



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA21/09343

Date and time of decision: 14 July 2021 12:39:00
S Kamandi, Reviewer

Decision

The IAA remits the decision for reconsideration with the direction that:

- the referred applicant is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*.

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 national of Sri Lanka and of Tamil ethnicity. He arrived in Australia in September 2012 and lodged an application for a Safe Haven Enterprise Visa (SHEV) on 5 June 2017.
2. On 10 June 2021, a delegate of the Minister for Immigration (the delegate) made a decision refusing to grant the visa on the basis that the applicant was not a person in respect of whom Australia owed protection obligations.

Information before the IAA

3. I have had regard to the review material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. On 13 May 2021, the Immigration Assessment Authority (IAA) received an email from the applicant's representative attaching a submission and the 2013 Human Rights Watch report relating to sexual violence against Tamils by the Sri Lankan security forces. The submission restates the applicant's claims made before the delegate, expresses disagreement with the delegate's findings and refers to country information and other submissions and material provided to the delegate. I do not consider the submission to contain new information and have had regard to it in undertaking this review.
5. The 2013 Human Rights Watch report was not before the delegate and is new information. The report pre-dates the delegate's decision and there is no submission why the report was not, or could not have been, provided to the delegate. The report is general country information and not credible personal information and given the nature of the report and the delegate's acceptance of the applicant's claims that he was tortured and mistreated at the hands of the Sri Lankan authorities, I do not consider that the report may have affected the consideration of the applicant's claims. In addition, given the number of reports regarding the treatment of Tamils by the Sri Lankan authorities during and after the end of the war, I do not consider this report to materially add to the information before the delegate. I am not satisfied that the requirements under s.473DD (a) or (b) of the Act are met.

Applicant's claims for protection

6. The applicant's claims can be summarised as follows:
 - The applicant was born in [Location 1], Mannar in the northern province of Sri Lanka. He is of Tamil ethnicity and Hindu religion.
 - In April 2008, the applicant's brother was forcibly conscripted by the Liberation Tigers of Tamil Eelam (LTTE) and taken to a training camp in Mullaithivu. His brother escaped from the training camp and came home. A few days later, the LTTE came to the applicant's home and asked about his brother and warned that if the applicant or his brother were seen they would be taken by force.
 - Between April and June 2008, the LTTE visited the applicant's home on more than ten occasions warning that they would take the applicant or his brother by force. The

applicant's parents arranged for the applicant and his brother to leave the LTTE controlled area.

- [In] June 2008, the applicant and his brother reached [Location 2], an army-controlled area. They were interviewed by the Criminal Investigation Department (CID) and sent to [a] Refugee camp. They told the CID that they had escaped the LTTE controlled area because they were scared that they would be killed.
- Shortly after the applicant's father was forcibly taken by the LTTE as a labourer. He was forced to dig bunkers for the LTTE.
- The applicant was kept at the camp from June 2008 until October 2009. Throughout this period, the applicant and his brother were interrogated about whether they knew any LTTE members within the camp. They were suspected of being LTTE members and due to the well-known fact, that at the time the LTTE were recruiting one member from each family, the Sri Lankan Army Intelligence Department (SLAID) suspected that either the applicant or his brother must have been a member. They were interrogated regularly, tortured and the applicant was sexually assaulted on more than 20 occasions.
- In April 2009, the applicant's father was shot dead by the Sri Lankan army. He was shot dead Infront of the applicant's mother as he was limping, and the authorities assumed that he had worked with the LTTE.
- In October 2009, the applicant was released but told that investigations into his brother were not completed and his brother, along with another five Tamils, was put into a van and taken by the SLAID. That was the last time the applicant saw his brother.
- The applicant went to his uncle's place in [City], where his mother was residing. The applicant's uncle obtained him a new National Identity card which listed [City] as his residential address to prevent him from being persecuted or harassed while living in [City].
- In November 2009, the applicant's uncle hared that there were six corpses in [City] near a cemetery. The applicant examined the dead bodies but was unable to confirm whether his brother was amongst the dead. He lodged a complaint with the police, which was not accepted. He then lodged a complaint with the parliamentarian from Mannar who said he would help, but no action was taken.
- In February 2010, a Terrorism Investigation Division (TID) officer came to the applicant's uncle's home asking the applicant to report to their office Infront of [a] camp in [City]. On arrival, the applicant was told that his brother had admitted that he was guilty of LTTE involvement and this meant that the applicant was also involved. He was blindfolded, taken away, and detained for over a year. During this period, the applicant was tortured, severely beaten and sexually molested. He has scars on his back and received treatment for his injuries while in [Immigration detention].
- The applicant's uncle approached the TID and offered to pay a bribe to secure his release. On release the applicant was told not to talk about his experiences while in detention or he would face the same fate as his brother. He was photographed prior to his release.
- Approximately 15 days after his release, the applicant's uncle arranged for his departure to [Country 1]. His uncle found an agent who assisted LTTE members to depart the country undetected. The agent paid a bribe to obtain the applicant's passport and arranged for officers at the airport to allow the applicant to depart the country without being questioned.

- After about a year, in April 2012, the applicant returned to Sri Lanka. He returned because his mother was unwell, and his uncle could no longer care for her. At the time, while the applicant was fearful of returning, he had hoped that the situation was different and that he could return to care for his mother.
- The applicant was detained at the airport for ten days, during which he was accused of being a terrorist, tortured and questioned about how he managed to depart the country. He was forced to reveal the details of the agent who organised his travel. He was asked to sign a document in Sinhalese and was told that he had left the country without permission and had to report to [the] camp.
- After his return to his uncle's house, he received numerous calls to report to [the] camp. He did not report as he feared that he would face the same treatment he faced in the past.
- In June 2012, the applicant received an official letter from the TID demanding that he report to [the] camp. The applicant went to the camp with his uncle. His passport and his original identity documents were taken and burnt. He was told that he was an LTTE suspect and not to leave the area. The applicant was beaten for four hours. He was released after his uncle begged for his release into his care. The applicant was told that he was not to leave the area without their permission, and he was photographed prior to his release.
- Due to fear, the applicant decided to go to [Location 1] with his mother without obtaining permission. They were stopped at the checkpoint and incorrectly told the authorities that he had permission to leave. Although they got to [Location 1], the applicant's mother feared that the authorities would find out that the applicant had left [City] without permission and that he would be taken to [the] camp. For this reason, after three days, they returned to his uncle's house in [City].
- After a few days, the TID came to the applicant's uncle's house. Due to fear that the authorities had found out about his travel to [Location 1], the applicant hid at the back of the house. His uncle was asked about the applicant's whereabouts and they also found out that the TID was making enquiries about the applicant in the village.
- The applicant planned to go to India via Mannar, but he was too scared to go to Mannar. He was also advised against going to Mannar and his uncle's friend made arrangements for him to leave for Australia. He was taken to [Town] where he boarded a boat to Australia.
- After his departure, the authorities visited his uncle and threatened him. The applicant's uncle was told that if the applicant was sighted, he would be killed. Since then, the applicant's uncle and his uncle's wife have passed away and his mother is mentally ill and residing in a home. The applicant has no other family in Sri Lanka to provide him with information about the circumstances in Sri Lanka.
- The applicant fear harm at the hands of the Sri Lankan authorities because they believe that the applicant is an LTTE member due to his brother's training with the LTTE and admission that he was involved with the LTTE and because he is a young Tamil male from an LTTE controlled area who was suspected of LTTE involvement and was under monitoring. He also fears harm on the basis of his Tamil ethnicity and having left Sri Lanka illegally in breach of the authorities order not leave the area without permission.

Refugee assessment

7. Section 5H(1) of the Act provides that a person is a refugee if, in a case where the person has a nationality, he or she is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Well-founded fear of persecution

8. Under s.5J of the Act ‘well-founded fear of persecution’ involves a number of components which include that:
 - the person fears persecution and there is a real chance that the person would be persecuted
 - the real chance of persecution relates to all areas of the receiving country
 - the persecution involves serious harm and systematic and discriminatory conduct
 - the essential and significant reason (or reasons) for the persecution is race, religion, nationality, membership of a particular social group or political opinion
 - the person does not have a well-founded fear of persecution if effective protection measures are available to the person, and
 - the person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour, other than certain types of modification.
9. The applicant has consistently claimed that he was born in Mannar in the northern province of Sri Lanka in 1986 and is of Tamil ethnicity and Hindu religion. The delegate was provided with documentary evidence in support of his identity and nationality. I accept that the applicant is a national of Sri Lanka and of Tamil ethnicity. Sri Lanka is the receiving country for the purposes of this review.
10. The applicant’s evidence regarding his experiences in Sri Lanka has been presented in a consistent and detailed manner since his arrival in Australia. He has consistently claimed that he and his family lived in [Location 1] in Mannar district, an LTTE controlled area. His evidence is that in April 2008, his brother was forcibly recruited by the LTTE and taken to a training camp. His brother, along with other new conscripts, managed to escape the training camp and came home. He claims that at the time the LTTE was requiring all Tamils in the area to allow one person within their families to be conscripted and fight with the LTTE. After his brother’s escape, the LTTE came looking for his brother on several occasions and warned that if either the applicant or his brother were seen they would be taken. The applicant claims that his father would get them to hide in a bunker in their home with the LTTE came looking for his brother and would maintain that his son had not come home since taken by the LTTE.
11. The applicant has consistently claimed that in June 2008, the applicant’s father arranged for him and his brother to leave their LTTE controlled area and go to [Location 2], an army-controlled area and to surrender themselves. He has given detailed account of their travel out of their village and into the army-controlled area and claims that on arrival they were interviewed by the CID and sent to [a] refugee camp, where he remained until October 2009. He claims that during this period he suffered many occasions of interrogation regarding he

and his family's involvement with the LTTE and that he was tortured and sexually assaulted. The applicant provided detailed account of his experiences during this period in his SHEV statement. He also claims that shortly after he and his brother's departure from their home area, his father was taken by the LTTE and forced to work for them as a labourer.

12. Country information¹ indicates that the LTTE formed in the 1970s and launched an armed insurgency against the Sri Lankan state in 1983. The LTTE established and maintained de facto control of Tamil-populated areas in the north and east requiring Tamils in the area to interact with the LTTE, including forced recruitment of Tamils. The civil conflict, which lasted until May 2009, displaced hundreds of thousands of people and killed tens of thousands of people on both sides. As almost all LTTE supporters were Tamils, the security forces imputed LTTE support based on ethnicity and emergency regulations to detain and interrogate civilians were applied in a discriminatory manner. Many Tamils, particularly in the north and east, have reported being monitored, harassed, arrested or detained by security forces during the conflict. Many, the majority from the north and east, have disappeared without explanation and remain missing. It is reported that several local and international organisations have alleged torture by the Sri Lankan military, intelligence and police forces, mostly from the period immediately following the war and involving Tamils with imputed links with the LTTE. Torture is claimed to have been of routine nature practiced all over the country, mainly in relation to police detentions with police using torture during interrogation and arrest regardless of the nature of the suspected offence.
13. Considering the country information and the applicant's consistent and detailed evidence regarding his brother's forcible recruitment and their experiences while residing at an army-controlled camp in a period prior to and after the end of the civil war in May 2009, I accept that the applicant and his brother travelled from their village to an army-controlled area to escape the LTTE. I accept that in June 2008, they surrendered themselves to the Sri Lankan authorities and that they were sent to the camp where they endured many interrogations regarding their involvement with the LTTE and were tortured and that the applicant was physically and sexually abused. I accept that as Tamils from an LTTE-controlled area and the authorities knowledge that the LTTE were requiring Tamils to interact with them and were forcibly recruiting young Tamils to fight with them, the applicant and his brother were suspected of having been involved with the LTTE and that the authorities interrogated and tortured them to obtain information about their and other Tamils' involvement with the LTTE.
14. The applicant has consistently claimed that in October 2009, although they were given a document which indicated that the applicant and his brother were to be released from the camp, the applicant was told that the investigations into his brother's involvement with the LTTE were ongoing and that his brother, along with another five Tamil men, were taken in a van, after which his brother has not been seen. The applicant's evidence is that after the end of the war, his father was shot dead by the army as they suspected that his father was involved with the LTTE. His mother, after her release from the camp, developed mental health issues and lived with his uncle in [City]. After his release from the camp, the applicant claims that he also went to reside with his uncle in [City]. I accept that the applicant's brother was taken, and that the applicant was allowed to leave the camp and that he went to his uncle's house in [City] where his mother resided and was informed her of her son's situation. I also accept that the applicant's father died in April 2009 as evidenced by the death

¹ Department of Foreign Affairs and Trade (DFAT), "Country Information Report Sri Lanka", 4 November 2019, 20191104135244; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil Separatism", May 2020, 20200527172009; International Truth and Justice Project, "unstopped: 2016/17 Torture in Sri Lanka", July 2017, CISED50AD4849.

certificate provided. I note that the death certificate indicates that the applicant's father was killed during a shell attack. The applicant was asked about this at the SHEV interview and explained that at the time they authorities did not specify the real reason for the death as it would implicate them and that they would generally note in death certificates that people died due to the events during the war. I consider it plausible that after the LTTE's unsuccessful attempts to locate the applicant and his brother, that the LTTE recruited the applicant's father as a labourer and that his father was killed in April 2009, after which the applicant's mother to reside with the applicant's uncle in [City]. I accept that the applicant, after his release from the camp, also resided with his mother and uncle in [City].

15. The applicant claims that in November 2009, he was informed that there were six corpses near a cemetery and that he went there with his uncle to determine if his brother was one of the dead. He was unable to confirm that his brother was amongst the dead as the bodies were disfigured. He claims that he lodged a complaint with the police, but the police did not accept his complaint as it was a matter involving the TID, CID and the military. The applicant then lodged a complaint with the parliamentarian in Mannar who promised that he would let them know of anything that came to light, but no action was taken and the applicant and his family have not heard of his brother's whereabouts to date. I accept the applicant's evidence that despite his endeavours to gain information about his brother, his brother remains missing.
16. It is claimed that in February 2010, the applicant was asked to report to the TID office in [City]. He went in the hope of receiving information about his brother, but when he arrived, he was told that his brother had admitted that he was guilty of LTTE involvement which indicated that the applicant was also involved. The applicant claims that he was blindfolded and taken to an unknown location where he was interrogated about his family members' involvement with the LTTE. Despite the applicant denying any involvement with the LTTE, he claims that he was tortured and severely beaten resulting in scars on his back. He claims that he was detained because he inquired about his brother's whereabouts. The applicant has given very consistent and detailed account of these events, and I accept that he was detained following his attempts to obtain information about his missing brother's circumstances and that he was told that his brother had admitted to having been in the LTTE. He has consistently claimed that he was detained for a period of over a year, during which he suffered sexual and physical mistreatment. His evidence is that he obtained treatment for his injuries while in [Immigration detention] and offered to provide evidence in this regard, but was advised by the delegate that would not be necessary and that there were no concerns regarding his evidence about the mistreatment and torture that he suffered during his detentions in Sri Lanka. The applicant claims that the torture and treatment that he endured was severe leaving his with a desire to commit suicide. Given the applicant's consistent and very detailed evidence, and the country information which reports on sri Lankan authority's mistreatment and torture of Tamils with imputed LTTE links, I accept the applicant's evidence in this regard.
17. The applicant claims that his uncle was approached by the TID and asked if he would pay a bribe in exchange for the applicant's release and that after payment of a bribe, he was released, told not to speak about what occurred during his detention and that he was photographed. I accept that the applicant was released after his uncle paid a bribe to secure his release and that he told his uncle all that he endured and that he feared for his life. In his SHEV statement, the applicant claims that after about 15 days, his uncle arranged for him to leave Sri Lanka for [Country 1] with the assistance of one his friends who was an agent. The agent paid a bribe to obtain a passport and made all the arrangements necessary for the applicant to leave Sri Lanka via Colombo airport. At the SHEV interview, the applicant

explained that he did not apply for a passport in person and that he provided the agent with his passport photos and signature and that the agent organised to obtain his passport. He also stated that at the time LTTE members were departing the country and the agent had assisted many LTTE members to depart the country without detection. The agent was experienced in paying bribes to the authorities at the airport to turn a blind eye to people of interest and allow them to depart. While the applicant was very concerned for his safety and feared detention, he claims that the agent advised him that he had organised everything and that he should not be worried about going the airport.

18. Country information² indicates that former LTTE members departed the country and that some remain active abroad which is of concern to the Sri Lankan authorities. It is also reported that Sri Lanka has a mature people smuggling industry and that document fraud is common in Sri Lanka. People seeking illegal passports include those on the 'stop' and 'watch' lists maintained by the authorities and those wishing to falsify age to obtain employment, or those wishing to return to a country from which they have previously been deported. Given the applicant's experiences with the Sri Lankan authorities during his extended periods of detention involving interrogation and torture, I accept that the applicant was fearful for his life and that he was afraid of being detected and detained in the course of departing the country. Given the circumstances, I consider it plausible that the applicant's uncle engaged an agent, experienced in assisting others who were wanted by the authorities or would have been of interest to the authorities, to arrange for the applicant's passport and departure from Sri Lanka in 2011.
19. The applicant claims that after about a year of residing in [Country 1], in April 2012, he was forced to return to Sri Lanka to take care of his ill mother. As his father was dead and his brother was missing, he was the only one left with the responsibility to care for his mother. In his SHEV statement the applicant indicates that his uncle was struggling with caring for his ill mother and told the applicant that he had to return to care for her. The applicant states that he needed and wanted to return to Sri Lanka and that he had hoped that the situation would be different on his return. At the SHEV interview, the applicant gave a very emotional account of his desire to return to care for his mother and that he, like the rest of the world, read and watched news reports which indicated that the situation was better in Sri Lanka. He made the decision to return to Sri Lanka, even though he feared for his safety given his past interactions with the authorities. I accept that despite his fear of returning to Sri Lanka, the applicant made the decision to return to care for his ill mother.
20. The applicant has claims that on his arrival at the airport, he was approached by the authorities and told that he had been detained in the past and asked how he managed to depart the country. The applicant was detained on arrival for a period of ten days, during which he was interrogated about how he departed the country and under torture was forced to disclose the details of the agent who arranged his departure. He was told that he had departed the country without permission and was released after signing a document in Sinhalese, which he did not understand, and was also told that he had to report to [the] camp. The applicant's evidence does not indicate that during the period that he resided in [Country 1], the authorities made any inquiries about him or his whereabouts. While I have some doubts about the applicant's claim that he was approached at the airport after having been away from the country for a period of a year, during which his evidence does not suggest that the authorities made any inquiries about him, given the applicant's very consistent and detailed evidence in this regard and country information which indicates that the authorities collected and maintained sophisticated intelligence on former LTTE members

² DFAT, "Country Information Report Sri Lanka", 4 November 2019, 20191104135244.

and supporters, which I accept that the applicant was imputed with, I am willing to accept that the applicant was approached, detained and mistreated after his arrival at the airport and was only released after signing a document and told to report to the authorities.

21. The applicant claims that after receiving an official letter from the TID in June 2012, he reported to their office with his uncle. He was asked for his passport and identity documents. When arrived, his documents were burnt, and he was taken to a room accused of having left the country because he was a terrorist and was severely beaten for four hours. After his uncle begged for his release, the applicant was released into his uncle's care, was photographed and made to sign a document in Sinhalese. He was told that he would need to obtain permission to leave the area and that his file would be spread to whichever district he goes. The applicant claims that he went to his village in [Location 1] with his mother by incorrectly telling officers at the checkpoint that he had permission, he became scared and worried about being detected in the area and returned to [City] with his mother after three days. He claims that a few days the TID officers came to his uncle's house and as his uncle was scared that they would harm the applicant, he advised the applicant to hide at the back of the house. The applicant became aware that the authorities were making inquiries about him in the village and feared that they became aware that he left the area without their permission. He claims that while he originally planned to go India, he was too scared to go to Manner and get on a boat. His uncle arranged for a smuggler to take him to [Town] and depart the country for Australia. The applicant has consistently presented his evidence in this regard. While I accept that the applicant was told not to depart the area without obtaining permission, I have some doubts about the applicant's evidence that he managed to go to [Location 1] giving the authorities the wrong information that he had permission to leave his area and that the authorities came looking for him after his return to his uncle's house and were inquiring about him. I consider it more likely that given the applicant's purpose for his return to Sri Lanka to take care of his ill mother and his interactions with the authorities on arrival, that the applicant secured suitable accommodation for his ill mother and then made arrangements to depart the country before encountering further attention at the hands of the authorities. I accept that the applicant departed Sri Lanka illegally by boat to Australia and also consider it plausible that after his illegal departure from the country, the authorities went to his uncle's house inquiring about and may have threatened his uncle, with whom the applicant resided during the few months that he remained in Sri Lanka. At the SHEV interview, the applicant stated that his uncle has now passed away and his mother has been residing in a home. After his uncle's passing and given his mother's illness, he has not been kept informed about the situation in Sri Lanka.
22. As indicated above, overall, I found the applicant's evidence regarding his experiences and encounters with the authorities in Sri Lanka credible. He presented his evidence in a consistent and detailed manner. I accept that he was interrogated and mistreated during the period he was detained with his brother in an army-controlled camp between June 2008 and October 2009. I accept that the applicant and his brother were suspected of having LTTE involvement given their Tamil ethnicity and having resided in an LTTE controlled area. I accept that although the applicant was released in October 2009, his brother was taken for further interrogation and has been missing since. I accept that after the applicant inquired and attempted to locate his brother, the authorities detained him on the basis that his brother had confessed to having been involved with the LTTE which implicated the applicant. I accept that he was detained for a period of over a year, during which his was tortured and sustained injuries for which he received treatment while in [Immigration detention]. I accept that the applicant's uncle arranged for him to depart the country for [Country 1] in the manner that he did due fears for his safety and that he returned to Sri Lanka to care for his mother. I accept that he was detained at the airport and accused of being a terrorist,

mistreated and placed on reporting conditions and told not to leave the area. I accept that after he arranged for his ill mother's care, he departed the country illegally by boat and that after his departure the authorities made inquiries about his whereabouts.

23. Country information³ reports before me generally indicates that the security and situation for Tamils in Sri Lanka has improved since the end of civil war in May 2009 and the applicant's departure from Sri Lanka in 2012. Government initiatives, particularly after 2015, resulted in improving the lives of Tamils in Sri Lanka. Government initiatives have included the lifting of restrictions on travel to the north and east of the country; the freeing of civilian land from military control; the release of some individuals detained under the Prevention of Terrorism Act (PTA) and the government's public commitment to reducing military involvement in civilian activities. Such measures resulted in a decrease in the number of Tamils held in detention, reduced incidents of extrajudicial killing, disappearances, abductions, extortion and kidnapping for ransom. Regarding the LTTE, the reports indicate that, although the LTTE has not held any military or political power since the end of the war in 2009, the Sri Lankan government remains sensitive to the potential re-emergence of the LTTE throughout the country, and as a result surveillance of Tamils in the north and east of the country continues. Those most at risk of detention and mistreatment are those who are, or are perceived to be a threat to the integrity of Sri Lanka as a single state, have a significant role in relation to post-conflict Tamil separatism and those former LTTE members who had leadership roles, or are suspected of having committed terrorist or serious criminal acts during the conflict or have provided weapons or explosives to the LTTE.
24. While, I accept that the security situation for Tamils have improved, I also note DFAT's⁴ observation that surveillance of Tamils in the north, where the applicant is from and where he is very likely to return to, continues. DFAT also reports that while LTTE was comprehensively defeated, Sri Lankan authorities remain sensitive to its potential re-emergence. Sri Lankan authorities collect and maintain sophisticated intelligence on former LTTE members and supporters, including 'stop' and 'watch' electronic databases which remain active. 'Watch' list includes names of those individuals that the Sri Lankan security services consider to be of interest with the report noting that in June 2017, 'watch list' comprised minor offenders and former LTTE cadres. DFAT assesses that those on watch list are likely to be monitored. It also reported that any low-profile former LTTE member, who came to the attention of the authorities, would likely be detained and may be sent to the remaining rehabilitation centre, where LTTE members were detained and rehabilitated after the end of the war in 2009, and that a modest number of former LTTE members continue to be detained and prosecuted within the Sri Lankan criminal justice system. The 2020 US Department of State report⁵ also reports that throughout the country, especially in the north and east, Tamils reported security forces regularly monitor and harass members of their community, especially former or suspected former LTTE members.
25. Regarding detention and torture, it is reported that if a person is detained by the Sri Lankan authorities there remains a real risk of ill-treatment or harm requiring international protection.⁶ Several local and international organisations have alleged torture by the Sri

³ DFAT, "Country Information Report Sri Lanka", 4 November 2019, 20191104135244; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil Separatism (version 6)", May 2020, 20200527172009; United Kingdom Home Office (UK Home Office), "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928.

⁴ DFAT, "Country Information Report Sri Lanka", 4 November 2019, 20191104135244.

⁵ US Department of State, "Country Reports on Human Rights Practices for 2020 - Sri Lanka", 30 March 2021, 20210401122412.

⁶ DFAT, "Country Information Report Sri Lanka", 4 November 2019, 20191104135244; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil Separatism (version 6)", May 2020, 20200527172009.

Lankan military, intelligence and police forces, mostly involving people with imputed links to the LTTE. In the years after the end of the war, it is reported that torture was used during interrogations and arrest regardless of the nature of the suspected offence and that there were 76 alleged cases of torture between 2015 and 2017, involving individuals suspected of LTTE involvement. The most recent DFAT report also indicates that police routinely mistreat suspects during investigations, that treatment amounting to torture is common in prisons and that Tamils continue to report mistreatment and torture by police with Sri Lanka lacking efficient mechanisms to address complaints of torture.

26. The 2019 United Nations Human Rights Report⁷ also reports that there is credible information about cases of unlawful detention, torture and sexual violence by the Sri Lankan security forces in the years between 2016 and 2018, which continue in the northern part of the country. Further it is noted that although the government has condemned any act of torture and indicated that such cases would be investigated, the OHCHR is not aware of any such investigations. The 2021 Freedom House report⁸ also echo the same information that security forces have engaged in forced disappearances and torture, all of which disproportionately affect Tamils.
27. While the reports generally indicate that being of Tamil ethnicity in itself, Tamils who resided in an LTTE-controlled area during the conflict or with past connections with the LTTE does not warrant international protection, the assessment of the level of risk faced by any individual is to be assessed based on that individual's particular profile and circumstances. What distinguishes this applicant from the vast numbers of Tamils who endured severe mistreatment during and in the aftermath of the longstanding civil war in Sri Lanka, is that he had significant and ongoing interactions with the Sri Lankan authorities on the basis of his Tamil ethnicity and imputed membership and association with the LTTE, including his missing brother's involvement with the LTTE. He was subjected to long periods of detention and torture on this basis and the authorities' interest in him continued, even after the end of the civil war and after the applicant's return to Sri Lanka in 2012. He will be returning as a Tamil with a long history of adverse attention with the authorities based on imputation of his and his family's connection/membership with the LTTE, and as someone who departed the country while required not to depart his local area.
28. While I accept that the applicant came to the attention of the authorities after his return from [Country 1] in 2012 and was released after a period of detention, I note that the applicant had departed Sri Lanka legally and returned to Sri Lanka using his own passport and was not the subject of prosecution for illegal departure which would be the case if returned from Australia. DFAT⁹ indicates that entry and exit from Sri Lanka is governed by the Immigrants and Emigrants Act (I&E Act) and that persons departing Sri Lanka in contravention of the I&E Act will be interviewed and prosecuted. In addition while as a Sri Lankan without a passport, like the applicant, can re-enter the country on temporary travel documents, this will result in the applicant being questioned at the airport, have his criminal and background history checked and charged under the I&E Act. Given the applicant's past and extensive interactions with the authorities based on the authorities perception of the applicant's LTTE involvement, I accept that enquiries into his background on return to Sri Lanka, would lead to the authorities discovering his past periods of detention on suspicion of his and his brother's LTTE involvement.

⁷ OHCHR, "Promotion reconciliation, accountability and human rights in Sri Lanka: Report of the Office of the High Commissioner for Human Rights", 27 January 2021, 20210203162131.

⁸ Freedom House, "Freedom in the World 2021 - Sri Lanka", 3 March 2021, 20210304102827.

⁹ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064.

29. I consider this to be the case even in considering the passage of time since he was last detained by the authorities, particularly given his evidence that he was warned against leaving his area without permission. Having regard to the country information reports cited above, I am of the view that while arbitrary detention and use of torture by the Sri Lankan authorities may have decreased, there remains a significant risk of such treatment by the authorities in cases involving Tamils who are detained and those who are or imputed with an LTTE profile, which I consider is the case with this particular applicant. Considering information about detention of Tamils and the use of torture by the authorities, I am satisfied that the applicant would face more than a remote chance of interrogation, detention and mistreatment amounting to torture.
30. Having considered the applicant's background and particular circumstances and the country information, I find that there is a real chance that he would come to the adverse attention of the authorities if returned to Sri Lanka. I am satisfied that once detained, there is a real chance that the applicant would face treatment amounting to serious harm, at the hands of the Sri Lankan authorities, for the essential and significant reasons of his Tamil ethnicity and imputed political opinion. The Sri Lankan authorities maintain effective control of the country, and I do not consider that the applicant would be able to relocate to another area in Sri Lanka where he can access effective state protection. As the Sri Lankan authorities are the agent of harm, and there is no information that the applicant can seek protection from any other non-state agent in Sri Lanka, I am not satisfied that effective protection measures are available to him, and find that he faces a real chance of persecution in all areas of the country.
31. I am satisfied that the applicant faces a real chance of persecution if returned to Sri Lanka.

Refugee: conclusion

32. The applicant meets the requirements of the definition of refugee in s.5H(1).

Decision

The IAA remits the decision for reconsideration with the direction that:

- the referred applicant is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*.

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.