



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA18/05583

Date and time of decision: 31 October 2018 16:04:00
S McNeill, 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) is a national of Sri Lanka. On 11 August 2016 he lodged an application for a Safe Haven Enterprise visa (SHEV application). He claims to fear persecution from the Sri Lankan authorities because of his Tamil ethnicity, his cousin was a member of the Liberation Tigers of Tamil Ealam (LTTE) and he was regularly harassed by the Sri Lankan Army (SLA).
2. On 23 August 2018 a delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa. The delegate accepted the applicant's cousin had been an LTTE fighter but found the applicant was of no adverse interest to the SL authorities.

Information before the IAA

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

Applicant's claims for protection

4. The applicant's written claims can be summarised as follows:
 - He was born in [year] in [Batticaloa], Eastern Province, Sri Lanka.
 - His is of Tamil ethnicity and a Hindu. He had only [number] years of education and cannot read or write in Tamil. He worked on his family farm.
 - When he was about [age] years old his [cousin] who was a year younger than him came to stay with him after his mother died. At the age of [age] his cousin volunteered to join the LTTE.
 - His cousin was with the LTTE for two years then came back home on leave for three months and then left to re-join. His cousin never told him where he was stationed.
 - Whenever his cousin visited home he would bring weapons and openly carry guns, grenades and ammunition around with him when he left the house, or he would leave them in his room. He visited friends or spent time with the family.
 - His cousin would say nothing about what he was doing, only that it was difficult giving general details about how they would go to the jungle and walk many miles. His cousin did not ask him to join the LTTE and when he returned he took all his weapons with him.
 - When he was about [age] years old there was a big battle between the SLA and the LTTE, many people were killed and he received a message his cousin may have be one of them. They never received confirmation of his cousin's death.
 - During this time his family was displaced into an army camp. Because of ongoing shelling from both sides they were moved to another camp. After three months in the two camps they could return home which had been destroyed.
 - After their release from the camps, they were required to go everyday to the army camp and sign a list to confirm they were still at their village. He was also required to undertake working for the army which included [specified tasks].

- The army started coming to the village to conduct inspections of every house. They army questioned his family stating they had heard they had weapons and told them on two occasions they suspected his cousin of giving them weapons. The army acted aggressively, they were sometimes angry and this made him scared.
- Sometime in August 2012 a few months before he left Sri Lanka four people came in the night on motorcycles and honked on their horns around 11pm at night. They shouted angrily so he opened the door. He thinks they were searching for someone however he did not recognise the person whose name they said. They left after he said he did not know them.
- He left Sri Lanka because the harassment he was experiencing from the army was regular and serious making him afraid. The army were taking people from his village and he was scared this would happen to him because the army suspected his cousin had given him weapons. These people would disappear. After he left by boat he heard his [uncle] was taken and they have not heard of him since.
- He fears harm on return to Sri Lanka because he departed without a passport illegally. They will think because he left he will be guilty of the things they suspected him of including holding weapons. The authorities will not protect him because he is a Tamil and the government is Sinhalese.

Refugee assessment

5. 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

6. 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.
7. There is no issue as to the nationality of the applicant. I accept that the applicant is a national of Sri Lanka and that Sri Lanka is the receiving country for the purpose of this review.

Tamil from Batticaloa, Eastern Province of Sri Lanka

8. The applicant has consistently presented himself as being born in [Batticaloa], Eastern Province of Sri Lanka and as a Hindu of Tamil ethnicity since his arrival in Australia [in] November 2012, in his three interviews conducted with the Department (screening, arrival and SHEV) and in his SHEV application. The applicant has provided identification documents including his birth and marriage certificates which identify him as Tamil and from this region. The applicant's interviews before the Department were conducted using interpreters in the Tamil language. Furthermore Tamils comprise 39 per cent of the population of the Eastern Province.¹ I am satisfied the applicant is a Tamil who was born and grew up in Batticaloa District, the Eastern Province of Sri Lanka.

Cousin in the LTTE

9. The applicant claimed to have had a cousin in the LTTE who went missing. Based on the information in the referred material, I find the applicant has broadly been consistent in this claim. The applicant's SHEV interview was conducted on the 19 March 2018. The applicant stated he, himself, had never been involved with any political groups either in Sri Lanka or Australia. He had never been associated with the LTTE but his Auntie's son had. His cousin N was about two years younger than him and they were [related]. He could not provide any of his cousin's ID documents, he had not asked for them and he had only received his.
10. The applicant said his cousin was about 15 years when he joined the LTTE movement, but he was not exactly sure. He was also not exactly sure how long he was in the LTTE. The last time he had seen his cousin was when he came on leave and then returned; this was before they went as refugees and before the war ended. They had had no contact with him after the war; his family had made enquiries as to his whereabouts with a group that located missing persons and didn't find anything. The applicant said his cousin maybe had been killed because if he was alive he would have come home. His cousin was an ordinary fighter with the LTTE and he didn't have any rank. He was with the LTTE for about five years and they used to attack army camps. Asked whether his cousin was made to join the LTTE or whether he volunteered, the applicant said that he volunteered. The delegate put to the applicant that he had claimed in 2007 he had received a message that his cousin had been killed in battle and the applicant said yes. Again the applicant stated his cousin was not an important person with the LTTE but an ordinary fighter. His cousin first came on leave after being away for two years and he would stay one month. He visited twice and this happened before the war ended. The applicant claimed that his cousin would bring weapons home with him and would openly carry guns, grenades and ammunition.
11. A number of inconsistencies are apparent on the evidence before me. I note in his arrival interview of 4 January 2013, asked the reasons why he departed Australia, the applicant said his aunt's son was forcibly recruited by the LTTE then he went missing. This happened in 2004. In his SHEV application the applicant claimed that his cousin volunteered to join the LTTE and he confirmed this at his SHEV interview. In his SHEV application the applicant said that his cousin was one year younger than him and was about [age] when he joined the LTTE (approximately 2004); in his SHEV interview the applicant stated his cousin was about [a younger age] when he joined but he wasn't exactly sure. The applicant in his SHEV application said that he was about [age] when he heard his cousin was killed (2007) which given he had joined in approximately 2004 would have been in the LTTE for around three to four years but

¹ Department of Foreign Affairs and Trade ('DFAT'), "Country information Report Sri Lanka", 23 May 2018, CIS7B839411064, 3.4.

at his SHEV interview the applicant said he was with the LTTE for a minimum of five years. In his SHEV application the applicant claimed his cousin came on leave for a period of three months. At his SHEV interview the applicant said during the leave he would stay for one month. Despite these inconsistencies the applicant was otherwise forthcoming in his SHEV interview and at times appeared to struggle in providing accurate responses to various questions in particular when it came to dates. The delegate would ask the same question a number of times in order for the applicant to clearly comprehend what was being asked. I note the applicant has a very limited education of only [number] years; he cannot read or write and has mostly worked as a farmer. Taking everything into consideration, I accept the applicant had a cousin who fought with the LTTE from about 2004 and sometime before the war ended (mostly likely in 2007, his cousin disappeared after a battle between the LTTE and SLA and has been presumed dead.

SLA interest in the applicant

12. The applicant claimed that around the time his cousin disappeared his family were displaced in to an army camp and after three months in two camps they were allowed to return home. They rebuilt their house which had been destroyed. After their release they were required to report to the army and sign a list of names to confirm they were still at their village. Sometimes the army made him do work such as [specified tasks] and asking him to do [specified] work for the day.
13. The applicant claimed the army started coming to every house in his village to conduct inspections. They wanted to know if there was anyone in the house who they thought were terrorists. They questioned his family as they had heard he had weapons in his house, and they said on two occasions they suspected his cousin had given them the weapons. In about August 2012 before he left Sri Lanka four people came on motorbikes in the night at around 11pm and searched his house looking for someone. He did not recognise the name, told them and they left.
14. At his SHEV interview asked whether he had ever been arrested or detained in Sri Lanka, applicant said 'no'. Asked whether the SLA had ever visited his house, the applicant initially said yes in 2009 and then confirmed it was in 2011. They were looking for weapons as they were suspicious; they would come inside and have a look. They didn't find any weapons. Other houses were also searched and the SLA did find weapons. Asked how often they searched his house, the applicant digressed stating when they went back to their village after being refugees there were huge shell casings and because of these they came and checked. Asked how often they came, the applicant said about once in two months.
15. Asked when they stopped coming to his house, the applicant stated he couldn't remember but it was before he left Sri Lanka. The last time they visited his house was about two months before he left. Since he had left they had not returned to his house. The delegate noted the applicant had stated in his arrival interview in 2013 that his brother T was in [Country 1] and had now returned to Sri Lanka. The applicant said yes, he went to [Country 1] a long time back because 'they' had come looking for him. He had returned to Sri Lanka about 2012 and was at home now. He returned from [Country 1] voluntarily on his own passport and had not been arrested or had any problems since his return. Asked whether his family were experiencing any difficulties or problem in Sri Lanka now, the applicant stated 'no'. The applicant said the army had come looking for weapons because he had been friends with his cousin and they had only come and enquired about him. He feared the army on return to Sri Lanka because they had come looking for him often. He had been afraid they would find something.

16. Asked whether he had ever been arrested he said 'no' but that he was sometimes asked to go and sign something. Asked whether his neighbours also were required to go and sign at the army camp, the applicant said 'yes'. Asked whether his family members were still required to sign the applicant said they didn't. Asked whether there was a particular incident which made him leave Sri Lanka the applicant said the army came looking for him. Asked what he feared would happen if he returned to Sri Lanka, the applicant said he didn't know what would happen; that was his fear. The last time he had contact with the army was about two weeks before he left, they were looking for weapons. The army had not visited his family since he departed.
17. Country information indicates that historically under the Rajapaksa government the security and intelligence forces in the north and east were known to monitor any possible LTTE activity and any form of civil resistance or anti-Government sentiment. Many Tamils reported being monitored, harassed, arrested and/or detained by security forces.² Country information also indicates house to house searches by the SLA were routine after the conflict ended in the Batticaloa area with former LTTE members, family, friends and relatives being summoned. There are also reports of villages in Batticaloa being required to register with the authorities.³
18. The delegate put to the applicant that his cousin who was in the LTTE had been missing and presumed dead since possibly 2007, why would the army still be interested in him on his return considering it was over 10 years since his cousin went missing. In response the applicant stated he didn't know but he was afraid. The applicant again repeated he didn't know but he was afraid.
19. Asked whether his family told him how it was in Sri Lanka at the present time, the applicant said there were problems between the Muslims and Sinhalese now. If he goes to town the Muslim and army areas are close by. Told he was a Tamil and Hindu, how would this affect him, the applicant said if sometimes both of them started fighting he might be caught in the middle.
20. I note the applicant, in his arrival interview with regards to the reasons he departed Sri Lanka, stated the army came to his house three times and the last time was in August 2012. I accept after the war ended in 2009 the SLA came to the applicant's house looking for weapons a number of times. At the same time the SLA also searched other houses for weapons. The SLA did not find any weapons at the applicant's house on each occasion his house was searched and he was otherwise not harmed by the army. The applicant has never been involved with the LTTE and although it may have been known that his cousin N who lived with them and that he was friends with his cousin N the passage of time of over 11 years is too significant. Whilst I note the applicant may have felt harassed by the SLA just prior to his departure from Sri Lanka I am not satisfied the applicant was of adverse interest to the SLA because of his association with his cousin or to the Sri Lanka authorities in general.
21. The Australian Department of Foreign Affairs and Trade 2018 country report on Sri Lanka indicates the security situation, particularly in the north and east, has significantly improved since the conflict ended in 2009. The Sri Lanka government exercises effective control over the entire country.⁴ Towards the end of the conflict, government security forces arrested and detained a large number of LTTE members. Most were sent to government-run rehabilitation

² DFAT, "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143 2.39 and 3.7

³ "SL military detains 28 Tamils in 2 weeks", Tamil net, 27 March 2014, CX1B9ECAB7847; Tamil Net, "'News' 2010 July [190 Reports] [Summaries], Tamil Net", 1 August 2010, CISDCDAAB1766; Research Directorate, Immigration and Refugee Board of Canada, "Sri Lanka: Whether there has been increased surveillance, arrests and detentions of Tamil citizens since February 2011", 12 July 2011, LKA103782.E.

⁴ DFAT, "Country information Report Sri Lanka", 23 May 2018, CIS7B839411064, 2.32.

centres. A smaller number were prosecuted through Sri Lanka's court system. Security forces also questioned or monitored many civilians for possible LTTE activity, and for civil resistance or anti-government sentiment. Although not officially mandated, in many areas the military took a visible and active role in civilian life. Since 2015, the government has publicly committed to reducing military involvement in civilian activities.⁵ The government no longer restricts travel to the north and east. It removed military checkpoints on major roads in 2015. Military involvement in civilian life has diminished although military involvement in some civilian activities continues in the north.⁶

22. The Sri Lankan Constitution provides that 'no citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any such grounds'.⁷ DFAT 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.⁸ Tamils have a substantial level of political influence and their inclusion in political dialogue has increased since the change of government in 2015. Tamils faced less harassment during the 2015 presidential and parliamentary elections than in the 2010 elections. DFAT assesses there are no barriers to Tamil political participation.⁹
23. Many Tamils, particularly in the north and east, reported being monitored, harassed, arrested or detained by security forces during the conflict. 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. Communities in both the north and east report that monitoring is undertaken by military intelligence and the Police Criminal Investigation Department, though in many cases officers dress in plain clothes and do not identify themselves. Some members of the Tamil community reported they felt more empowered to question monitoring activities. In the east, local informants within the community (including neighbours and business owners) reportedly undertook monitoring on behalf of the authorities. 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. During the conflict, authorities detained more Tamils under the Prevention of Terrorism Act (1978) (PTA) than any other ethnic group. Since 2015, the government has reviewed some cases of persons still detained under the PTA and released some detainees, mostly Tamils (see Arbitrary Arrest and Detention). The PTA is currently suspended but remains legally in force.¹⁰ The UN Special Rapporteur to Sri Lanka noted in late 2016 those detained under the PTA had reduced significantly with 43 currently detained.¹¹ I am not satisfied the applicant has a profile of someone associated with a politically sensitive issue to warrant any adverse attention from the Sri Lankan authorities. Whilst the country information does indicate Tamils, particularly in the north and east, may face harassment including monitoring, I am not satisfied this would amount to serious harm.
24. At its peak in 2004, the LTTE had an armed force of approximately 18,000 combatants. The LTTE was supported by foreign funding and both voluntary and forced recruitment of Tamils. DFAT assesses that the LTTE no longer exists as an organised force in Sri Lanka. Any former

⁵ Ibid 3.36.

⁶ Ibid 2.35.

⁷ Ibid 3.1.

⁸ Ibid 3.3.

⁹ Ibid 3.5.

¹⁰ Ibid 3.8-3.12.

¹¹ 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

LTTE members within Sri Lanka would have only minimal capacity to exert influence on Sri Lankans, including those returning from abroad. Towards the end of the conflict, government security forces arrested and detained a large number of LTTE members. Most were sent to government-run rehabilitation centres. The government established 24 rehabilitation centres in the Northern, Eastern and Western Provinces for approximately 12,000 former LTTE members who surrendered in 2009. According to the Bureau of the Commissioner General of Rehabilitation, by November 2017, 12,882 people, primarily former LTTE, had completed rehabilitation. Only one centre with eight inmates remained open in Vavuniya in December 2017. Former LTTE members face no legal barriers to participating in public life, including politics. Sri Lankan authorities remain sensitive to the potential re-emergence of the LTTE throughout the country.¹² The Sri Lankan government acknowledges that ex-combatants and their families may continue to face discrimination both within their community and from government officials. The TNA and the Tamil Civil Society Forum reported in 2016 that authorities continued to follow and monitor former LTTE cadres and their families. 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.¹³ Based on his own evidence the applicant's cousin was not high profile within the LTTE but an ordinary fighter. The applicant has stated that his family including his father and other brothers have not been subject to any ongoing attention from the SLA since his departure from Sri Lanka. Whilst I note the applicant in his SHEV application claimed that his [uncle] was taken by the SLA since he departed Sri Lanka and he has not been heard from since, the applicant did not state on what basis his uncle had been taken away and the matter was not raised by the applicant at his SHEV interview. I am not satisfied the applicant's [uncle] has been taken away by the SLA. I consider the applicant included this point in his claims to embellish and strengthen his claims for protection.

25. I note the June 2017 UK Home Office report on Tamil Separatism before the delegate states a person being of Tamil ethnicity would not in itself warrant international protection. Furthermore, neither in general, would a person who evidences past membership or connection to the LTTE, unless they are perceived to have a significant role in it; or if they are, or are perceived to be, active in post-conflict Tamil separatism and thus a threat to the state.¹⁴ As already discussed, the applicant has never claimed to have been involved with the LTTE in the past, nor has he claimed to have had any involvement with Tamil political groups or Tamil separatism either in Sri Lanka or in Australia.
26. Based on the information before me, the applicant's profile, that he has had no direct involvement with the LTTE, the country information, and the fact that the applicant was of no adverse interest to the authorities at the time he departed Sri Lanka, I am not satisfied the applicant who is an ethnic Tamil has a well-founded fear of serious harm because of any real or perceived links or real or imputed political association with the LTTE because of his connection to his cousin, a former low level LTTE cadre, who disappeared and was presumed dead some 12 years ago. Furthermore, given the improved security situation in the East of Sri Lanka, his lack of previous profile with the authorities, I am also not satisfied the applicant has a well-founded fear of serious harm for being a young Tamil male from the East of the country or for being from an area previously controlled by the LTTE.

¹² DFAT, "Country information Report Sri Lanka", 23 May 2018, CIS7B839411064, 3.35.-3.43.

¹³ Ibid 3.59.

¹⁴ UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OGG6E7028826, p.13.

27. The applicant expressed a fear of harm because of recent conflict between the Tamil and Sinhalese communities and that he might be caught in the middle of the conflict. DFAT indicates in March 2018 the government declared a nationwide State of Emergency for 12 days in response to incidents of communal unrest between members of the Sinhalese Buddhist and minority Muslim communities in Kandy District, Central province. A smaller incident occurred in February 2017 whereby Buddhist national groups perpetrated arson attacks against Muslim-owned residences, shops and a mosque in Ampara, Eastern District.¹⁵ A lack of reliable statistics precludes an accurate assessment of whether incidents are increasing, but supporters of Sinhala Buddhist nationalist groups have engaged in a sustained campaign of hate speech against Muslims in recent years. While there have been incidents of property damage and personal violence, overall violence remains sporadic. DFAT assesses that Sri Lankan Muslims face a low risk of official and societal discrimination and a low risk of violence.¹⁶ Given the applicant is a Tamil and of the Hindu faith, I am not satisfied the applicant has a well-founded fear of any harm on the basis of sporadic conflict between the Sinhalese Buddhist and Muslim communities in Sri Lanka.

Failed (Tamil) asylum seeker who departed illegally

28. The applicant claimed that he will be questioned on return to Sri Lanka and because he left Sri Lanka without a passport and he will need an identity document to return and this will alert to authorities that he left illegally. They will believe he is guilty of the things they suspected him of including holding weapons. I accept that on his return to Sri Lanka the applicant may be identified by the Sri Lankan authorities as a Tamil asylum seeker who departed Sri Lanka illegally.

29. Sri Lanka's Constitution entitles any citizen to 'the freedom to return to Sri Lanka'. The Immigrants and Emigrants Act (1949) (the IE Act) governs exit and entry from Sri Lanka. Sections 34 and 45(1) (b) of the IE Act make it an offence to depart other than via an approved port of departure, such as a seaport or airport. Returnees who depart Sri Lanka irregularly by boat are considered to have committed an offence under the IE Act.¹⁷ Processing of returnees at the airport can take several hours, due to the administrative processes, interview lengths, and staffing constraints at the airport. Returnees are processed in groups, and individuals cannot exit the airport until all returnees have been processed. For returnees travelling on temporary travel documents, police undertake an investigative process to confirm identity, which would identify someone trying to conceal a criminal or terrorist background, or trying to avoid court orders or arrest warrants.¹⁸

30. This often involves interviewing the returning passenger and contacting their claimed home suburb or town. At the earliest available opportunity after investigations are completed, police transport the individual to the closest Magistrate's Court, after which custody and responsibility for the individual shifts to the courts or prison services. The magistrate then makes a determination as to the next steps for each individual; crew and facilitators or organisers of people smuggling ventures are usually held in custody. Apprehended individuals can remain in police custody at the Criminal Investigation Department's Airport Office for up to 24 hours after arrival. Should a magistrate not be available before this time – for example,

¹⁵ DFAT, "Country information Report Sri Lanka", 23 May 2018, CIS7B839411064, 3.22.

¹⁶ Ibid 3.24.

¹⁷ Ibid 5.27.

¹⁸ Ibid 5.29.

because of a weekend or public holiday – those charged may be detained for up to two days in an airport holding cell.¹⁹

31. 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 IE Act. Penalties for leaving Sri Lanka illegally can include imprisonment of up to five years and a fine of up to 200, 000 Sri Lanka Rupees. In practice, most cases result in a fine and not imprisonment. Fines are issued to deter people from departing illegally in the future. DFAT has been advised by the Sri Lankan government, but cannot verify, that no mere passenger on a boat has been given a custodial sentence. A guilty plea attracts a fine, which can be paid by instalments. If a passenger pleads not guilty the magistrate will usually grant bail on a personal surety or guarantee by a family member. Where a guarantor is required, the returnees may have to wait for the guarantor to come to court. Anecdotally, most passengers may spend years on bail and most are free to go after paying a fine.²⁰
32. DFAT states that all returnees are treated according to the standard procedures, regardless of their ethnicity and religion, and understands they are not subject to mistreatment during processing at the airport. There is country information containing reports of some returnees being tortured.²¹ DFAT does not suggest that there is no risk and those other reports provide some examples of incidents of mistreatment. I accept that some asylum seekers with significant actual or perceived links to the LTTE may still be at risk of harm when processed at the airport. However, as discussed above, on my findings, the applicant is not such person. I am not satisfied that the applicant for having departed illegally would be suspected and found guilty of holding weapons.
33. The Sri Lankan authorities may monitor members of the Tamil diaspora returning to Sri Lanka depending on their risk profile. I am not satisfied the applicant had a profile with the authorities prior to his departure from Sri Lanka and despite spending over five years in Australia where he has sought asylum the applicant has otherwise not been politically active to warrant any attention. The applicant is from Batticaloa District in the Eastern Province, where his family including his wife and child, his parents and four siblings, still reside and I am satisfied that this is the applicant's home area to which he will return. The monitoring of returnees based on country information appears to be focussed on the north, the applicant will be returning to the East.²² I note the applicant's brother who returned after a period of time in [Country 1] has not experienced any problems or difficulties with the authorities. Given the applicant's profile, I am not satisfied there is a real chance the applicant will be monitored because of his absence from Sri Lanka, his Tamil ethnicity or as failed asylum seeker, on return to Sri Lanka.
34. DFAT reports that refugees and failed asylum seekers face practical challenges to successful return to Sri Lanka including expenses or debts incurred to undertake their outward journey. Many face difficulty in finding suitable employment and reliable housing, and refugees and failed asylum seekers have reported social stigma from their communities on return. DFAT assesses that returnees may face some societal discrimination upon return to their

¹⁹ Ibid 5.30.

²⁰ Ibid 5.32.

²¹ "Another Tamil returnee arrested", Sri Lanka Mirror, 1 July 2015, CXBD6A0DE16698; "SL military continues to arrest Tamils from East returning from Middle East", Tamil net, 31 May 2015, CXBD6A0DE7540; "16 Batticaloa Tamils arrested within last 100 days at Colombo airport", Tamil net, 3 May 2015, CXBD6A0DE6027; "10 Tamils arriving in Lanka arrested," Sri Lanka Mirror, 4 March 2015, CXBD6A0DE6065; Freedom From Torture, "Sri Lanka Tamils tortured on return from the UK", 1 September 2012, CIS24086; Freedom from Torture, 'Sri Lanka – Update on torture since 2009', 6 May 2016, CIS38A8012881

²² DFAT, "Country information Report Sri Lanka", 23 May 2018, CIS7B839411064, 5.40.

communities, and that continued surveillance of returnees contributes to a sense of mistrust. Bureaucratic inefficiencies rather than official discrimination present the biggest challenge to reintegration for returnees.²³

35. The applicant is [age] years old. Whilst he has not worked in Australia the applicant in the past has worked as a [farmer] on the land that his family leased and on their family farm. He also worked [in another industry]. The applicant stated at his SHEV interview his mother provided the money for his journey and he did not have any debts or owe any money for his journey here. He also stated his family had land and [livestock]. His [siblings], mother and father are supporting themselves through farming and he has maintained an ongoing relationship with his family since his arrival in Australia. The applicant's family including his in-laws would be able to provide him with basic support on his return to Sri Lanka and I am satisfied he will be able to re-establish himself in Batticaloa without suffering harm in relation to any housing or employment difficulties. I accept that the applicant may face some social stigma on his return as a failed asylum seeker. However, although social stigma may be hurtful, I am not satisfied it amounts to significant ill treatment or any other type of harm that may be regarded as serious harm.
36. I accept the applicant may be processed under the IE Act at the airport on his return, that he may face court action and that he may be detained for a brief period of time and be fined under the IE Act. Whilst I note DFAT reports that prison conditions in Sri Lanka do not meet international standards because of a lack of resources, overcrowding and poor sanitary conditions²⁴, I am of the view any questioning and detention the applicant may experience would be brief and would not in this case constitute serious harm. I also find the imposition of a fine, surety or guarantee does not of itself, or when combined with the brief detention, constitutes serious harm.
37. The country information states that all persons who depart Sri Lanka illegally are subject to the IE Act on return. That law is not discriminatory on its terms. Case law states that a generally applicable law will not ordinarily constitute persecution because the application of such a law does not amount to discrimination.²⁵ In this case, the evidence does not support a conclusion that the law is selectively enforced or that it is applied in a discriminatory manner. I find that the processing, investigation, prosecution and punishment of the applicants under the IE Act would be the result of a law of general application and does not amount to persecution for the purpose of ss.5H(1) and 5J(1) of the Act.
38. I am not satisfied that the applicant faces a real chance of persecution on the basis of being a returned Tamil asylum seeker from Australia who departed Sri Lanka illegally, now or in the reasonably foreseeable future.
39. Considering the applicant's circumstances and profile as a whole, in the context of the current country conditions in Sri Lanka I am not satisfied that the applicant faces a real chance of persecution now or in the reasonably foreseeable future. The applicant does not have a well-founded fear of persecution within the meaning of s.5J.

²³ Ibid 5.39-5.42.

²⁴ DFAT, "Country information Report Sri Lanka", 24 January 2017, CISED50AD105, 4.25.

²⁵ *Chen Shi Hai v MIMA* (2000) 201 CLR 293; and *Applicant A v MIEA* (1997) 190 CLR 225.

Refugee: conclusion

40. 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

41. 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

42. 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.
43. As set out above, I have found there is not a real chance the applicant faces serious harm now or in the reasonable foreseeable future as a Tamil originating from Batticaloa, Eastern Province, or because of any real or perceived links or real or imputed political association with the LTTE because his [cousin] was a former low level LTTE cadre, or because the SLA has in the past searched his house for weapons, or because of any conflict in his area between the Sinhalese and Muslim communities. I have similarly found he does not face a real chance of harm as a Tamil asylum seeker. Based on the same information and for the reasons outlined above, I am also not satisfied that there is a real risk that he would face significant harm for those reasons.
44. I have accepted the applicant will be returning to Sri Lanka having departed illegally. I have found that as a returnee he would be subject to an interviewing process whilst security, criminal and identity checks are undertaken by the authorities. I have found he might be remanded in custody for a brief period at the airport or at a prison before he is brought before a magistrate, that he is likely to be fined or that a surety or guarantee may be imposed on him. I have found the applicants do not to have any specific profile that would warrant a longer detention, custodial sentence or further interrogation. Whilst prison conditions in Sri Lanka are overcrowded, with poor sanitary conditions and under resourced, this is more as a result of circumstances rather than the intention of the authorities who are working to address these issues.
45. I am also not satisfied that the treatment and penalties to which the applicant may be subject means there is a real risk the applicant will be subject to the death penalty or will be arbitrarily deprived of his life or will face torture. Nor am I satisfied that there is any intention to inflict severe pain or suffering, pain or suffering or to cause extreme humiliation. I am not satisfied

the applicant faces a real risk of cruel or inhuman treatment or punishment or degrading treatment or punishment.

Complementary protection: conclusion

46. 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.