



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA18/05711

Date and time of decision: 29 October 2018 09:02:00
D Corrigan, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Sri Lankan national. On 6 October 2016, he lodged an application for a Safe Haven Enterprise Visa (SHV).
2. In a decision dated 6 September 2018, a delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa. The delegate found the chance that he will face serious harm or significant harm on account of his Tamil race, his perceived links and family connection to the Liberation Tigers of Tamil Eelam (LTTE), his claimed involvement in an election and as a failed Tamil asylum seeker to be remote and not real.

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). The IAA received submissions from the applicant and his representative. To the extent that they discuss the findings of and other matters before the delegate this is not new information for the purpose of s.473DC(1) of the Act.
4. Included with the submission is a translated copy of a letter, dated [October] 2018, from a Grama Niladhari, stating that the applicant's cousin and family have been forcibly disappeared since 2012 and that the army had given trouble to him and he was in the circumstances of insecurity and was "in the point of threatening death". It also states that the applicant is being troubled by Sri Lankan forces. This is new information. Whilst I note that the document post-dates the delegate's decision, I note that the applicant has not claimed that the family of his cousin has disappeared, only that the cousin himself has so its content is inconsistent with the claims of the applicant. I consider the document and its very limited content to have very little probative value and I am not satisfied that there are exceptional circumstances to justify considering this new information under s.473DD(a).
5. The submission also includes references to country information that pre-dates the delegate's decision as well as an undated statement of the UN rapporteur with a citation only of a hyperlink. This is new information. The representative has not provided any reasons as to why there are exceptional circumstances to justify considering this new information. Nor has reasons been provided as to why this new information was not, and could not have been provided to the delegate before the delegate made the decision or that it is credible, personal information which was not previously known and had it been known, may have affected the consideration of the applicant's claims. No reasons are apparent to me. Due to all of this, I am not satisfied that there are exceptional circumstances to justify considering this new information and I am not satisfied that s.473DD(a) is met in relation to it. I am also not satisfied that any of this new information was not, and could not have been provided to the delegate before the delegate made the decision or that it is credible, personal information which was not previously known and had it been known, may have affected the consideration of the applicant's claims and I am not satisfied that s.473DD(b)(i) or (ii) are met in relation to it.

Applicant's claims for protection

6. The applicant's claims can be summarised as follows:

- He is a Hindu Tamil from Mannar District, Northern Province in Sri Lanka.
- His cousin (who from early childhood lived with the applicant's family) was [an official] of a fishing cooperative and collected money in this role. His cousin was forced to give the LTTE a commission from the money he collected and he travelled to the LTTE-controlled area to do this. His cousin provided [goods] and also transport for the LTTE.
- The army suspected his cousin was a part of the LTTE because of his regular entry to the LTTE-controlled area. The applicant sometimes assisted his cousin by taking the money to the LTTE-controlled area. The army detained and tortured the cousin for [a number of] days in late 2005.
- On several occasions between 2005 and 2007, the army detained and tortured the applicant or his father for several days if they did not find the cousin at home. The applicant remembers one specific occasion in 2006 when the army came to the house to look for this cousin and accused the applicant of being a LTTE supporter. The army detained and tortured the applicant and released him after three days.
- The applicant's family moved around to different places nearby to hide from the army but the army would eventually find them.
- The applicant fled to [Country 1] in 2007 but returned to Sri Lanka after three days. A couple of weeks after he returned from [Country 1], he was detained, questioned and abused by the army who suspected he had travelled overseas to train with the LTTE.
- In 2007, the army detained his cousin for one month. One month after his cousin was released from detention, the army visited the applicant's house to look for his cousin. His cousin was shot but escaped. The army detained the applicant and his father for two days and tortured them.
- His cousin fled to [Country 2], but the army continued to look for the cousin at the applicant's house. The army continued to detain and assault the applicant if they did not find the cousin at home.
- In April 2012, his cousin returned to Sri Lanka from [Country 2]. His mother visited his cousin after he returned to Sri Lanka in 2012. The army visited the applicant's house to look for his cousin. The army told the applicant's mother to surrender the cousin and threatened to detain, torture and kill the family. After this, the army continued to visit the applicant's house. The army assaulted and sometimes detained the applicant. His cousin has been missing since 2012.
- The applicant fled to [Town 1] and remained in hiding there for three months. He departed Sri Lanka lawfully via plane from Colombo in August 2012.
- His uncle [was] an election candidate for the Tamil National Alliance (TNA). He assisted with his uncle's election campaign by putting up posters and talking to people. The Sri Lankan authorities and people from other political parties threatened the applicant and his uncle.
- His school friend was an LTTE member and would sometimes visit the applicant. The applicant and other villagers were rounded up, detained and tortured by the SLA after the LTTE attacked an army bus near the village. He was detained for 2-3 days. The applicant was asked questions by the army about his friend. His friend was killed during the war and the army attacked and killed his friend's family.
- Another uncle [was] a LTTE member when the applicant was young.

- He attended at the local sports club where there were self-defence meetings run by the LTTE.
- He was registered and assessed for refugee status by the UNHCR in [Country 3] in 2012.
- He will be harmed as a failed asylum seeker.

Refugee assessment

7. 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

8. 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.

Country of reference

9. The applicant has provided copies of his passport and his birth certificate (with translation) and he has consistently maintained that he is a Sri Lankan national. I accept that he is a Sri Lankan national and I find that Sri Lanka is his receiving country.

Association with LTTE and Tamil claims

10. I have considered carefully the applicant’s claims but I find his evidence to be severely lacking in credibility. I do so for the following reasons:
- At the SHEV interview, the applicant claimed that he had helped the LTTE because he had assisted a school friend who was a LTTE member. He claimed that this friend would visit him and he would provide him food and that this friend sent him messages via trustworthy people. He also claimed that during the conflict, the army detained him, questioned and tortured him when they rounded up villagers following a nearby attack on an army bus. He claimed that they asked questions about his friend. However, the applicant made no mention of these matters in his statutory declaration which

accompanied his visa application despite being represented by a lawyer and having had the contents of this declaration being interpreted to him in the Tamil language. Near the start of the SHEV interview, he was asked if there was anything in his application that he would like to change, he answered “no”. The applicant commented at the interview that he did not raise the claim of his school friend because he would be scared of what would happen to him. However, he had specifically claimed that his cousin was associated with the LTTE, so I do not find this to be a credible or plausible explanation for his failure to previously mention these claims. I find this substantially detracts from his credibility.

- At the SHEV interview, the applicant claimed that he had an uncle who was a member of the LTTE. However, he made no mention of this in his statutory declaration despite being represented by a lawyer and having had the contents of this declaration being interpreted to him in the Tamil language. Near the start of the SHEV interview, he was asked if there was anything in his application that he would like to change, he answered “no”. Given the applicant has claimed that his cousin was associated with the LTTE and serious consequences had arisen from it, I do not accept that it is plausible or credible that he would not have raised this claim earlier and I find this further detracts from his credibility.
- At the SHEV interview, the applicant stated that his cousin travelled by boat to LTTE-controlled areas to avoid passing through army checkpoints and monitoring when exiting the government-controlled area. However, in his statutory declaration, he stated that his cousin came to the attention of the army because he had to register his name with the army when leaving the government-controlled area. I find this inconsistency further detracts from his credibility.
- At the SHEV interview, the delegate asked the applicant how many times his cousin had been detained by the army and he responded that his cousin was detained by the army in 2007. Asked if this was the only time his cousin was detained by the army, he responded in the affirmative but that they had interrogated his cousin on 2-3 occasions and his cousin had bribed them. Asked whether these interrogations occurred before or after 2007, he said they all occurred around 2007. However, in his statutory declaration he claimed that the army detained his cousin for [a number of] days and tortured him in around late 2005 and that they had also detained his cousin for a month in 2007. I consider the applicant’s failure at the SHEV interview to mention his previous claim of his cousin’s detention in 2005 and his inconsistent evidence concerning the number of times his cousin was detained to detract substantially from his credibility.
- The applicant has claimed that the army came one night to his house looking for his cousin. He claims that when they saw him trying to escape, they shot him in the leg or foot but he was able to get away. I find it to be implausible and not credible that his cousin would have been able to get away from army forces if he had been hindered by a gunshot wound in the leg or foot and I find this further detracts from his credibility.
- At the SHEV interview, the applicant was asked if anything had happened to his family between 2007 and 2012 when his cousin was in [Country 2]. He stated that his family had to spend a lot of money because his father earned a lot of money and they had to pay them. It is not apparent to whom they had to pay money but the implication seemed to be the army. I consider the applicant’s evidence to be very vague and undetailed. Furthermore, the applicant made no mention of these matters in his statutory declaration which accompanied his visa application despite being represented by a lawyer and having had the contents of this declaration being interpreted to him in the Tamil language. Near the start of the SHEV interview, he was asked if there was

anything in his application that he would like to change, he answered “no”. I find this detracts further from his credibility.

- The applicant has claimed that his cousin returned from [Country 2] in April 2012 despite the applicant’s family telling him that the army was still coming around looking for him. He claims that his cousin returned for the sake of his relationship with his girlfriend because both of them were getting old and she wanted him to return. Noting that the applicant had claimed that the Sri Lankan authorities had twice detained his cousin for significant periods and tortured him in 2005 and 2007 and that they had shot him when he was escaping from them and that he had been told that they were still searching for him, I find it implausible and not credible that his cousin would have returned to Sri Lanka in these circumstances. I find this further detracts from his credibility.
 - The applicant claims that the Sri Lankan authorities discovered his cousin had returned to Sri Lanka because they questioned two people who came back with the cousin on the same boat. He further claims that these two people told the authorities they had travelled with the cousin. At the SHEV interview, the delegate asked the applicant how he knew this happened. He stated that when the authorities visited the house to look for his cousin, his mother told them the cousin was in [Country 2]. When faced with his mother’s denial, the authorities said they could prove to the mother that the cousin was in Sri Lanka. The authorities then made a phone call to the two people they had questioned and got them to verify the story to the mother. I find it implausible and not credible that the authorities would feel the need to justify to the applicant’s mother their intelligence on how they knew the cousin had returned to Sri Lanka. I also consider it implausible and not credible that a phone call initiated by the authorities to two essentially unknown people verified or proved anything to the applicant’s family about the cousin’s return to Sri Lanka. I find this further detracts from his credibility.
 - The applicant raised the claim that his cousin has been missing since 2012 for the first time at the SHEV interview. He did not raise this claim in his statutory declaration despite being represented by a lawyer and having had the contents of this declaration being interpreted to him in the Tamil language. Near the start of the SHEV interview, he was asked if there was anything in his application that he would like to change, he answered “no”. Given the significance of this claim and the fact that he considers his cousin to be like his brother, I find it implausible and not credible that the applicant would not have made this claim that his cousin is missing in his statutory declaration. I find this further detracts from his credibility.
11. Given these highly significant and fundamental concerns about his credibility, I do not accept that the applicant and his cousin travelled to and from LTTE-controlled areas to take money and that this travel caused the army to suspect his cousin was involved in the LTTE. I do not accept that his cousin provided [goods] or transport to the LTTE. I do not accept that the army detained and tortured his cousin in late 2005. I do not accept that on several occasions between 2005 and 2007, the army detained and tortured the applicant or his father for several days if they did not find the cousin at home. I do not accept that on one specific occasion in 2006 the army came to the house to look for this cousin and accused the applicant of being a LTTE supporter. I do not accept that he army detained and tortured the applicant and released him after three days. I do not accept that the applicant’s family moved around to different places nearby to hide from the army but the army would eventually find them.
12. I accept that the applicant went to [Country 1] in 2007 but I do not accept that he fled there I do not accept that a couple of weeks after he returned from [Country 1], he was detained,

questioned and abused by the army who suspected he had travelled overseas to train with the LTTE. I do not accept that one month after his cousin was released from detention that the army visited the applicant's house to look for his cousin. I do not accept that his cousin was shot and escaped. I do not accept the army detained the applicant and his father for two days and tortured them. I do not accept that his cousin fled to [Country 2], but the army continued to look for the cousin at the applicant's house. I do not accept that the army continued to detain and assault the applicant if they did not find the cousin at home. I do not accept that in April 2012, his cousin returned to Sri Lanka from [Country 2]. I do not accept that his mother visited his cousin after he returned to Sri Lanka in 2012. I do not accept that the army visited the applicant's house to look for his cousin. I do not accept the army told the applicant's mother to surrender the cousin and they threatened to detain, torture and kill the family. I do not accept that after this, the army continued visit the applicant's house. I do not accept that the army assaulted and sometimes detained the applicant. I do not accept that his cousin went into hiding or has been missing since 2012 and I do not accept that his cousin has been of adverse interest or targeted by the authorities since his detention and release in 2007. I do not accept that the applicant fled to [Town 1] and remained in hiding there for three months.

13. I do not accept that the applicant's school friend was an LTTE member. I do not accept that the applicant and other villagers were rounded up, detained and tortured by the army after the LTTE attacked an army bus near the village. I do not accept that he was detained for 2-3 days. I do not accept that the applicant was asked questions by the army about his friend. I do not accept that his friend was killed during the war and the army attacked and killed his friend's family. I do not accept that another uncle [was] a LTTE member when the applicant was young. I do not accept that his family were ever subjected to extortion by the military or anyone else.
14. In making my findings, I have taken into account the letter from a Parish Priest, dated [January] 2013, that supports the applicant's claims. However, given the highly significant and fundamental concerns that I have with the applicant's credibility, I have given this letter only limited weight and I find that it does not overcome these concerns.
15. I accept that the applicant's cousin was [an official] of a fishing co-operative and was required to pay "tax" to the LTTE. The applicant has been consistent about this and it accords with country information. Country information indicates that the LTTE had a systematic taxation system, which expanded after the Ceasefire Agreement was signed in 2002 and the LTTE were able to travel freely to government-controlled areas. The LTTE imposed taxes on various transactions, businesses and individuals, including tax on fuel.¹
16. I accept that the applicant attended self-defence meetings and training run by the LTTE at his local sports club as it is consistent with country information that indicates that the LTTE conducted basic training for civilians in government controlled areas during the ceasefire period.²
17. I accept that the applicant's cousin was detained by the army in 2007 for a month and then released. The applicant has submitted a receipt of arrest and International Committee of the Red Cross detention attestation to support his claim. Country information indicates that

¹ Centre on Conflict, Development and Peacebuilding (CCDP) - Graduate Institute of International and Development Studies, "An Institutional History of the Liberation Tigers of Tamil Eelam (LTTE)", Geneva, CCDP Working Papers, 1 November 2014.

² Centre for Policy Alternatives, "War, peace and governance in Sri Lanka: Overview and trends 2006", 1 August 2007.

wide scale arrests of young Tamil men occurred in 2007.³ In addition, fighting between government security forces and the LTTE occurred in 2007 in the Mannar District with the opening of a new front of the conflict in the northwest along the border of Mannar and Vavuniya.⁴

18. The applicant has given evidence that he was never a member of the LTTE and I have not accepted that any of his family members have been members of this organisation. I have accepted that his cousin had to pay "tax" during the conflict to the LTTE; however country information indicates that many people in LTTE-controlled areas and nearby government-controlled areas were forced to pay LTTE taxes and necessarily had contact with the LTTE and its administration as a part of their daily lives.⁵ I have accepted that his cousin was detained by the army in 2007; however, he was released after a month which indicates that the authorities were no longer interested in him. This event occurred many years ago during the war which has now ended. I note the applicant's parents and sister continue to live in Sri Lanka without any problems and that his brother lived in [Town 1] until 2014-15 without facing any problems. I have not accepted that the cousin has gone into hiding or gone missing or was targeted by the authorities after his 2007 detention. Whilst I have accepted that the applicant attended LTTE self-defence meetings and training at his local sports club, this occurred many years ago and country information indicates that many people in LTTE-controlled areas and nearby government-controlled areas had contact with the LTTE and its administration as a part of their daily lives. I have not accepted that the applicant or any of his family members (other than his cousin in 2007) has ever had any problems with the Sri Lankan authorities. I do not accept that the applicant had an adverse profile or was imputed with a pro-LTTE profile by the Sri Lankan authorities or anyone else or that this is the case now.
19. Based on the country information before me, conditions in Sri Lanka, particularly in the north and east (where the applicant comes from) have significantly improved since the ending of the war in 2009 and from when the applicant left the country. DFAT have assessed that monitoring of Tamils in day-to-day life in has decreased significantly under the current government though surveillance of Tamils in the north and east continues, particularly those associated with politically sensitive issues. They state that Tamils have a substantial level of political influence and their inclusion in political dialogue has increased since the change of government in 2015 and that the current government includes 29 Tamils and President Sirasena presides over a diverse coalition of parties that includes Tamil members. DFAT state that they are not aware of an evidence to suggest that Sinhalese, Tamil, Muslim or other parties face any differences in treatment and that they understand Tamils do not receive unwarranted attention from authorities because of their political involvement. They assess 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. They assess that there is no official discrimination on the basis of ethnicity in public sector employment but that limited Tamil appointments are a result of a number of factors including disrupted education because of conflict and language constraints. DFAT have stated

³ UK Home Office, "Sri Lanka February 2009", 18 February 2009; Associated Press (AP), "Sri Lankan government says it has freed most detained Tamils caught up in security sweep", 4 December 2007.

⁴ Centre on Conflict, Development and Peacebuilding (CCDP) - Graduate Institute of International and Development Studies, "An Institutional History of the Liberation Tigers of Tamil Eelam (LTTE)", CCDP Working Papers, 1 November 2014; UK Home Office, "Sri Lanka November 2007", 15 November 2007.

⁵ Centre on Conflict, Development and Peacebuilding (CCDP) - Graduate Institute of International and Development Studies, "An Institutional History of the Liberation Tigers of Tamil Eelam (LTTE)", CCDP Working Papers, 1 November 2014; 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.

that the number of incidents of extrajudicial killings, disappearances and abductions for ransom, including incidents of violence involving former LTTE members has reduced significantly since the ending of the conflict.⁶ Recent country information indicates that the Prevention of Terrorism Act (PTA) was suspended in late 2016 and the number of persons detained under it has reduced significantly and was in double digits as of July 2017.⁷

20. The June 2017 UK Home Office report on Tamil separatism opines that a person being of Tamil ethnicity would not in itself warrant international protection and 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 be, active in post-conflict Tamil separatism and thus a threat to the state.⁸
21. The representative's submission refers to a 2012 United Nations High Commissioner for Refugees (UNHCR) guidelines referring to persons with real or perceived links to the LTTE who may require international refugee protection as including former LTTE supporters who may have never undergone military training, but were involved in sheltering or transporting LTTE personnel, or the supply and transport of goods for the LTTE and persons with family links or who are dependent on or otherwise closely related to person with above profiles. I note these guidelines are now six years old and I have given them only limited weight and I have given far greater weight to the other more recent reports outlined above. I also note that the guidelines themselves stated that even if a person came within a listed profile there still needed to be an examination of the individual circumstances of the case. I have not accepted that the applicant or any of his family members have ever been involved in sheltering or transporting LTTE personnel or the supply and transport of goods for the LTTE and I note that I have not accepted that the applicant or any family member has had any problems after his cousin's detention and release in 2007.
22. I do not accept that, now or in the reasonably foreseeable future, that there is a real chance that the applicant or any family member would be perceived to have had a significant connection to the LTTE and targeted as a result. The applicant has not claimed that he has been involved in post-conflict Tamil separatist activities either here or in Australia.
23. I have not accepted that the applicant's family were subjected to extortion by the military. There is nothing in the evidence before me, including the latest DFAT report⁹, that indicates that the applicant would face a real chance of being extorted by the military or anyone else and I find this to be the case. I find that the applicant does not face a real chance of any harm on this basis.
24. Whilst the country information indicates that the applicant may face a low risk of societal or official discrimination due to being a Tamil, I note that according to his SHEV application that he was employed for an 11 year period as a fisherman and completed Year 11 and he has not claimed any issues with obtaining housing. Given the applicant's profile, I do not accept that there is a real chance that he will face serious harm upon return due to his being a Tamil male from the north and east of Sri Lanka, his family or due to an imputed pro-LTTE political opinion.

⁶ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018.

⁷ DFAT, "UN Special Rapporteur (Ben Emmerson) on human rights and terrorism in Sri Lanka", 14 August 2017.

⁸ United Kingdom (UK) Home Office, "Country Information and Guidance: Tamil Separatism", 15 June 2017.

⁹ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018.

UNHCR

25. The applicant claims that he was registered and assessed for refugee status by the UNHCR in [Country 3]. He claims to have left the registration paper issued by UNHCR issued in [Country 3]. I find it plausible and credible that the applicant registered with the UNHCR in [Country 3]. However, the applicant has not provided any documentation to support the claim that he was assessed for refugee status. Registration is not, in itself, considered to be a refugee status determination (RSD) that recognises an asylum seeker to be a refugee.¹⁰ I note the applicant was only in [Country 3] for approximately 3.5 months. Country information indicates that the waiting times between registration and RSD outcome by UNHCR [Country 3] is very long due to the high volume of asylum seekers – the wait time between registration and the first RSD interview in itself was seven to 11 months.¹¹ This strongly indicates that he had not gone through the RSD process and did not receive a RSD outcome. Therefore, I do not accept that the applicant was assessed for refugee status by the UNHCR in [Country 3] and received a RSD outcome.

Election involvement

26. I do not accept that the applicant assisted with his uncle's election campaign in 2012 by putting up posters and talking to people and that the Sri Lankan authorities and people from other political parties threatened the applicant and his uncle. The applicant gave very limited and undetailed evidence concerning his involvement at the SHEV interview when he asked what his role was saying only that he put up posters and told people. I have taken into account the passage of time may have affected his memory to some degree, but I am not satisfied this is an adequate explanation for his undetailed evidence. Furthermore, the applicant gave evidence that he undertook these activities 2-3 months prior to departing Sri Lanka. I do not consider it is plausible or credible that the applicant was campaigning and putting up posters at the same time he has claimed that he was in hiding in [Town 1] and Colombo.
27. The applicant told the delegate that his uncle lost the election and his evidence indicated that nothing had happened to his uncle since then. Whilst I accept that his uncle was a TNA candidate in 2012, I find that the chance that the applicant will face any harm on account of these claims is remote.

Hinduism

28. The applicant did not claim to fear any harm on account of his religion or make any claims of any past mistreatment because of this. Surprisingly, however, the delegate did consider this as an implied claim even though it is not apparent from the application and I have therefore also considered this to avoid any accusation of legal error.
29. DFAT have stated that in December 2016, Minority Rights Group International reported allegations by activists and politicians of violations affecting Hindu places of worship. They referred to the 2017 report by the UN Special Rapporteur on minority issues reported allegations of '... systematic, government-sponsored movements of Sinhalese settlers to the Tamil-speaking areas [in the north and east] that are intended to change the demographics of

¹⁰ UNHCR, "Procedural standards for RSD under UNHCR's Mandate", 1 September 2005; "Mapping and Analysing the Protection Situation of Unaccompanied and Separated Children (UASC) in Indonesia, Malaysia and Thailand", 1 December 2013; UNHCR, "UNHCR Global Report 2010, Malaysia", 1 June 2011.

¹¹ [Source deleted].

the region, to the political disadvantage of the minorities.’ This included the rapid development of new Sinhalese settlements and military-assisted construction of Buddhist statues and temples in areas that have no Buddhist population. DFAT state they are not aware of any organisations in Sri Lanka that systematically document violations against Hindus, and as such cannot verify this information. DFAT have noted that Sri Lanka recognises religious holidays for Hindus and that school students are able to study Hindu religious classes in most public and private schools and that there are some Hindu public schools. They assess 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.¹²

30. The applicant has not claimed that he or his family have ever suffered harm in practising Hinduism or been prevented from doing so and taking into account the totality of the country information and his individual circumstances, I find that he would not face a real chance of any harm on account of his religion.

Failed Tamil asylum seeker

31. I have considered the chance of the applicant facing harm on his arrival at Colombo airport or afterwards on account of being a failed Tamil asylum seeker who had legally departed the country.
32. In its most recent report, DFAT reported that between 2008 and 2017, over 2,400 Sri Lankans departed Australia for Sri Lanka. Many others have returned from the US, Canada, the UK and other European countries, and most of these returnees are Tamils. The Sri Lankan government claims that failed asylum seekers are welcome back with the Sri Lankan Prime Minister publicly stated this during a 2017 visit to Australia. However, DFAT have also noted that returnees may face practical difficulties upon return. There is limited reintegration assistance available and some returnees have reported social stigma from community members upon return. DFAT notes that the biggest challenge facing returnees are bureaucratic inefficiencies, rather than official discrimination, which can result in delays in obtaining official documentation and support. The Sri Lankan government has reportedly decreased systematic surveillance of returnees, although 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. DFAT assesses that continued surveillance of returnees contributes to a sense of mistrust of returnees within the communities. However, UNHCR conducted interviews with returnees in 2016 and only 0.3 per cent indicated they had any security concerns following their return.¹³
33. I have also give weight to the fact that the latest Sri Lanka country guidance from the UK Home Office does not mention failed asylum seekers, Tamil failed asylum seekers, or Tamils returning after residence abroad as one of the UK Upper Tribunal’s four profiles of persons identified as being at risk of persecution.¹⁴ Country information indicates that most Tamils singled out for ill-treatment upon their return have involved those with a significant actual or

¹² DFAT, “DFAT Country Information Report Sri Lanka”, 23 May 2018.

¹³ Ibid.

¹⁴ UK Home Office, “Country Information and Guidance: Tamil Separatism”, 15 June 2017.

suspected LTTE connection or links to separatist activities¹⁵ but I have not accepted that the applicant is in this situation.

34. I 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. I also accept that he may need to re-establish himself in Sri Lanka after his time in Australia. I note, however, that the applicant worked as a fisherman for 11 years up until 2012 and I note that he still has parents residing in Sri Lanka. I am not satisfied his capacity to subsist will be threatened. I do not consider the treatment he may face as a returning Tamil asylum seeker constitutes serious harm in this case.
35. DFAT have reported 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. This often involves interviewing the returning passenger, contacting the person's claimed hometown police, contacting the person's claimed neighbours and family, and checking criminal and court records. All returnees are subject to these standard procedures, regardless of ethnicity and religion. DFAT understands detainees are not subject to mistreatment during processing at the airport.¹⁶ The applicant has not claimed that there are any outstanding court orders or arrest warrants in relation to him or that he has ever even been charged with any criminal offence. He has also claimed that he departed Sri Lanka lawfully on his own passport in 2012 before coming to Australia. I have already found that the applicant is not of any adverse interest to Sri Lankan authorities and I am not satisfied that any investigations would lead to a real chance of him being seriously harmed.
36. Based on the totality of the country information and his individual circumstances, I do not accept that he faces a real chance of serious harm as a returning Tamil asylum seeker even taking into account that he is a Tamil male from the north, his family, his and his cousin's past interactions with the LTTE, his uncle's candidature for an election and his Hinduism.

Overall assessment

37. Considered cumulatively, I do not accept that the treatment the applicant may face upon return (including social stigma, monitoring, questioning and official and social discrimination) amount to serious harm. Considering his profile on a cumulative basis (including that he is a Tamil male from the north, his actual or imputed political opinion, his and his cousin's past interactions with the LTTE, his religion and his being a failed Tamil asylum seeker), I find that he does not face a real risk of serious harm for any reason.

Refugee: conclusion

38. 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).

¹⁵ Sri Lanka Mirror, "Another Tamil returnee arrested", 1 July 2015; Tamil net, "SL military continues to arrest Tamils from East returning from Middle-East", 31 May 2015; Tamil net, "16 Batticaloa Tamils arrested within last 100 days at Colombo airport", 3 May 2015; Sri Lanka Mirror, "10 Tamils arriving in Lanka arrested", Freedom From Torture, 4 March 2015; 'Sri Lanka – Update on torture since 2009', 6 May 2016.

¹⁶ Ibid.

Complementary protection assessment

39. 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

40. Under s.36(2A), a person will suffer 'significant harm' if:
- 41. the person will be arbitrarily deprived of his or her life
 - 42. the death penalty will be carried out on the person
 - 43. the person will be subjected to torture
 - 44. the person will be subjected to cruel or inhuman treatment or punishment, or
 - 45. the person will be subjected to degrading treatment or punishment.
46. For the reasons given above, I have found that the applicant would not face a real chance of serious harm for any reason. The real risk standard is the same as the real chance standard, I am not satisfied that the applicant faces a real risk of significant harm on these bases even when considering his profile (including that he is a Tamil male from the north, his actual or imputed political opinion, his and his cousin's past interactions with the LTTE, his religion and his being a failed Tamil asylum seeker) cumulatively.
47. I do not accept that the treatment the applicant may face upon return (including social stigma, monitoring, questioning and official and social discrimination) amounts to significant harm even when considered cumulatively. I am not satisfied that there is a real risk that the applicant will be arbitrarily deprived of his life, be subject to the death penalty or be subject to torture. Nor does the evidence before me indicate that there is a real risk that he will be subjected to cruel or inhuman treatment or punishment or degrading treatment or punishment. I am not satisfied the applicant faces a real risk of significant harm for any reason.

Complementary protection: conclusion

48. 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.