests that most passengers of people smuggling ventures spend many years on bail, and that most are free to go after paying a fine. DFAT is unable to obtain any data to support this claim. 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.²⁰
41. I accept the applicant departed Sri Lanka irregularly by boat as a passenger in 2012 and in doing so may be found to have committed an offence under the I&E Act. On the information before me, I am not satisfied there is a real chance that the applicant will be subject to a custodial sentence for departing Sri Lanka illegally. I accept that the applicant may be questioned and detained at the airport for processing by authorities for up to 24 hours with the possibility that he may be further held at an airport holding cell for up to two days. If he pleads guilty, a fine could be imposed on him which can be paid by instalment and he would be free to go. If he does plead not guilty, there is no suggestion he will not be able to secure bail on the basis or personal surety or guarantee by a family member. 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 not satisfied that the questioning, temporary detention, imposition of a fine or any other costs associated with possible bail or the court appearances if they arise would constitute persecution to the applicant.
42. In light of my consideration of the above, I am not satisfied the applicant faces a real chance of persecution for any of the reasons claimed.

¹⁹ Ibid.

²⁰ Ibid.

Refugee: conclusion

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

Complementary protection assessment

44. A criterion for a protection visa is that the applicant is a non-citizen in Australia (other than a person who is a refugee) in respect of whom the Minister (or Reviewer) is satisfied Australia has protection obligations because there are substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm.

Real risk of significant harm

45. Under s.36(2A), a person will suffer 'significant harm' if:
- the person will be arbitrarily deprived of his or her life
 - the death penalty will be carried out on the person
 - the person will be subjected to torture
 - the person will be subjected to cruel or inhuman treatment or punishment, or
 - the person will be subjected to degrading treatment or punishment.
46. While there is a possibility the applicant may face monitoring, social stigma and/or some practical challenges in resettling, I am not satisfied they amount to significant harm or would lead to a real risk of significant harm in the applicant's circumstances. I am not satisfied they amount to death penalty, arbitrary deprivation of life or torture. I am not satisfied that they involves an intention to inflict severe pain or suffering, pain or suffering that is cruel or inhuman in nature, or an intention to cause extreme humiliation for the purposes of the definition of torture, cruel or inhuman treatment or punishment or degrading treatment or punishment. I am not satisfied that the applicant if he were to return to Sri Lanka, faces a real chance of other harm (apart from possible monitoring, social stigma and/or some practical challenges in resettling) for reasons of his race, imputed political opinion and religion in his circumstances, as a young Tamil male from Northern Sri Lanka, a failed asylum seeker who had who has spent a number of years abroad, who had some links to the LTTE through two uncles and who was detained for a short period in the past. Having regard to the information discussed above, I am not satisfied that applicant faces a real risk of significant harm for the reasons claimed.
47. Based on the same information discussed above, I accept that the applicant, due to his illegal departure from Sri Lanka, will be likely subject to questioning, various checks, possibly a fine and a brief period in detention at the airport and other processes and costs if he pleads not guilty . Noting the information discussed above, and having regard to the definition of significant harm, I am not satisfied that the processes and penalties in his circumstances involves a real risk of the death penalty, arbitrary deprivation of life, torture, degrading treatment or punishment, cruel or inhuman treatment or punishment or other form of significant harm. I am not satisfied that the treatment he may experience as a result of his illegal departure (including the questioning, temporary detention, imposition of a fine or any

other costs associated with possible bail or the court appearances if they arise) involves an intention to inflict severe pain or suffering, pain or suffering that is cruel or inhuman in nature, or an intention to cause extreme humiliation.

48. I am not satisfied there are substantial grounds for believing that, as a necessary and foreseeable consequence of being returned from Australia to a Sri Lanka, there is a real risk that the applicant will suffer significant harm.

Complementary protection: conclusion

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

Decision

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

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

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

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

...

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

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

...

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

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

...

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

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

...

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

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

...

5H Meaning of refugee

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

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

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

...

5J Meaning of well-founded fear of persecution

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

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

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

5K Membership of a particular social group consisting of family

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

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

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

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

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

5L Membership of a particular social group other than family

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

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

5LA Effective protection measures

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

...

36 Protection visas – criteria provided for by this Act

...

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

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

...

Protection obligations

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

Determining nationality

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