



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA21/09031

Date and time of decision: 19 May 2021 12:59:00
J Maclean, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Tamil who was born in the Northern Province of Sri Lanka. In July 2017 he lodged a valid application for a Safe Haven Enterprise Visa (SHEV). On 12 April 2021 a delegate of the Minister for Immigration (the delegate) refused to grant the visa because the delegate found the applicant is not a person in respect of whom Australia has protection obligations.

Information before the IAA

2. I have had regard to the review material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
3. On 30 April 2021 the IAA received an email from the applicant's representative. Attached to the email are a cover letter from the representative, a document titled 'Applicant's Submission', a document titled 'Lawyer's Letter', and eight .pdf files. The applicant's submission (IAA submission) is signed by the applicant and dated 29 April 2021, but refers to the applicant in the third person.
4. In the main the IAA submission reiterates the applicant's claims, takes issue with the delegate's findings, and provides commentary on issues and information discussed by the delegate, or on matters that may have been overlooked by the delegate. To that extent I am satisfied the IAA submission is not new information, and I have had regard to it.
5. The IAA submission refers to two country information reports which were not before the delegate, and are new information. They are a New York Times (NY Times) article dated 18 November 2019 titled 'Gotabaya Rajapaksa wins Sri Lankan presidential election', and an International Crisis Group (ICG) article dated 18 November 2019 titled 'Sri Lanka's presidential election brings back polarising wartime figure'. None of the information contained in the eight .pdf files attached to the email to the IAA was before the delegate, and it is also new information. The cover letter from the applicant's representative refers to the attachments as 'supporting documents under section 473DD(aa)'. The files are named VA1 to VA8 and all appear to be online media content about Sri Lanka, or country information. The files contain the following information:
 - VA1 - A portion of an article regarding the possibility of the anthem not being sung in Tamil this Independence Day. The article is dated 11 January 2020 and the author's name is shown, however the source of the article has not been provided;
 - VA2 – An undated online media article from an unidentified source regarding the Sri Lankan civil war and President Gotabaya Rajapaksa's acknowledgement that thousands who are missing are dead;
 - VA3 – TamilNet articles dated 29 August 2019 and 31 December 2019 regarding the EPDP harassment of families of Tamils subject to enforced disappearances, and to such families in the Vanni protesting against the EPDP, and what appears to be an online media article from an unidentified source dated 3 December 2019 regarding Sri Lankan families waiting for news from children who disappeared during and after the war;
 - VA4 – An online media article from Maddunews.com, and English translation done on 3 December 2020, and which appears to have been published in January 2020. The article

concerns attacks and threats against human rights activists and media persons in Sri Lanka;

- VA5 – An online media article from Tamilwin.com and English translation. The date of the article is not apparent from either the original or translation, nor is the date the material was translated. The article concerns operation of a special task force in the Northern Province;
 - VA6 – An online media article dated 31 July 2016, from an unidentified source, and English translation done on 18 August 2016. The article concerns the suspected poisoning of rehabilitated LTTE fighters causing their death;
 - VA7 – Online media content from ‘We are Jaffna’ dated 31 July (year not specified), and English translation done on 18 August 2016, regarding detainees being poisoned and the use of cluster bombs. The original source apparently includes a video which is not accessible from the .pdf provided;
 - VA8 – A document from an online source, www.virakesari.lk, which is not in English. The date and content of the document is not apparent from the information provided. The cover letter indicates an English translation will be forwarded when it is received, however the IAA has at this time not received a translation.
6. Contrary to the IAA Practice Direction for Applicants, Representatives and Authorised Recipients (1 May 2020), a copy of which was provided to the applicant when the IAA advised him of the referral to the IAA, the IAA submission does not address the requirements of s.4733DD, containing no explanation as to why the two reports referred to in the IAA submission, or any of the other attachments to the email, could not have been given to the Department before the delegate’s decision was made, or why the information is credible personal information which was not previously known and may have affected consideration of the claims. Also contrary to the Practice Direction, copies of the NY Times and ICG reports have not been provided. The applicant had assistance from a representative who is a solicitor, barrister, and registered migration agent, who should have been aware of the IAA Practice Direction. None of the information in the .pdfs is referred to in the IAA submission, and the applicant has not identified which part of the documents he relies upon, or how the information is relevant to his circumstances, or how it may have affected consideration of his claims. Further, the bulk of the information clearly pre-dates the delegate’s decision, however some is undated, or the date is not apparent from the translation, and relates primarily to issues the applicant has not raised as a part of his protection claims, including harassment by the EPDP, missing persons and children, attacks and threats against human rights activists and media persons, and the poisoning of rehabilitated LTTE fighters, and so is of questionable relevance. In any event, many of these issues are dealt with in credible country information reports that were before the delegate and are before me, including concerns regarding the relatively recent election of Gotabaya Rajapaksa as president. In the circumstances, pursuant to s.473FB(5) of the Act, I have decided not to accept this new information. Even if I had accepted the information, I would not be satisfied it met s.473DD. In particular, I would not be satisfied the information could not have been provided before the delegate’s decision, or that it was credible personal information which, if known, may have affected the consideration of the applicant’s claims, or that there were exceptional circumstances to justify considering the information.
7. I have also taken into consideration that the applicant did not have a representative present with him during the SHEV interview. He did however have assistance from a solicitor/registered migration agent from [Agency 1] to prepare his SHEV application and associated statutory declaration, and [a] 21-page country information package was provided with the application. At the start of the SHEV interview the applicant was advised it is his responsibility to raise all of his

claims and provide evidence in support of those claims, and that if his application is refused he may not have another chance to provide further information to support his claims or to raise new claims. He was asked if he had read and understood the information sheet called 'Important information about your interview for a protection visa', which had been provided to him before the interview, and he said 'Yes'. The information sheet outlines the purpose of the interview, and specifies the extreme importance of telling the truth and presenting all claims for protection during the interview, and providing all information in support, and that there may not be another opportunity to raise new claims if the application is refused. More than two and a half weeks elapsed between the SHEV interview and the decision being made, during which there was an opportunity to provide additional information, or request further time to do so, however no information was provided, and no such request was made.

8. With regard to the lawyer's letter, it is dated 21 January 2020 and is from an Attorney-at-Law practising in Jaffna, who indicates it was written at the request of the applicant's mother. The letter was not before the delegate and is new information. The writer indicates the applicant and his family are 'well known' to him for several years, but gives no information about when he first made acquaintance with them or the context in which that occurred. The letter describes various events in Sri Lanka relating to the applicant's father, including him being a Liberation Tigers of Tamil Eelam (LTTE) member from 2004 till 2009, the Criminal Investigation Department (CID) and Sri Lankan Army (SLA) coming to the applicant's family home in search of his father, the father then absconding and the family losing contact with him, and further visits from Sri Lankan authorities. It is not apparent from reading the letter that the writer has any first-hand knowledge of those events, but rather it appears the family told him what had occurred. The writer also describes contact with the applicant's mother in a legal context, seeking assistance to lodge a habeas corpus application in Jaffna High Court in relation to the father, making complaints to him about the visits from authorities, and consulting with him about sending the applicant overseas. The writer goes on to express the opinion that the applicant's life would be at risk on return to Sri Lanka because his absence from the country could be linked to the re-emergence of the LTTE.
9. As noted above the applicant has not explained why the lawyer's letter could not have been provided before the delegate's decision, or why the information is credible personal information which was not previously known and may have affected consideration of the claims. Despite the non-compliance with the Practice Direction, the letter contains information that is clearly personal to the applicant, and relevant to the applicant's situation in a way that the country information, discussed above, is not. I have decided to accept the letter and will consider whether s473DD is satisfied. The letter is dated over 14 months before the delegate's decision, and describes events that occurred well before the date of the letter. The applicant has not satisfied me s473DD(b)(i) is met. However, taking into account the nature of the information in the letter, I am satisfied s473DD(b)(ii) is met. The bulk of information in the letter relates to events the writer does not appear to have any direct knowledge about, and the majority of the information accords with evidence the applicant has provided, the bulk of which I have accepted as discussed below, and for the same reasons noted above, I am also not satisfied there are exceptional circumstances to justify considering this new information, and I have not had regard to it.

Applicant's claims for protection

10. The applicant's claims can be summarised as follows:
 - He was born and lived in Jaffna in the Northern Province of Sri Lanka.

- In 2004 his father went to Vanni to join the LTTE. He does not know what his father did while working for the LTTE.
- In 2009, after the war finished his father returned home. When his father started working as a fisherman, SLA members started coming to the family home and taking his father for interrogation. He believes his father was tortured and beaten at those times.
- In 2010 his father left to hide from the SLA, and the SLA came to the family home looking for his father. He has not seen his father since 2010.
- In 2011 he started fishing work to support his family, and was often questioned at SLA checkpoints when he went fishing.
- In January 2011 SLA members assaulted him at a checkpoint when he could not provide information about his father's whereabouts.
- Sometime in 2011 his father visited his mother to ask for a divorce. He thinks a local fisherman told the SLA about the visit and the SLA visited the house in search of his father.
- Around December 2012 he was again assaulted by Sri Lankan authorities during questioning.
- He left Sri Lanka illegally by boat in April 2013.
- The SLA visited his home four times after he departed Sri Lanka.
- If he returns to Sri Lanka he fears he will be detained, interrogated, tortured and/or killed by Sri Lankan authorities because he is Tamil and his father was an LTTE member, and they believe he supports the LTTE. He is also likely to be harmed because he departed Sri Lanka illegally.
- He does not have a National Identity Card (NIC). This will lead authorities to suspect he has connections to the LTTE, as NICs were not issued to LTTE members.

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.
13. In his interactions with the department the applicant has consistently claimed to be a Sri Lankan Tamil, who was born in [year] in the Jaffna District, Northern Province of Sri Lanka. A copy of his Sri Lankan birth certificate has been provided to support his identity, along with an English translation of that document. A Sri Lanka Navy Fishing Pass, in the applicant's name and showing his address and photograph, has also been provided. He was assisted by a Tamil interpreter during his interactions with the department, including during Arrival and SHEV interviews, and appeared to converse easily in the language. On the information before me, I accept his identity is as claimed, that he is a Tamil from the Northern Province of Sri Lanka, and Sri Lanka is the receiving country for the purposes of the Act.
 14. The applicant has consistently claimed during his interactions with the department that he is of the Hindu religion. However, in the statutory declaration submitted with the SHEV application (statement of claims) he states that he became a 'registered Christian' to be able to stay at a hostel and attend a Christian school. I can accept the applicant may have registered as a Christian for the purpose of attending a Christian school, but I am satisfied he otherwise identifies as a Hindu. The applicant has not claimed he experienced any harm or discrimination in Sri Lanka because of his religion, or made any protection claims on that basis.
 15. The applicant's evidence regarding his family background and early life has also been broadly consistent, including as described in the Age Determination Assessment documents from October 2013, at the Arrival interview, in his statement of claims, and at the SHEV interview. Other than confirming the applicant's narrative regarding his family composition, education and employment in Sri Lanka, and his travel to Australia, the Age Determination Assessment documents contain no information of material relevance to the applicant's protection claims.
 16. Taking into account the applicant's broadly consistent evidence over time, I accept: prior to leaving Sri Lanka he always lived in the family home in Jaffna District; he completed [number] years of schooling; he has [specified family members]; and his mother and siblings continue to live in the Jaffna District.
 17. In his statement of claims, the applicant claims his father left Jaffna in 2004 to go to Vanni to join the LTTE, but that he does not know if he joined voluntarily or was forced to join, nor does he know what his father did while working for the LTTE. The applicant has been broadly consistent in his interactions with the department in describing his father having involvement with the LTTE, and regarding him being detained by the SLA in a detention centre for LTTE members for an unknown period of time, being released from detention in 2009, and returning home after the war ended in 2009. At the SHEV interview the applicant said his mother had told him his father joined the LTTE in 2002 or 2003, and when asked if he had any idea what his father did in the LTTE, he said 'No'.
 18. In his statement of claims the applicant claims that shortly after returning home his father started going to sea working as a fisherman, and the SLA started coming to the family home and taking his father for interrogation. This occurred two or three times, however sometimes the applicant was at school when it happened. The applicant believes his father was tortured whilst detained. In 2010 his father left to hide from the SLA, and the SLA came to the family home looking for him. He has not seen his father since 2010. The applicant's evidence at the SHEV

interview was that his father was detained and questioned about monthly, starting in 2010, and he went into hiding for about four to five months. He also said while his father was in hiding Sri Lankan authorities came to his school and asked him if he knew where his father was hiding.

19. The applicant claims that sometime in 2011 his father visited his mother to ask for a divorce because he wanted to marry another woman. He believes a local fisherman saw his father and informed the SLA. The SLA visited the house, searched for his father, and started throwing furniture and breaking things when they realised he was not there.
20. The applicant has provided a broadly consistent description about starting fishing work to help support his family, and experiencing mistreatment from Sri Lankan authorities at that time. In his statement of claims he describes being required to show his Fishing Pass at the SLA checkpoint to go fishing. He described one occasion, in January 2011, when he was taken from the public area of the checkpoint and questioned about his father's whereabouts. When he could not tell them he was tied up and beaten. He states that the reason he was being questioned was because of his father's involvement with the LTTE, and claims his father's photo was on a board at the checkpoint, and it was noted he was someone who had run away, and the applicant's photo was next to the photo, which shows they were also looking for the applicant. At the SHEV interview the applicant mentioned being questioned and beaten on the way back from work in January 2011, but also referred to a second occasion when he was questioned and mistreated by the SLA, being hit with shoes and fainting. Initially he appeared to indicate the second event took place in 2011, but clarified it was 'before 2012 December'. At an Enhanced Screening interview the applicant referred to having to show his pass to go fishing, and to being questioned and beaten. He also referred to being taken from his home for enquiries, that this occurred every two weeks, and he was caned at those times. At the Arrival interview he said that because his father wasn't home the SLA would take him for questioning and beat him. At both those interviews the applicant said when he was taken for enquiries he would be released in the evening, and the last time this happened was about August or September 2012.
21. Given the applicant's young age at the time his father became involved with the LTTE, and also at the time his father was detained by Sri Lankan authorities, I can accept the applicant might have limited knowledge on those issues, including about his father's LTTE involvement and later detention. I am also mindful that it has been several years since these events occurred, and I make no adverse inference on that basis regarding that lack of knowledge, or about minor discrepancies regarding the date or frequency of events.
22. Country information reports the LTTE was the most prominent of a number of militant groups that emerged in Sri Lanka to advance the cause of Tamil statehood. The LTTE was formed in 1976 and launched an armed insurgency against the Sri Lankan state in 1983. At its peak in 2004, the LTTE had an armed force of approximately 18,000 combatants, and there was both voluntary and forced recruitment of Tamils to the LTTE. Towards the end of the war, government security forces arrested and detained a large number of LTTE members, most of whom were sent to government-run rehabilitation centres. In the immediate post-war period Sri Lankan government forces continued to detain those with links to the LTTE, imputed or otherwise, and that their use of torture was particularly brutal.¹
23. Taking into account the applicant's broadly consistent evidence in the context of the country information, I can accept the applicant's father joined the LTTE sometime between 2002 and 2004, that he was detained as claimed, and that he returned to the family home in Jaffna after

¹ Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

the war ended in May 2009. I can also accept Sri Lankan authorities attended the family home and took the applicant's father for questioning on a number of occasions, that he may have been mistreated at those times, that his father left the family home in about 2010, and the applicant did not see him again, and after that authorities attended the applicant's school enquiring about his father's whereabouts. Given the mistreatment his father experienced, I can also accept this was at least part of the reason the applicant's father left the family home. I am prepared to accept the applicant's father may have gone into hiding for a period of time, and that his photograph was displayed at the checkpoint, along with the applicant's photograph, and that authorities were looking for his father because he had left the area. However, I am satisfied the applicant remained living at the family home, and regularly presented his fishing pass at the checkpoint to be able to go fishing, and I do not accept authorities were looking for the applicant. I consider the applicant's evidence that his father visited his mother to ask for a divorce so he could marry another woman is not indicative of a person in hiding, and I do not accept he was in hiding at the time of that visit. I consider it is not implausible that someone may have informed Sri Lankan authorities about the applicant's father visiting the home, and that they attended the home and damaged it in the manner suggested, and I accept that evidence. Although there are some discrepancies in the applicant's evidence regarding the timing and frequency of instances of mistreatment by Sri Lankan authorities, I consider those discrepancies to be minor. I accept the applicant was taken from his home for questioning by Sri Lankan authorities on a number of occasions, during which he was asked about his father's whereabouts, that he was questioned about his father's whereabouts by authorities at SLA checkpoints when he went fishing, and that he was sometimes mistreated by authorities at those times, including being assaulted during questioning in January 2011 and in late 2012.

24. The applicant claims both he and his mother feared for his safety because the SLA were looking for his father, particularly as he regularly presented his fishing pass to authorities to be able to go fishing. As a result of those fears his mother organised for him to leave Sri Lanka in April 2013. Given the applicant's background and experiences in Sri Lanka, I can accept he and his mother feared for his safety and that was the reason it was decided he should leave Sri Lanka, and that he did so in April 2013.
25. The applicant's statement of claims refers to the SLA visiting his house four times after he left Sri Lanka. He states this was because his fishing pass had not been used for some time. His mother told them she did not know where he was, and they got very angry and threatened they would kill him if they found him. The applicant was not questioned on this issue at the SHEV interview, and the statement of claims provides no details about exactly when the visits to his family home occurred. The applicant has not suggested any of his family members were harmed during the visits. Country information indicates Tamils reported monitoring and harassment by security forces during the war and for a number of years after it ended.², and in that context I am prepared to accept the purported visits occurred, during which threats were made. The statement of claims was prepared in July 2017, almost four years ago, and on the information before me, I am not satisfied the visits from authorities have been ongoing or recent.
26. The applicant completed his SHEV application with the assistance of a legal practitioner/registered migration agent from [Agency 1], and a 'Sri Lanka (Tamil) Country Information Package' from [that agency] was provided with the SHEV application. The package provides an outline of the human rights situation in Sri Lanka, in particular regarding Tamils, and references a number of documents, mainly published between 2012 and 2016. Of relevance to the applicant's situation, the package claims human rights abuses are ongoing in Sri Lanka, and that Tamils continue to report harassment and persecution by Sri Lankan authorities. In regard

² DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

to the treatment of Tamil returnees to Sri Lanka, it is asserted that authorities remain preoccupied with identifying, detaining and harming those perceived to have had associations with the LTTE, and those people continue to be at risk of persecution. The delegate's decision refers to various more recent country information reports, including from DFAT, the UK Home Office, and the US Department of State, assessing the situation in Sri Lanka. Those reports post-date the information referred to in the [Agency's] country information package by several years, and are based on on-the-ground knowledge and discussions with a range of sources in Sri Lanka.³ Although the reports are not an exhaustive country overview, I am satisfied they are authoritative and credible documents providing current and cogent information on the situation for Tamils in Sri Lanka at the current time, and I afford those documents greater weight than the information in the [Agency's] country information package.

27. The applicant fears being detained, interrogated, tortured and/or killed by the SLA because he is Tamil, and because his father was an LTTE member, which will lead to him being imputed as having links to the LTTE. During the SHEV interview he also expressed concern about the return of 'the same government as when the Tigers had problems before'. The submission to the IAA refers to the return to power of a Rajapaksa government, and to the previous Rajapaksa government's monitoring for any possible LTTE activity, civil resistance or anti-government sentiment, and to individuals in the north and east reporting being monitored and questioned simply for being Tamil.
28. Given his past experiences in Sri Lanka, I can accept the applicant may feel somewhat alienated and distrustful of Sri Lankan authorities. However, there have been significant changes in Sri Lanka since the applicant departed, and the information before me does not support that he would face a real chance of persecution for the reasons claimed if he returned to Sri Lanka.
29. During the civil conflict in Sri Lanka, and for several years after it ended in May 2009, more Tamils were targeted by Sri Lankan authorities than any other ethnic group. While LTTE members and supporters were targeted, there was also widespread, systematic, and discriminatory harm and mistreatment of Tamils with no connection to the LTTE, but who lived in areas formerly controlled by the LTTE during the civil war, in the north and east of the country, with LTTE support at times imputed on the basis of ethnicity. Although the LTTE were comprehensively defeated in 2009, both DFAT and the UK Home Office confirm the Sri Lankan government remains sensitive to the potential re-emergence of the LTTE or other Tamil separatist groups. However, the Sri Lankan government's present focus is to identify those who pose a threat to the country's unity, rather than identifying a person's past LTTE links.⁴
30. The UK Home Office reported in its 2020 assessment, from a fact-finding mission to Sri Lanka, that if returning failed asylum seekers were found to have links to the LTTE they would likely face further questioning, but it would depend on the case. A non-governmental organisation worker advised the UK Home Office in October 2019 that although after the war whoever was connected to the LTTE would be arrested, sent to court and go through rehabilitation, now just having supported the LTTE is not enough to be arrested. The Attorney General's Department and the CID told the UK Home Office that former LTTE cadres would only be of interest if there was a pending criminal case against them, and that mere membership of the LTTE would not make someone of interest. In October 2019, a representative of the Northern Province

³ DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244; UK Home Office, 'Report of a Home Office fact-finding mission to Sri Lanka', 20 January 2020, 20200123162928; US Department of State, 'Country Reports on Human Rights Practices – Sri Lanka', 10 March 2020, 20200312151418; UK Home Office, 'Country Policy and Information Note Sri Lanka: Tamil Separatism', May 2020, 2020052717200

⁴ DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244; UK Home Office, 'Country Policy and Information Note Sri Lanka: Tamil Separatism', May 2020, 2020052717200

community advised that after 2015 (when there was a change of government), there continued to be some surveillance and house visits of former LTTE cadres by intelligence services, however the style of enquiry was different to pre-2015 – they were polite and non-threatening.⁵

31. The applicant was not an LTTE member or supporter, and there is no evidence there is a pending criminal case against him in Sri Lanka. Although I have accepted the applicant's father was an LTTE member, there is nothing in the information before me to support he held a senior position within the LTTE that could be considered high-profile. I am not satisfied the applicant's father was other than a low-level or low-profile former LTTE member. The information before me does not support a conclusion that his father's low-level LTTE membership, which ended over 12 years ago, or the interest Sri Lankan authorities had in the applicant's father or the applicant previously, would cause the applicant to be of interest to Sri Lankan authorities on return. I am not satisfied there is a real chance the applicant would be imputed as being an LTTE member or supporter on his return to Sri Lanka, or that he would be of adverse interest for that reason, including as a result of his father's prior LTTE membership, and any past experiences in Sri Lanka.
32. The situation has improved generally for Tamils since the end of the conflict. The UK Home Office and DFAT have confirmed the UNHCR position that simply being of Tamil ethnicity, or a Tamil from an area formerly under LTTE control, no longer gives rise to a need for international protection, the rationale being that almost every Tamil who resided in those areas during the conflict had some sort of connection with the LTTE. The country information does not indicate Tamils are currently at risk of persecution in Sri Lanka purely on account of their race, or that Tamil ethnicity of itself imputes LTTE membership or a pro-LTTE opinion, even when combined with other factors such as gender, age, marital status, or place of origin.⁶
33. The security situation in Sri Lanka, particularly in the north and east, has improved significantly since the end of the civil war in May 2009, changing notably during the period of the former Sirisena government. The government exercises effective control over the entire country, including in the predominantly Tamil-populated north and east of the country. Monitoring of Tamils in day-to-day life decreased significantly under the Sirisena government, however surveillance of Tamils in the north and east continues, particularly those associated with politically-sensitive issues, but physical violence against those being monitored is not common. Security was heightened across Sri Lanka following the Easter Sunday terrorist attacks of 21 April 2019. The *Prevention of Terrorism Act* (PTA) has been used, along with the now lapsed Emergency Regulations, to detain those involved with the 2019 Easter Sunday attacks, and checkpoints were brought back in, and the military and police enjoyed expanded powers of detention, search and entry, resulting in fears amongst the Tamil community. However, the focus was clearly on the Muslim community and the apprehension of terrorists, rather than being directed at Tamils.⁷
34. In the IAA submission the applicant submits that monitoring of Tamils with past association to the LTTE persists, and if public ceremonies such as Great Heroes Day are conducted participants are likely to be monitored, especially in the Northern and Eastern provinces. Sources told DFAT there is monitoring by the authorities at public commemoration of events associated with the Tamils' armed struggle for statehood, and I can accept such monitoring occurs.⁸ However, the applicant has not indicated he ever attended commemorative events, in Sri Lanka or Australia,

⁵ UK Home Office, 'Country Policy and Information Note Sri Lanka: Tamil Separatism', May 2020, 2020052717200

⁶ DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244; UK Home Office, 'Country Policy and Information Note Sri Lanka: Tamil Separatism', May 2020, 2020052717200

⁷ DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244; UK Home Office, 'Report of a Home Office fact-finding mission to Sri Lanka', 20 January 2020, 20200123162928

⁸ DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

or that he would do so on return to Sri Lanka, or that he would otherwise engage in politically-sensitive issues. I do not accept he would do so, such that he would be at risk of monitoring for those reasons. As noted above, I am not satisfied the applicant would be imputed with being an LTTE member or supporter, and I am also not satisfied there is a real chance he would be monitored as a result of any past association with the LTTE through his connection to his father.

35. The applicant also refers to the recent arrest of the Jaffna Mayor by government forces under the PTA, for hiring security guards who wore uniforms similar to LTTE uniforms. It is submitted this is evidence that operation of the PTA continues and that it is used against Tamils. The PTA remains legally in force, and there have been recent instances of its use, including for the detention of Tamils, such as a Tamil man in 2018 who was a suspect in the murder of two policemen.⁹ The applicant does not claim he was ever involved in criminal activities or other politically-sensitive activities that may draw the attention of Sri Lankan authorities, or that he would engage in such activities on return to Sri Lanka, such that there is a real chance of him being detained under the PTA for any reason.
36. DFAT reports the military maintains a significant presence in the north, particularly in the Jaffna Peninsula, but that most military personnel are confined to the Security Forces Cantonment on Jaffna Peninsula and smaller surrounding military camps, and military involvement in civilian life has decreased.¹⁰ Both DFAT and the UK Home Office report that the checkpoints reinstated temporarily after the Easter attacks are no longer in operation, the emergency regulations have lapsed, the heightened security has eased, and the military is much less visible.¹¹ I accept there is a continued military presence in the north and east of Sri Lanka, and that there may be heightened security in response to specific incidents of concern. A number of the applicant's relatives continue to live in Jaffna district, including his mother, [and siblings], however the applicant gave no evidence they have recently been of interest to authorities, or that they have any problems as a result of the ongoing military presence. Overall, I am not satisfied the ongoing military presence in the north and the east, is indicative of a risk of harm to the applicant.
37. The applicant submits that any improvements in the security situation in the Northern and Eastern provinces have not been enough to allay the applicant's fears that as a Sri Lankan Tamil male he faces a risk of mistreatment on a day to day basis, and a risk of torture. The 2015 OISL report found that 'victims of war-related torture perpetrated by Government forces... were generally Tamil, and they documented 'particularly brutal use of torture by the Sri Lankan security forces' in the immediate post-war period, following the LTTE's surrender. Local sources told DFAT the police routinely mistreat suspects during criminal investigations, including to extract confessions. Sources also told DFAT that mistreatment was common in prisons. Mistreatment could range from a slap to the face to severe beatings, and, in some cases, may amount to torture. According to sources, mistreatment in prisons, where it occurs, does not discriminate on ethnicity. DFAT indicates Sri Lankans face a low risk of mistreatment on a day-to-day basis. In the case of individuals detained by the authorities, DFAT assesses the risk of mistreatment to be moderate. Where it occurs, some mistreatment may amount to torture. However, DFAT assesses that Sri Lankans face a low risk of torture overall. I do not accept the applicant is wanted for any outstanding criminal activity, or that he would be of interest for any LTTE connections, such that he would be at risk of detention and torture.
38. The applicant submits that as a Tamil from the north and east he may face a degree of discrimination or harassment and not have the same opportunities as Sinhalese Sri Lankans.

⁹ DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

¹⁰ DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

¹¹ DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244; UK Home Office, 'Report of a Home Office fact-finding mission to Sri Lanka', 20 January 2020, 20200123162928

DFAT assesses that non-Muslim Sri Lankans, including Tamils, face a low risk of official or societal discrimination based on ethnicity or caste, including in their ability to access education, employment or housing [with low risk indicating DFAT is aware of incidents but has insufficient evidence to conclude they form a pattern]. DFAT further assesses that there is no official discrimination on the basis of ethnicity in public sector employment, but that the under-representation of Tamils is largely the result of language constraints and disrupted education because of the war. Similarly, the 2020 UK Home Office fact-finding mission report, which includes information from a wide range of informed sources, including Sri Lankan government officials, journalists, and non-governmental organisations, indicates that since the end of the civil war the focus of the Sri Lankan government has changed, there have been improvements in the general feeling of personal freedom in the country, and although there remains some discrimination towards Tamils, along with other minorities, most Tamils do not suffer persecution simply for being Tamil.¹²

39. There is no evidence before me that the applicant's family, who live in the Jaffna district of Sri Lanka, have recently experienced incidents of official or societal discrimination. Nevertheless, I can accept there is a chance the applicant, as a Tamil, may face some discrimination, such as in relation to the ability to access public sector employment. However, overall I am not satisfied any societal or official discrimination the applicant may face as a Tamil on return to Sri Lanka amounts to serious harm, now or in the reasonably foreseeable future.
40. There have been substantial political changes in Sri Lanka recently, in particular the election of Gotabaya Rajapaksa as President in November 2019. Gotabaya is the brother of Mahinda Rajapaksa, who was president from 2005 to 2015, and who was appointed prime minister shortly after the 2019 election. The Tamil community and various commentators have expressed concerns about the return of the Rajapaksas to power, including concerns about the appointment of military officials to key government positions, some of whom served during the former Rajapaksa era and who have been implicated in human rights violations in the final stages of the war. There are also criticisms about the lack of progress on reforms promised by the previous Sirisena government, including delayed delivery of human rights and reconciliation commitments, and the government being slow to implement transitional justice mechanisms. DFAT reports that although there has been some progress, for example with the establishment of offices for Missing Persons and Reparations, implementation of the government's transnational justice and reconciliation commitments has been slow and uneven to date, and minimal progress on accountability for abuses committed during the war, including against the Tamil community.¹³
41. The applicant submitted to the IAA that under the Rajapaksa government persistent ethnic and religious tensions in Sri Lanka will sharpen. More recent country information has reported on the Rajapaksa government's overwhelming victory in the August 2020 parliamentary election in Sri Lanka. Commentators have expressed concerns regarding the centralisation of powers, that planned constitutional reforms will lead to authoritarianism and a further crackdown on journalists and political dissent, and regarding the impact for the future of democracy and pluralism in Sri Lanka.¹⁴

¹² DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244; UK Home Office, 'Report of a Home Office fact-finding mission to Sri Lanka', 20 January 2020, 20200123162928

¹³ DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

¹⁴ Office of the High Commissioner for Human Rights (OHCHR), Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka, 18 February 2020, 20200221140652; London school of economics and political science, 'Sri Lanka's parliamentary election: Landslide win for the Rajapaksa puts democracy and pluralism at risk', 12 August 2020, 20200813141629; S. Rajaratnam School of International Studies (RSIS), 'Sri Lanka Elections: Stronger Powers, At What Cost?'

42. I accept Sri Lankan Tamils may have continued concerns about the return to power of members of the Rajapaksa family. I also accept the present government is more authoritarian than the previous government, it is unsympathetic to continuing post-war reconciliation efforts, or Tamils' calls for greater cultural recognition and political representation, and there is unlikely to be accountability for human rights abuses during the war under the regime. Despite the concerns, I am satisfied the situation for Tamils in Sri Lanka is vastly different than under the previous Rajapaksa regime. The present Rajapaksa government has been in power since November 2019, over 18 months, and the evidence does not support that Tamils have been targeted or harmed in that time, or that there is an intention to do so. On the information before I am not satisfied the change in government has resulted in a deterioration of conditions for Tamils generally in Sri Lanka, or more specifically that the risk for people with the applicant's profile has increased, or would increase in the reasonably foreseeable future.
43. Overall, considering the applicant's evidence in the context of the country information, although I have accepted Sri Lankan authorities visited the applicant's home searching for him after his departure, and that his father was an LTTE member, I am not satisfied such interest has been ongoing or recent. His family members continue to live in their home area unharmed. I am not satisfied the applicant has any outstanding criminal matters that may make him of interest to authorities, or that he is politically active or involved in politically sensitive activities. I am not satisfied the applicant would be imputed with being an LTTE member or supporter, or with pro-LTTE or anti-government opinions for any reason, or that he would be of interest to Sri Lankan authorities on his return for any reason, now or in the reasonably foreseeable future, including because of his Tamil ethnicity and origins in the north, as a result of his father's low-level LTTE membership, or as a result of his past experiences with Sri Lankan authorities. I am not satisfied the applicant faces a real chance of any harm from the present government, or any other person or group in Sri Lanka, on the basis of his overall profile.
44. The applicant claims he has never held a NIC, and that because NICs were not issued to LTTE members, and he is a Tamil, he will be suspected of being connected to the LTTE. He also claims he would not be able to access basic services such as healthcare due to not having a NIC, and if he tried to get one he would experience a lot of problems because people will assume he is with the LTTE. The review material includes a Sri Lankan NIC for a person born in [a specified year], some eight years before the applicant. The applicant explained during the SHEV interview that someone on the boat to Australia asked him to keep the NIC in his bag and return it later, but it was not returned, and I accept that explanation.
45. DFAT reports Sri Lankans generally use the NIC as their primary identification document, and Sri Lankan citizens are required by law to register their identity. Following registration, persons over the age of 16 are eligible to apply for a NIC regardless of their ethnicity, religion, language or geographic location. A NIC can only be obtained within Sri Lanka, and is obtained through one's *grama niladhari* (village officer) or the Department for Registration of Persons. A NIC is required to access government services, including public health and education services.¹⁵
46. Country information indicates many individuals affected by the war and the 2004 Indian Ocean tsunami lack key identity documents.¹⁶ According to a 2012 report from the BBC, a non-governmental organisation estimated at that time there were over 100,000 people in northern Sri Lanka who had either lost or damaged their identity cards. The report indicates the LTTE

– Analysis', 12 August 2020, 20200812104655; Eurasia Review, 'Sri Lanka's 2020 Parliamentary Election Results – Analysis', 18 August 2020, 20200818104748; Aljazeera, 'Sri Lanka: Economy, human rights key challenges facing Rajapaksas', 19 August 2020, 20200819205836

¹⁵ DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

¹⁶ DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

placed no importance on a NIC, and for those who lived in areas outside government control there was no question of having a government identity card. However, Tamils without identity cards travelling to other areas of the country were suspected by Sri Lankan military, and one person who did not have a NIC reported being arrested on suspicion of belonging to the LTTE during a search operation during the war.¹⁷ More recently DFAT reports that even former LTTE members can obtain a NIC upon successful completion of the rehabilitation process.¹⁸

47. I am prepared to accept the applicant, who was only [age] when he left Sri Lanka, may not yet have applied for a NIC, and that he has never held a NIC. I accept during the war and for several years afterwards Tamils without a NIC may have been suspected of having LTTE connections. In his IAA submission the applicant contends he will be unable to apply for a NIC until he has resided in Sri Lanka for six months, and during that time he will be at risk of being detained for an extended period and exposed to adverse questioning at any time. No country information has been provided to support those contentions, and I reject them. Taking into account my finding above, that I am not satisfied the applicant would be imputed with being an LTTE member or supporter on return, and the country information, which I consider supports there are a variety of reasons a person might not have a NIC, and that it is now over 12 years since the end of the war, I am not satisfied the applicant would be suspected of being connected to the LTTE because he does not have a NIC. I accept the applicant may not be able to access some government services until he obtains a NIC. He has a copy of his birth certificate, and I am satisfied his birth has been registered, and he will be able to obtain a NIC within a short period of time in Sri Lanka, even taking into account DFAT's report that, in the north and east of Sri Lanka, documentation processes can be delayed due to the lack of Tamil-speaking officials.¹⁹ I am not satisfied the processes he would be required to undertake to obtain a NIC, or the mere fact of interacting with Sri Lankan authorities to do so, including any processing costs, or delay in obtaining the document, amounts to serious harm for this applicant. I am also satisfied the processes for obtaining identity documents are not discriminatory on their face, being applicable to all Sri Lankans, and they are not discriminatory in intent, or implemented in a discriminatory manner, and I find they are not the result of systematic and discriminatory conduct, and does not amount to persecution within the meaning of s.5J(4).
48. Included in the review material is a letter from the Department addressed to the applicant, dated 13 March 2014, and advising of a Departmental website disclosure (data breach) that occurred in February 2014. The letter indicates that as the applicant was in immigration detention on 31 January 2014 some of his personal information may have publicly available for a short time on the Department website. The information included his name, date of birth, nationality, gender, and details about where he was detained, the reason and location of detention, and whether there were other family members in detention. The delegate did not consider the risk of harm as a result of the data breach, as they did not consider the applicant had made any claim on that basis. Although the applicant may not have articulated a claim, I consider a claim arises on the material before me, and have considered whether the applicant is at risk of harm as a result of the data breach.
49. I accept the applicant was in Immigration detention on 31 January 2014, that he was subject to the data breach, and it is possible his information was accessed, including by Sri Lankan authorities. That information would have revealed no more than that he sought asylum in Australia, which will be apparent in any case as a result of the manner of his return to Sri Lanka using temporary travel documents, and which, for reasons discussed below, I do not accept will

¹⁷ British Broadcasting Corporation (BBC), 'Sri Lanka's Tamils face identity crisis', 28 June 2012, CX290924

¹⁸ DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

¹⁹ DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

give rise to a real chance of any harm. I am otherwise not satisfied the applicant faces a real chance of any harm on return to Sri Lanka as a result of the data breach.

50. The applicant claims Sri Lankan authorities are likely to harm him because he left Sri Lanka illegally. During the SHEV interview he said he would have problems on return to Sri Lanka because he left the country illegally, and that people who did so are presumed to be LTTE. The delegate also considered his risk as a Tamil failed asylum seeker who departed illegally.
51. I accept the applicant's consistent evidence that he departed Sri Lanka illegally by boat, travelling to Australia, arriving in May 2013, and that he has never held a Sri Lankan passport. Sri Lankans without passports can re-enter the country on temporary travel documents.²⁰ I consider it highly likely as a result of the manner of his return, using such documents, the applicant will be identified as an asylum seeker returning from Australia who departed Sri Lanka illegally.
52. DFAT reports that most returnees, including those from Australia, are questioned upon return (usually at the airport) and, where an illegal departure is suspected, they can be charged under the *Immigrants and Emigrants Act (I&E Act)*. DFAT understands such people are processed by police located at the airport. The process often involves interviewing returning passengers, confirming their identity, contacting police in their claimed hometown, contacting claimed neighbours and family, and checking criminal and court records, and would identify someone trying to conceal a criminal or terrorist background, or trying to avoid court orders or arrest warrants. I am not satisfied the applicant has a profile that would be of interest for those reasons.
53. During the SHEV interview the applicant expressed some concern that his family members could face problems because of him, and they may be questioned about why he was sent overseas, and whether he was in the LTTE. I accept the applicant's family may be contacted in the course of confirming his identity, but I am not satisfied they would otherwise be questioned in the manner suggested, or face problems as a result of his return to Sri Lanka. The applicant has provided a copy of his Sri Lankan birth certificate, and I am satisfied Sri Lankan authorities would be able to confirm his identity within a short period of time.
54. At the earliest available opportunity after investigations are completed, police transport individuals charged with departing Sri Lanka illegally to the closest Magistrate's Court. The Court makes a determination as to the next steps for each individual. Should a magistrate not be available, for example because of a weekend or public holiday, those charged may be detained at the airport for up to two days. Although DFAT describes this as occurring in a 'holding cell', the UK Home Office observed returnees sat in a 'waiting area or room' off the CID office at the airport, and that there was access to bathrooms, a prayer room, food and water, and the airport has a medical facility available to all passengers if required. The International Organization for Migration (IOM) provides support for returnees during the arrivals process, and unlike in the past, has not seen intense questioning in the last few years.²¹
55. The information before me does not indicate returnees are subject to mistreatment at the airport, and all returnees are treated according to standard procedures irrespective of ethnicity and religion. I do not accept the applicant would be imprisoned as a result of his illegal departure. However, I am satisfied the applicant would be questioned at the airport, and he may be detained for a period of time at the airport, before being transferred to the court for the matter of his illegal departure to be dealt with. Country information indicates those who plead guilty

²⁰ DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

²¹ DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244 ; UK Home Office, 'Report of a Home Office fact-finding mission to Sri Lanka', 20 January 2020, 20200123162928

receive a small fine for departing Sri Lanka illegally, which can be paid by instalments, and they are allowed to leave.²² Given the applicant departed Sri Lanka illegally, I consider it highly likely he would plead guilty to that offence, and I find that he would, and that he may receive a fine, and will be allowed to leave. I am not satisfied the applicant would be mistreated during processing at the airport, or that the processes he will experience on return, including being questioned, detained for a short period at the airport, and being fined, amounts to serious harm for this applicant. On a separate basis, I am satisfied the *I&E Act* provisions relating to illegal departure are not discriminatory on their face, and they are not discriminatory in intent or implemented in a discriminatory manner. I find that the investigation, detention, prosecution or punishment of the applicant under the *I&E Act* for his illegal departure would not be the result of systematic and discriminatory conduct, and does not amount to persecution within the meaning of s.5J(4).

56. Those who plead not guilty to an illegal departure are usually granted bail, and are subject to discretionary bail conditions, which can involve monthly reporting to police at the returnee's expense, over a protracted period of time. The usual result is a fine. The penalties and processes associated with pleading not guilty to an illegal departure are equally non-discriminatory, and I am not satisfied they amount to persecution, should the applicant plead not guilty.
57. Thousands of Sri Lankans have returned from Australia and other western countries after unsuccessfully seeking asylum, and Sri Lankan authorities are reported to have said they are welcome to return.²³ It is not an offence to seek asylum outside Sri Lanka, and independent sources told the UK Home Office that even those who have been absent from Sri Lanka for a number of years are not questioned on those grounds.²⁴ There is no information before me to support that such returnees are targeted merely for seeking protection or being failed asylum seekers. Reports to the UK Home Office indicate that simply having supported the LTTE is now not enough for a person to be arrested, and the former LTTE cadres would only be of interest if there was a pending criminal case against them, and even mere membership of the LTTE would not make someone of interest.
58. Although the applicant's father was an LTTE member, and the applicant was questioned on a number of occasions about his father's whereabouts, it is not apparent to me the applicant was ever questioned about his father's involvement with the LTTE. The applicant was never an LTTE member/cadre, nor did he suggest he ever provided support to the LTTE, or that he has been engaged in any activities, in Sri Lanka or Australia, that could be considered to be anti-government. I am not satisfied the applicant's profile is such that he would be of interest on return, for any reason, including as a returning asylum seeker, or because of his father's prior LTTE membership, that he would be interrogated about his father's links to the LTTE, or that authorities would assume he was an LTTE member because he departed illegally and sought asylum.
59. The UK Home Office report that monitoring on return is possible if a person is deemed to have done something against the government. DFAT also reports that some returnees, including those with suspected LTTE links in the north and east, have been the subject of monitoring including home visits and phone calls from the CID. DFAT understands most returnees, including returning asylum seekers, are not actively monitored on an ongoing basis. DFAT is unable to verify whether the monitoring that does occur is specific to former LTTE cadres, but is not aware of returnees being treated in a way that endangers their safety and security. Tamils who had failed to secure

²² DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

²³ DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

²⁴ UK Home Office, 'Report of a Home Office fact-finding mission to Sri Lanka', 20 January 2020, 20200123162928

asylum in Australia and since returned to the Northern Province told DFAT they had no protection concerns and had not been harassed or monitored by authorities. Similarly, the UK Home Office report indicates security was not identified as a major issue by a sample of returning asylum seekers questioned by the UNHCR.²⁵ Considering the applicant's profile in the context of the country information, I am not satisfied he would experience monitoring or interrogation on return to his home area in the reasonably foreseeable future, including interrogation about his father's prior involvement with the LTTE.

60. At the SHEV interview the applicant was asked about his family in Sri Lanka, and said his mother, [and siblings] live in Jaffna in the Northern Province. In his SHEV application he indicated he speaks with family members every day or two. He was born in that province, and always resided there when in Sri Lanka previously. I am satisfied he would very likely return to live in the Northern Province of Sri Lanka with family members, at least until he re-establishes himself. He has not indicated otherwise. DFAT reports that failed asylum seekers can face practical challenges to successful return to Sri Lanka, including difficulty finding suitable employment and reliable housing, but do not experience societal discrimination for seeking asylum elsewhere. Some returnees have also reported social stigma upon return to their communities, with some communities resenting the support provided to refugee returnees.²⁶ The applicant left school to support his family, in his SHEV application indicates he has been employed since May 2016, initially at [a service] company, and from October 2016 with a [specified] company. I consider the applicant has shown himself to be resilient working under difficult circumstances in Sri Lanka, and capable of finding and maintaining work in Australia.
61. On the information before me, I am satisfied the applicant will be able to re-establish himself in the Northern Province, find employment and accommodation, and be able to support himself financially. I accept it is possible he may encounter some challenges re-integrating to society and may experience some social stigma. I am not satisfied any social stigma or reintegration difficulties he may experience rises to the level of serious harm for this applicant, whether considered separately or together. I am not satisfied the applicant faces a real chance of persecution in Sri Lanka, as a result of his illegal departure, or for being a returning failed asylum seeker.
62. In all the circumstances, I am not satisfied the applicant faces a real chance of persecution, now or in the reasonably foreseeable future, for any of the reasons claimed, even when those reasons are considered together. I am not satisfied the applicant has a well-founded fear of persecution within the meaning of s.5J.

Refugee: conclusion

63. 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

64. 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

²⁵ DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244; UK Home Office, 'Report of a Home Office fact-finding mission to Sri Lanka', 20 January 2020, 20200123162928

²⁶ DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 2019110413524

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

65. Under s.36(2A), a person will suffer 'significant harm' if:

- the person will be arbitrarily deprived of his or her life
- the death penalty will be carried out on the person
- the person will be subjected to torture
- the person will be subjected to cruel or inhuman treatment or punishment, or
- the person will be subjected to degrading treatment or punishment.

66. The expressions 'torture', 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' are in turn defined in s.5(1) of the Act.

67. I accept it is likely on return to Sri Lanka the applicant will be subject to a series of administrative processes at the airport, he may be detained for a short period of time, questioned, and subject to penalties as a consequence of his illegal departure from Sri Lanka. I have not accepted the applicant would be a person of interest to Sri Lankan authorities, or any other group or person, on return for any reason, or that there is a real risk he would be mistreated during processing at the airport or any associated brief period of detention. I accept the applicant may face some challenges re-integrating to society in Sri Lanka, and he may face some discrimination as a Tamil, such as in being able to access public sector employment, and social stigma as an asylum seeker. He is also likely to be required to engage in processes to obtain a NIC, and may experience some delay in accessing services whilst he does so. Although experiencing social stigma and discrimination may be hurtful, and it may be stressful to undergo the processes associated with arriving in and establishing himself in Sri Lanka (including those involved with obtaining a NIC and any associated delay in accessing services), I am not satisfied such treatment would amount to significant harm, as defined in the Act, for this applicant. I am not satisfied it involves a level of pain, suffering or humiliation to meet the definition of torture, cruel or inhuman treatment or punishment, or degrading treatment or punishment, or that there is a real risk the applicant will be arbitrarily deprived of his life, or be subject to the death penalty for those reasons.

68. I have otherwise found there is not a real chance the applicant will face any harm on return to Sri Lanka for the reasons claimed, now or in the reasonably foreseeable future. For the same reasons, I am also not satisfied there is a real risk of any harm on return, including significant harm.

Complementary protection: conclusion

69. 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.