



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA18/05781

Date and time of decision: 19 November 2018 16:57:00
F Kerr, 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 Hindu Tamil from Sri Lanka. On 10 November 2016 he lodged an application for a Safe Haven Enterprise Visa (SHEV). On 4 October 2018 a delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa.

Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
3. On 26 October 2018 the applicant's representative provided information to the IAA comprising a submission and nine items of country information. The country information was provided to the delegate in a post-SHEV interview submission and is not new information.
4. To the extent the submission responds to, and takes issue with, the findings of the delegate I do not consider this to be new information. The submission refers to country information by Human Rights Watch in two separate reports including its 2018 World Report and a media article dated 18 January 2018 publicising the findings of that report. Neither of the Human Rights Watch reports or the media article was before the delegate and is new information. The submission states the information was published prior to the date of the applicant's interview and was not, but should have been, referred to or taken into account when the delegate made her decision.
5. None of the reports contains what may be regarded as personal information in the s.473DD sense. The publication dates of the Human Rights Watch reports are not apparent but I accept that they and the article were published before the applicant's interview. Given that and the fact that his representative was present at his SHEV interview on 20 August 2018, it is not apparent why the Human Rights Watch reports and the media article could not have been provided to the delegate together with the other country information which his representative provided in the post-SHEV interview submission to the delegate. I note that no explanation has been given as to why they could not have been provided to the delegate before she made the decision. The delegate had regard to a number of country information reports from credible, authoritative sources which similarly dealt with ongoing human rights problems in Sri Lanka and the government's apparent lack of progress in addressing those outstanding concerns for the Tamil community. Overall, I am not satisfied that there are exceptional circumstances to justify my consideration of the information about the Human Rights watch reports which pre-date the delegate's decision.
6. The submission also refers to a recent report of nine Sri Lankans who were "recently deported" from Darwin to Sri Lanka and whose whereabouts are unknown. The submission states the report could not be provided any earlier as it only just came into their possession. This information was not before the delegate and I find it is new information. Under the *Practice Direction for Applicants, Representatives and Authorised Recipients* (the Practice Direction), if new information such as country information reports or media articles are referred to, a copy of the information or extract must be provided. I note the report itself has not been provided; the only information provided is the bare assertion that such a report exists. No further information has been provided which would assist me to understand the quality and reliability

of the information including when the report was published. Other recent authoritative information about the situation for returnees to Sri Lanka is before me. For these reasons and as the information does not comply with the Practice Direction, I have decided under s.473FB(5) not to accept it.

7. On 5 November 2018 the applicant's representative provided further information to the IAA in the form of three items of country information. This information was not before the delegate and is new information. His representative asserts that exceptional circumstances exist to justify the consideration of the new information. However, beyond that bare assertion, there is no indication of what those exceptional circumstances are.
8. The reports are all dated 28 October 2018, some two weeks after the date of the delegate's decision and I am satisfied could not have been provided to the delegate before she made her decision. The articles do not contain what may be regarded as personal information in the s.473DD sense. The information concerns the recent parliamentary crisis in Sri Lanka. However, there is no indication in the covering letter as to the significance of the articles to the applicant's claims for protection and how they are relevant to my decision. The applicant does not claim to be a member of a political party in Sri Lanka and it is not apparent to me how the President's decision to suspend parliament and the resulting political uncertainty has any bearing on the applicant's claims for protection beyond that which would apply to every Sri Lankan citizen. Overall, I am not satisfied that exceptional circumstances exist to justify considering this information.
9. In accordance with s.473DC(1) of the Act I have obtained new country information being the most recent DFAT Country Information Report on Sri Lanka¹ (the DFAT 2018 report). The DFAT 2017 report is dated 23 May 2018 and replaces the DFAT 2017 report considered by the delegate. The DFAT 2018 report contains information on the situation for people with a profile similar to the applicant's in Sri Lanka. I consider DFAT an authoritative source of country information, the DFAT information relied on by the delegate is now almost two years old and in my view, the applicant would have expected the delegate to consider the DFAT 2018 as it was released over four months before the date of the delegate's decision. The DFAT 2018 report is DFAT's most recent assessment regarding the situation in Sri Lanka and was prepared for the specific purpose of protection status determination. I am satisfied there are exceptional circumstances to justify considering this new information.

Applicant's claims for protection

10. The applicant's claims can be summarised as follows:
 - His father and brother, [Brother A], were members of the Liberation Tigers of Tamil Eelam (LTTE). [Brother A] was killed [in] February 1989 during a battle between the Indian Peace Keeping Force (IPKF) and the LTTE.
 - The family relocated to India and lived in a refugee camp in the Indian state of Tamil Nadu.
 - In May 2009, whilst living in the refugee camp in India, the civil war in Sri Lanka ended. He was involved in a lot of political work whilst in the camp regarding the treatment of Tamils by the Sri Lankan government.

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

- He participated in protests, demonstrating against the way Tamil people were treated by the authorities. He was attacked by people from other political groups because of the work he did in organising the protests.
- He was well-known for the work he did in organising the protests and the Indian Criminal Investigations Division (CID), Q branch officers, started keeping a watch on his activities in the camp.
- On [separate] occasions he was taken by the Indian CID and questioned. He was accused of being an LTTE supporter and of helping the LTTE. He was badly treated and tortured by the officers. He was threatened with being charged under the TADA.
- He left India because he feared he would be arrested again and because of how difficult the situation was living in the camp.
- He does not have a National Identity card (NIC) for Sri Lanka due to the civil war.
- After his departure to Australia his wife was questioned by Indian authorities in relations to his whereabouts and his name has been removed from his family's Government of Tamil Nadu identity card for refugees.

Refugee assessment

11. 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

12. 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.

Applicant's identity and background

13. The applicant has provided documentary evidence of his identity. I accept his identity as claimed and that Sri Lanka is the receiving country for the purposes of this decision.

14. The applicant claims for protection were put forward at an Irregular Maritime Arrival and Induction interview (IMA interview) on 16 July 2013, a second IMA interview on 20 August 2013, his written SHEV statement dated 25 October 2018, and at his SHEV interview on 20 August 2018.
15. His evidence is that he was born in [Village 1] in the Vavuniya district in the Northern Province, in [year]. He travelled to India in 1990, lived in a refugee camp, worked as a [occupation], married and had [number] children. His wife and children continue to reside in the refugee camp in India as do other members of his family (father, siblings). Other than as set out below I accept his address, education, work and family history as set out in his SHEV application and at his SHEV interview.
16. In summary, the applicant fears returning to Sri Lanka for two reasons: firstly, his family connections to the LTTE and secondly, his own profile as a person who has protested against the Sri Lankan government while living in India.

LTTE connections

17. I have a number of reservations about the claim that both his brother and father were members of, and fought for, the LTTE. When questioned about this claim in his SHEV interview, he spoke only in generalities and appeared unable to expand in any significant way on the very sparse information in his written statement about his family's connection to the LTTE. I also consider it implausible that the applicant would fail to mention in both earlier IMA interviews claims that are now central to his application for protection, that is, his family connections to the LTTE.
18. When asked in his SHEV interview about what his father did for the LTTE the applicant said he provided food to them and in the face of armed members of the LTTE felt he couldn't refuse that assistance. When the delegate attempted to clarify whether his father was a member or just a supporter, he stated his father was a member but not a fighter in contrast to the claim in his SHEV statement that his father was a fighter. He was unable to provide any details of his father's role other than that he provided the LTTE with food. He made the new claims that his father had been arrested and detained for [number] months, his mother had to sign for his father's release, and after he was released, his father went into hiding; it was after this that the family left for India. Later he appeared to contradict that evidence and said his father was informed on about giving the LTTE food and so went into hiding; when the authorities couldn't find him, they started giving the applicant problems. He said the authorities came to the house, on one occasion his mother was taken to a camp to give her signature, the applicant himself was beaten badly, they had ongoing problems from the authorities so they couldn't continue to live in Sri Lanka and left for India.
19. Leaving aside the fact that he has not previously claimed either that his father was in hiding or that this, in turn, led to the applicant himself being mistreated at the hands of the authorities, both of which I consider significant omissions, I have some difficulty in accepting that the applicant could not consistently state whether his father went into hiding before or after the authorities purportedly came looking for him.
20. According to the UNHCR, all persons living in LTTE controlled areas necessarily had contact with the LTTE and its civilian administration in their daily lives² and I am prepared to accept that the applicant's father, like many others in LTTE controlled territory, assisted the LTTE from

² UN High Commissioner for Refugees (UNHCR) "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012 UNB0183EA8

time to time by providing some material assistance (food, etc). However, on the applicant's evidence, this is all he did and notwithstanding the applicant's claim that he was a member of, and fought for, the LTTE I am not satisfied this was the case. While there is nothing in his SHEV statement about his father being detained for [number] months by the authorities, I note that in his IMA interview in July 2013 he referred to his father being tortured in the old days which led them to go to India. For this reason and as it is consistent with the country information before me regarding the suspicion that attached to Tamils living in LTTE controlled areas, I accept his father was arrested and detained for [number] months, subject to some mistreatment, that his mother had to sign for him, and after he was released, the family left for India. I also accept it is plausible that the family was subjected to some routine monitoring and harassment from the authorities which were prevalent during the war, however, I reject as a recent invention the later claim in his SHEV interview that his father was in hiding so when the authorities couldn't find him, they turned their attention to the applicant and he was beaten badly on one occasion. This claim has not been made before and I do not consider it plausible that the applicant would fail to mention such a significant matter in his SHEV application.

21. The evidence he was able to give at his SHEV interview about his brother, [Brother A], being a member of the LTTE was even less detailed than the evidence about his father and I found it overall, unconvincing. He said [Brother A] joined under the 'one member per family' rule, gave his nom-de-guerre as [Alias 1] and repeated the information in his written statement that [Brother A] was killed in a battle between the IPKF and the LTTE. When the delegate put to him that in his entry interview he said [Brother A] had been killed in a shell attack, the applicant referred to the difficult circumstances of his travel to Australia including the lack of proper food and the fact that he found the process confusing.
22. I do not find that explanation persuasive. His representative submitted to the IAA that at his first interview he was required to respond only yes or no, or a one-line answer, the talk in the camp was that all detainees would be returned and any information they provided would be shared with the Sri Lankan authorities, the interpreters did not have a proper understanding of the Tamil dialect the applicant speaks so they didn't interpret properly, and the applicant did not have access to a legal advisor.
23. I accept there are limitations on processes such as IMA interviews and that all of these factors may have impacted on the applicant's willingness or ability to divulge to the Australian authorities shortly after his arrival that his brother had been an LTTE fighter. Nonetheless, I remain concerned that in two separate interviews conducted three and four months after his arrival and well after his arduous voyage, the applicant stated on both occasions that his brother had been killed in shelling in [Town 1] and in his 16 July 2013 interview stated that it was because of the war and the loss of his brother in bombing and shelling that his parents decided to go to India.
24. However, country information before me indicates that it would not have been possible for a young civilian man living in the north during the conflict not to have had any contact with the LTTE.³ I note that at the time [Brother A] was killed, he would have been of an age to be recruited as an LTTE soldier and notwithstanding my doubts, I am prepared to accept that [Brother A] was a member of the LTTE who was killed in fighting between the IPKF and the LTTE in 1989.

³ UK Home Office "Report of a Home Office Fact-Finding Mission Sri Lanka: treatment of Tamils and people who have a real or perceived association with the former Liberation Tigers of Tamil Eelam (LTTE)", March 2017 CISED50AD3780

25. There is no evidence, however, that [Brother A]'s role as an LTTE fighter was known to the authorities either then or subsequently. In contrast to his claim that his father was detained and mistreated because he provided assistance to the LTTE, the applicant has not claimed that at any stage he or his family were confronted by the authorities with the knowledge that [Brother A] was a fighter for the LTTE or that the family was questioned or experienced adverse interest because of [Brother A]'s role in the LTTE which country information indicates would have been the usual course for families of known LTTE fighters. I am satisfied that the authorities were not aware that G was a member of the LTTE.

Protests in India

26. There were some quite significant discrepancies in the applicant's evidence about his involvement in protests in India.
27. He said in his written statement he was involved in a lot of political work. The group he was involved in organised a number of demonstrations and protests against the way Tamil people were treated by the authorities. He was well-known for his role in organising these demonstrations and protests and as a result the Q branch officers started to keep a watch on his activities in the camp. On [number] occasions he was taken in by the CID, questioned about his involvement, accused of being an LTTE supporter and of helping the LTTE, was told they had information he was involved in supporting the LTTE from India, was very badly treated and tortured. They gave him further problems from then on and threatened they could charge him under the TADA given his involvement.
28. In his SHEV interview he said he was one of a number of organisers of one protest in 2009 against the killing of innocent Tamil civilians in Sri Lanka and when directly asked by the delegate whether he had been involved in any other activities he said no. He said the Indian authorities questioned him and he had to explain why he was involved. He was held for a day by the Indian authorities then released and had to report three days later. He was not beaten or harmed by the Indian authorities.
29. He did not refer to any further problems from Q branch or the CID, that the authorities told him they knew he and his friend [Mr B] were involved in activities supporting the LTTE, or that he was threatened they could charge him under the TADA given his involvement.
30. His evidence at interview about the 2009 protest was natural, quite detailed, and he responded to the delegate's questions unhesitatingly. I am satisfied that he was speaking from personal experience and for that reason, I prefer his SHEV interview evidence. I accept that he was involved in organising one protest in 2009 in India and that he was questioned by the Indian authorities for one day about his involvement, told them about his brother, and had to report on a second occasion. I have formed the view that he has otherwise exaggerated his involvement in political activities in India and I do not accept the claims in his SHEV statement relating to his involvement in "a lot of political work" in India, that he had a profile with the authorities there because of it, or that he was watched and mistreated by the Indian authorities as a result.
31. On the basis of some consistency in his evidence, I accept that on one occasion around this time, he was beaten. In contrast to his SHEV statement, the applicant said in his SHEV interview that he didn't know why he was beaten one evening or by whom and in the absence of evidence that it was related to his involvement in the protest, I am satisfied his beating was an isolated incident, unrelated to his role in organising the 2009 protest.

32. The applicant has not claimed that the Sri Lankan authorities were aware of his involvement in the 2009 protest. He said in his SHEV interview that many people took photos of the protest he was involved with and it was reported in the media; he wasn't sure the Sri Lankan government would know of his involvement but it was possible they could. There is no evidence the Sri Lankan authorities were aware of his involvement in the 2009 protest and I consider the claim that they may have known about it nothing more than speculation. It follows that I am not satisfied that the Sri Lankan authorities were aware of the applicant's involvement in one protest in India in 2009 or that he would have a profile in Sri Lanka as a result of that limited involvement.
33. The applicant does not claim to be a member of a political party, to have participated in any political activities in Australia, or that he is interested in pursuing politics or political activities if he is returned to Sri Lanka. I am satisfied he is not at risk of harm on return to Sri Lanka or in the reasonably foreseeable future on the basis of his political opinion.
34. The applicant claimed in his SHEV interview that the Indian authorities visited his wife at the refugee camp in India to enquire about his whereabouts. He said that she told them he had gone to Australia and that they removed his name from the refugee card. As the applicant was registered with the authorities in India, I accept that if he was no longer residing there, it is likely the Indian authorities would have noticed his absence and made some enquiries about him. I do not accept it is indicative of any interest in him for any reason other than his status as a refugee in India as evidenced by the removal of his name from the family refugee card.

Tamil ethnicity/imputed political opinion generally

35. The applicant claims to fear harm on the basis of his Tamil ethnicity. There is ample information from a range of credible sources that Tamils have, in the past, been singled out by the authorities for adverse attention. During the war, more Tamils were detained under emergency regulations and the *Prevention of Terrorism Act 1979* (Sri Lanka) (PTA) than any other ethnic group with LTTE support at times imputed on the basis of ethnicity.⁴
36. Many years have passed, however, since the applicant lived in Sri Lanka with two notable changes in that time: the end of the war and a change of government in 2015. The International Crisis Group described the new President as moving away from former President Rajapaksa's narrative of Sinhala nationalism and returning power to the office of the prime minister and parliament.⁵ The new President passed the 19th amendment to the Constitution which reduced the terms of the President and Parliament from six years to five years, re-introduced a two-term limit for the President (which had been removed by former President Rajapaksa), created independent commissions to oversee the judiciary, police, elections, human rights and the office of the Attorney General, and re-established the Constitutional Council to make appointments to the new commissions.⁶ An early conciliatory gesture was the appointment of a civilian governor in the Northern Province, where Tamils comprise a majority replacing a retired army commander.⁷ The appointment of a new, Tamil chief justice in January 2015 was another positive step taken by the new administration.⁸

⁴ UK Home Office "Report of a Home Office Fact-Finding Mission Sri Lanka: treatment of Tamils and people who have a real or perceived association with the former LTTE", 31 March 2017, OGD7C848D112 at 2.39

⁵ Austrian Centre for Country of Origin & Asylum Research and Documentation (ACCORD) "Sri Lanka: COI Compilation", 31 December 2016, CIS38A80123251

⁶ DFAT "DFAT Country Information Report - Sri Lanka", 24 January 2017, CISED50AD105 at 2.27

⁷ ACCORD "Sri Lanka: COI Compilation", 31 December 2016, CIS38A80123251

⁸ *ibid*

37. DFAT assesses that a number of symbolic changes have further contributed to a more positive outlook for reconciliation. The 2015 Independence Day ceremony was attended by Tamil national Alliance (TNA) leaders for the first time since 1972 and at the 2016 Independence Day ceremony, the national anthem was allowed to be sung in Tamil as well as Sinhala.⁹ An Office of National Unity and Reconciliation was formed focussing on promoting social integration to build an inclusive society, securing language rights for all citizens, supporting a healing process within war-affected communities via the government's proposed Commission for Truth, Justice, Reconciliation, and non-recurrence of the violence, and providing coordinated development planning for war affected regions.¹⁰ Progress is being made on the return of Tamil lands by the military and the army has publicly committed to prosecuting personnel who committed criminal acts during and after the conflict, many of which were committed against the Tamil community.¹¹
38. The country information indicates the security situation in Sri Lanka has improved. There were reports in 2016 of Tamils, particularly in the north and east, being regularly monitored and harassed, especially activists and persons viewed as sympathisers of the LTTE.¹² DFAT, however, has assessed for some years that monitoring of Tamils in day-to-day life has decreased significantly under the current government, although its most recent report indicates that surveillance of Tamils in the north and east continues, particularly people associated with politically sensitive issues.¹³ A senior analyst for the International Crisis Group assessed in 2016 that there were no longer any active paramilitaries in Sri Lanka.¹⁴
39. At the end of his SHEV interview, the applicant's representative said that the government had changed but LTTE affiliates still suffer harm and there remained a number of ongoing issues in Sri Lanka. He also referred to the continuing use of the PTA which I accept has facilitated abuses and systematic denials of due process. However, the operation of the PTA was suspended in late 2016 and had not been used in 2017 to detain, charge or arrest any individual.¹⁵ The submission to the IAA referred to the Amnesty International February 2017 annual report which I accept refers to reports of Tamils suspected of links to the LTTE continuing to be detained under the PTA.¹⁶ I have found, however, that his brother's membership of the LTTE was unknown to the authorities. I have accepted that his father was arrested and detained for [number] months on suspicion of helping the LTTE. On my findings, his father was not a member of the LTTE and the applicant has not claimed that his father was ever charged, taken to court, jailed or sent for rehabilitation by the Sri Lankan authorities under the PTA. Instead, he was released after [number] months which, in my view, indicates that the authorities were satisfied with their enquiries and his father was not a person of ongoing interest or suspicion.
40. The applicant's representative subsequently provided country information to the delegate referring to a number of ongoing issues and submitted to the IAA that any references to improvements in the state of affairs in Sri Lanka under the new government are unreliable and inconsequential as these improvements cannot be equated to safety.

⁹ DFAT "DFAT Country Information Report - Sri Lanka", 24 January 2017, CISED50AD105 at 2.30

¹⁰ US Department of State "Country Reports on Human Rights Practices for 2016 Sri Lanka" 3 March 2017 OGD95BE926876

¹¹ Ibid

¹² Ibid

¹³ DFAT "DFAT Country Information Report Sri Lanka", 23 May 2018 CIS7B839411064 at 3.9

¹⁴ ACCORD "Sri Lanka: COI Compilation", 31 December 2016, CIS38A80123251

¹⁵ DFAT "DFAT Cable response: UN Special Rapporteur (Ben Emmerson) on human rights and terrorism in Sri Lanka" 14 August 2017, CISED50AD5239

¹⁶ UK Home Office "Country Policy and Information Note Sri Lanka: Tamil separatism" Version 5.0 15 June 2017, OGD6E7028826 at 8.4.8

41. DFAT assesses that generally, Sri Lankans face a low risk of mistreatment that can amount to torture irrespective of their religion, ethnicity geographic location or other identity.¹⁷ The UK Home Office in 2017 reported a notable reduction in torture complaints and its report indicates that the risk of torture in Sri Lanka appears to exist whenever an individual comes into contact with law-enforcement officers; it is a systemic issue with policing in Sri Lanka and exists regardless of ethnicity.¹⁸ Reported instances of arbitrary arrest and detention continue to fall.¹⁹
42. I am satisfied the submissions and country information referred to by the applicant's representative, both to the delegate and to the IAA, are broadly consistent with this other country information before me which does not suggest that there is no room for further improvement or that incidents of torture and impunity for war crimes do not continue but overall assesses that these incidents have reduced and the general political and security situation in Sri Lanka has improved as discussed above.
43. The majority of the sources consulted by the UK Home Office agreed that there had been improvements for Tamils since the change of government in 2015.²⁰ The major Tamil political party, the TNA, is supportive of the Sirisena government and its commitment to human rights although progress is very slow and in the view of the TNA, too cautious.²¹
44. Overall the monitoring and harassment of Tamils in the north has significantly decreased, there have been significant positive developments for Tamils politically, and the situation for Tamils generally has greatly improved even if, as most sources in the country agree, progress is slow. Overall, it does not support a conclusion that Tamils or Tamil men from formerly LTTE-controlled areas face a real chance of serious harm at the hands of the Sri Lankan authorities.
45. The applicant's representative referred to problems he'll encounter because he does not have a NIC. Returnees from Tamil Nadu can face a number of significant administrative barriers including obtaining identity documentation; there can also be some social stigma and a slight difference in Tamil dialects between Sri Lanka and Tamil Nadu also causes challenges.²² Returnees from Tamil Nadu have also reported challenges in obtaining well-paid employment and housing and in meeting the cost of basic needs that the Indian government provides to refugees in Tamil Nadu.²³ I accept that the applicant does not have a NIC and that he may face some difficulties adjusting to life in Sri Lanka after an absence of nearly 30 years. The applicant, however, already has a Sri Lankan birth certificate which will assist him in obtaining a NIC, which can be applied for from any Sri Lankan overseas mission.²⁴ The applicant was a young adult when he left Sri Lanka. He has demonstrated considerable enterprise and adaptability in providing for his family in India as a [occupation] and I am satisfied that notwithstanding some initial adjustments, he will be able to adapt to life in Sri Lanka, obtain work and provide for himself and his family. Contrary to the statement in his SHEV interview that he has no family in Sri Lanka he stated in his SHEV statement that he has family in the northern district which I consider will be able to assist in the initial adjustment phase and I do not accept that any social stigma to which he may be subject rises to the level of serious harm.

¹⁷ DFAT "DFAT Country Information Report - Sri Lanka", 24 January 2017, CISED50AD105 at 4.20

¹⁸ UK Home Office "Country Policy and Information Note Sri Lanka: Tamil separatism" Version 5.0 15 June 2017, OG6E7028826 at 2.3.13

¹⁹ US Department of State "Country Reports on Human Rights Practices for 2016 Sri Lanka" 3 March 2017 OGD95BE926876

²⁰ UK Home Office, "Report of a Home Office Fact-Finding Mission Sri Lanka: treatment of Tamils and people who have a real or perceived association with the former LTTE", 31 March 2017 OGD7C848D112

²¹ Ibid at 2.1.2

²² DFAT "DFAT Country Information Report Sri Lanka", 23 May 2018 CIS7B839411064 at 3.75

²³ Ibid

²⁴ DFAT "DFAT Country Information Report - Sri Lanka", 24 January 2017, CISED50AD105 at 5.34

I accept that he will be required to register. However, the requirement to register with the Grama Niladhari in one's place of residence is required of anyone in any part of the country in order to be recognised as a resident of the area and to be entered into the electoral list for that area.²⁵ The process of registering members of the Tamil community, introduced by the previous government, was discontinued after community protests.²⁶

46. Assessing his claims overall and having regard to the country information before me, I am not satisfied the applicant faces a real chance of harm now or in the reasonably foreseeable future for a number of reasons.
47. Residence in a former LTTE controlled area or being Tamil does not give rise to a need for protection.²⁷ While I have accepted that his brother was a member of the LTTE, I have found that this was unknown to the authorities at the time and the applicant has not claimed that the authorities have since become aware of [Brother A]'s membership of the LTTE or his role as a fighter. I have not accepted that his father was also a member of the LTTE. It is apparent that his father's role was explored by the authorities at the time and he was found not to be a person of ongoing interest because of the material assistance he provided to the LTTE. The applicant's family's experiences of some routine monitoring and harassment were typically experienced by many Tamils during the war. The applicant has not claimed that it was indicative of any interest in him personally and I am satisfied it was not. I accept that he had some role in organising one protest in India in 2009 against the treatment of Tamils at the end of the war. I have otherwise rejected his claims to have experienced harm as a result of that political protest. There is no evidence before me that the Sri Lankan authorities were aware of his involvement or that, nearly ten years on, the Sri Lankan authorities have any interest in people who took part in a peaceful protest in India immediately following the end of the war. The applicant does not claim otherwise to have a political profile or that he has participated in any activities in Australia and I am satisfied that he is not at risk of harm on the basis of his participation in the protest in India.
48. Overall, the applicant does not have a profile that country information before me suggests he is at risk of harm, now or in the foreseeable future, on the basis of his ethnicity, family links to the LTTE, his actual or imputed political opinion, role in a 2009 protest in India, as a Tamil male from the north, or for any other of the reasons claimed. I am not satisfied he faces a real chance of harm for any of these reasons if he returns to Sri Lanka now or in the reasonably foreseeable future.

Illegal departure/returning asylum seeker

49. On arrival at the Colombo international airport, returnees travelling on temporary travel documents are subject to a series of investigative checks to confirm their identity and ascertain if someone was trying to conceal their identity due to a criminal or terrorist background or trying to avoid court orders or arrest warrants.²⁸ DFAT advises that all returnees are subject to these standard procedures regardless of ethnicity and religion and that detainees are not subject to mistreatment during processing at the airport.²⁹

²⁵ UNHCR "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012 UNB0183EA8

²⁶ *ibid*

²⁷ UK Home Office "Country Policy and Information Note Sri Lanka: Tamil separatism" Version 5.0 15 June 2017, OG6E7028826 at 2.3.13; UNHCR "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012 UNB0183EA8

²⁸ DFAT "DFAT Country Information Report Sri Lanka", 23 May 2018 CIS7B839411064 at 5.29

²⁹ *Ibid* at 5.29

50. His representative submits that it is likely that in this process, his father's aid to, and brother's membership, of the LTTE would be discovered placing him at risk and that this risk is heightened as he does not have a NIC. I consider there is no more than a remote chance that 30 years later, the applicant would be identified as a person of interest on the basis of his father's brief detention in around 1989/1990 or his brother's membership of the LTTE and I am satisfied he is not at risk of harm because of either his father or his brother. Moreover, the UK Home Office assesses that unlike in the past, even those who have a previous connection with the LTTE are able to return to their communities without suffering ill-treatment; the police interest, if any, is not in any previous involvement with the LTTE, but on whether the person has committed any criminal act.³⁰ The applicant does not fit this profile. I accept he does not have a NIC but the basis for his representative's assertion that this places him at risk of extended detention is not apparent. The applicant has primary identification documents (birth certificate) and I am satisfied that he will quickly be able to establish his identity and that he is not at risk of any increased attention from the airport authorities during this investigative process whether because he does not have a NIC or for any other reason including his family links to the LTTE.
51. Refugees and failed asylum seekers can face practical challenges to successful return to Sri Lanka and nearly half of returnees in the north had received a visit at their homes for a purpose other than registration.³¹ However, the UNHCR interviewed refugee returnees in 2016, and only 0.3 per cent indicated they had any security concerns following their return.³² Refugees and failed asylum seekers also reported social stigma from their communities upon return.³³ DFAT assesses that returnees may face some societal discrimination on return which may affect their ability to secure housing and employment.³⁴ Until coming to Australia the applicant lived and worked in India where he supported himself and his family as a [occupation]. While I accept that he may face some challenges given the extended period he has lived outside Sri Lanka, I am satisfied he will be able to re-establish himself and obtain work and housing without suffering harm. I accept it is possible the applicant may be monitored for a period and may experience some social stigma as a returning asylum seeker/refugee. However, I am not satisfied that a period of monitoring and some social stigma would amount to serious harm.
52. Returnees who depart Sri Lanka irregularly are generally considered to have committed an offence under the *Immigrants and Emigrants Act 1949* (the I&E Act) and may be arrested and charged at the airport.³⁵ Returnees can remain in police custody at the CID airport office for up to 24 hours after arrival while enquiries are completed, and if a Magistrate is not available before this time (eg because of a weekend or public holiday), may be held for up to two days in an airport holding cell.³⁶ There is no information before me to indicate that during this process detainees are subjected to harm.
53. Those charged are required to appear in court or in the location where the offence occurred which involves legal and transport costs.³⁷ Penalties for leaving Sri Lanka can include imprisonment of up to five years and a fine of up to LKR 3,000 for a first offence.³⁸ DFAT has

³⁰ Ibid at 2.3.11

³¹ Ibid at 5.40

³² Ibid at 5.41

³³ Ibid at 5.40

³⁴ Ibid at 5.42

³⁵ Ibid at 5.30

³⁶ Ibid

³⁷ Ibid at 5.31

³⁸ Ibid at 5.32

been advised by Sri Lanka's Attorney-General's Department that no returnee who was merely a passenger on a people smuggling boat has been given a custodial sentence but fines are issued to deter future illegal departures.³⁹ A guilty plea will attract a fine, which can be paid by instalment, and the defendant is free to go.⁴⁰ If a person pleads not guilty, they will be granted bail by the magistrate on the basis of personal surety or guarantee by a family member.⁴¹ Anecdotal evidence is that most passengers of people smuggling ventures spend many years on bail, and most are free to go after paying a fine.⁴² Bail is usually granted to voluntary returnees, conditions are discretionary, and can involve monthly reporting to police at the returnee's expense.⁴³

54. In considering all of the above treatment that I accept the applicant is likely to experience - being detained and investigated for several hours at the airport, then potentially being detained for up to two days in an airport holding cell, and having to pay a fine and incur costs - I find that this treatment does not amount to serious harm. Further, the evidence does not suggest that the law is selectively enforced or applied in a discriminatory manner. I find that the investigation, prosecution and punishment of the applicant for illegal departure under the I&E Act would be the result of a law of general application and does not amount to persecution within the meaning of s.5J(4). For these reasons, I am not satisfied that the applicant is at risk of serious harm on the basis that he is a returning asylum seeker or refugee, or an illegal departee.

55. In considering those of his claims which I accept altogether, along with the country information and his personal circumstances, I am not satisfied that there is a real chance that the applicant will be seriously harmed by the Sri Lankan authorities now or in the reasonably foreseeable future for any reason.

Refugee: conclusion

56. 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

57. 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

58. 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

³⁹ Ibid

⁴⁰ Ibid at 5.22

⁴¹ Ibid

⁴² Ibid

⁴³ Ibid at 5.33

- 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.

59. I have found that the applicant does not face a real chance of suffering serious harm from the Sri Lankan authorities now or in the reasonably foreseeable future for any of the reasons he has claimed. For the reasons discussed above and based on the same country information, I am not satisfied that there is a real risk of significant harm to the applicant if he is returned to Sri Lanka.

60. While there is a possibility that he may face monitoring, and a level of societal discrimination as a failed asylum seeker and refugee in the form of some social stigma I am satisfied that, while hurtful, such treatment would not amount to significant harm. It does not amount to the death penalty, arbitrary deprivation of life or torture and I am not satisfied that it amounts to pain or suffering that is cruel or inhuman in nature, severe pain or suffering, or extreme humiliation for the purposes of the definition of cruel or inhuman treatment or punishment or degrading treatment or punishment.

61. I accept that on return to Sri Lanka the applicant will be subject to a series of administrative processes and identified as an illegal departee. He is likely to be investigated, may be detained for up to two days at the airport, fined for the offence of illegal departure and may incur costs associated with the judicial process. I am not satisfied, however, that this treatment amounts to significant harm. I am not satisfied that the acts or omissions of the Sri Lankan officials in this process are intended to cause pain or suffering or extreme humiliation. Nor am I satisfied that it amounts to serious pain or suffering, pain or suffering that is cruel or inhuman in nature, or extreme humiliation. I similarly find that the imposition of a fine under the I&E Act for his illegal departure does not amount to significant harm within the meaning of s.5(1) and s.36(2A).

62. In assessing his claims, I am not satisfied that any of his claims, even when taken together, mean that there is a real risk of significant harm within the meaning of ss.36(2A) and 5(1) now or in the reasonably foreseeable future if the applicant is returned to Sri Lanka.

Complementary protection: conclusion

63. 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.