



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA21/09350

Date and time of decision: 15 July 2021 16:02:00
M Oakman, 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 of the Hindu faith from Northern Province, Sri Lanka. He arrived in Australia [in] October 2012 and lodged an application for a Safe Haven Enterprise visa (SHEV) (XE-790) on 10 May 2017. On 11 June 2021 a delegate of the Minister for Immigration (the delegate) refused to grant the visa.

Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
3. According to the review material, on 27 April 2021 the applicant was invited to attend an interview on 17 May 2021 in relation to his SHEV application. The invitation was sent by letter to his residential address in [Suburb], nominated by the applicant in his SHEV application. The delegate sent an email on 13 May 2021 to the applicant on the email address the Department had in its records for the applicant. The email informed the applicant, among other things, that the interview was an important step in the process for his protection visa application and was his opportunity to provide further information about his claims for protection; and attached a copy of the invitation and related documents. There was no response from the applicant to the invitation letter of 27 April 2021 or the email of 13 May 2021. On 17 May 2021 the applicant did not attend the scheduled interview at 11:00am. The delegate made three calls to the applicant's mobile between 11:05am and 11:35am but the number was disconnected. The delegate also tried to contact the applicant on an older phone number, but it was also disconnected. On 11 June 2021 a copy of the delegate's decision was sent by registered post to the applicant's [Suburb] address.
4. On 17 June 2021 the IAA wrote to the applicant to advise that his case had been referred to the IAA. The correspondence was sent to the applicant's [Suburb] address and a courtesy copy sent on the same date to his email address. The applicant contacted the IAA by phone on 24 June 2021 and said he had received the IAA's acknowledgement letter and wanted to know what to do next. The IAA officer explained that the case had been referred to the IAA following the Department's decision; that he should read the letter for a detailed explanation of the IAA's procedures; and that he had 21 days from the date of referral to submit any new information. The applicant said that he did not have any new information to submit. The applicant also confirmed there was no change to his postal or email addresses. He did not agree to the IAA contacting him via email, as he did not own a phone, and was borrowing a friend's, so he could not access his email and did not have a phone number. As at the date of this decision the applicant has not provided any further information to the IAA.
5. The applicant confirmed with the IAA that the contact addresses used by the IAA were correct. Those addresses were the same ones used by the Department to invite the applicant to a SHEV interview. On that basis, I am satisfied that the applicant was properly notified of the opportunity to attend an interview but did not respond to that invitation or attend the scheduled interview. The IAA's correspondence was received by the applicant and, among other things, informed him he had 21 days from the date of the referral to provide new information to the IAA. He was also informed in his phone conversation with an officer of the IAA on 24 June 2021 that he had 21 days from the date of the referral to provide new information to the IAA. He stated in that phone conversation that he did not have any new

information to submit and none has subsequently been provided to the IAA. In the circumstances I have decided to proceed on the information before me without inviting the applicant to provide further information.

Applicant's claims for protection

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

- From about 2003 to 2007 the applicant was involved in several adverse incidents with the EPDP and PLOTE in [Town], Northern Province, during which he suffered beatings, torture and sexual abuse.
- If returned to Sri Lanka he fears he will be subjected to serious harm and he would not be able to protect himself from groups and the authorities who will harm him.
- He fears the EPDP, PLOTE and/or the authorities will come to know he is back, and he will be harmed. He will be considered a threat and targeted because of the violations they have committed against him. As PLOTE have taken his land by force they will also see him as a threat. If forced to return to Sri Lanka, he would seek to reclaim the land and in doing this he would become a target again and be harmed.
- If forced to return to Sri Lanka as a failed asylum seeker, he will be subject to interrogation and harmed by the Sri Lankan authorities as a Tamil and someone previously suspected of being part of the Liberation Tigers of Tamil Eelam (LTTE), previously detained and injured, having scars, and due to being from [Town].

Factual findings

Background

7. The applicant was born in [India], in approximately [Year]. He moved with his maternal grandparents to Sri Lanka in about 1994 or 1995. He lived in various location in [Town], Northern Province, until he left for [Country 1] in about April 2007. The applicant is unmarried and has no children. His grandparents have passed away; he does not know his parents; and he has no siblings. He attended school, initially in India then in Sri Lanka from about 1992 to [year], commencing but not finishing [grade]. He has worked as a self-employed [person] in Sri Lanka (approx. 2000-2007), [in a Work sector] in [Country 1] (2007-2012), and for a short period as [an Occupation] in Australia (during 2012-6). He speaks, reads and writes Tamil and speaks [Country 1 language]. He is Tamil and Hindu (Saiva).

Problems in Sri Lanka

8. In summary the applicant claims in his SHEV application statement that he fears that if forced to return to Sri Lanka, he would be seriously harmed by the EPDP, PLOTE and/or Sri Lankan authorities, who previously threatened him, beat him, tortured him and forced him to transfer land to them. He fears he would be targeted as a Tamil male, who has links to the LTTE.
9. The applicant was born in India and raised by his grandmother. He has never met his parents and his grandmother did not give him much information about them but said that there was a problem due to a caste issue. The name he had as a child was an insulting name and he does not use that name but wants to be known by the name he has given the Department. He returned to Sri Lanka from India with his grandmother in about 1994 or 1995; they lived in

[Town] and moved around a lot due to the war. His grandmother had a Sri Lanka Permanent Pass document which was given to people in [Town]. He was never given any Identity documents as a child.

10. From the age of about 13 he worked casually in [a Workplace] and other places, cleaning and such and doing odd jobs. "Z" was one of his bosses, but he worked for many people casually doing these odd jobs. The LTTE was in his village, "A", at the time and they would sometimes send him to do small jobs as a child. His grandmother was killed in the tsunami in 2004 and she had transferred her properties to him. There were quite a few properties and he started to look after those properties. On several occasions the EPDP officers would take him and others to work for them. He and up to 100-150 other Tamils were made to dig bunkers. When the EPDP and PLOTE were active in his village they would try to use his properties and would threaten him so he would give them the land. In particular, a man called "Y" was an EPDP leader; Y and his men tortured and threatened him.
11. When he was about [age], he was captured and taken to a specified PLOTE camp where there were many Tamil men who were suspected of being part of the LTTE. At the camp the applicant was beaten and sexually tortured to make him transfer the properties he owned to PLOTE. He eventually signed documents which transferred all but two of his properties to them. He was kept at the camp for about one and half months and released, without officially signing out, after he signed the land transfers.
12. On one occasion he was working in a [Workplace] owned by Z and saw a man ride past and shoot two army people. The applicant and others were rounded up and taken by the police. Later that day Z arranged for his release. A day or two later he went to work and saw two bodies covered in a tin sheet outside the [Workplace]. Later that day he and others were taken by the PLOTE and questioned about involvement with the shooting of the two army officers. He was beaten while being interrogated and was held for about 20 days before he was released. He thinks he was released as he was so young.
13. He saved money and bought a [vehicle] which he rented out for a fee. He was in his village of A, but due to the many problems he was too scared to stay at home, and with other young men, he was living in the temple. He and some other boys from the temple were taken away by EPDP and PLOTE people to a camp. He was held for about three and a half months, at different camps, and during his detention he was beaten, tortured and sexually abused. He was interrogated and accused of transporting goods and food to the LTTE. He was also accused of having links to another [vehicle] that had a bomb in it and had been in the [Workplace] where he worked. He was also questioned about his past, his land and the incident with the army officers being shot. He told them the truth and said they should question the driver who rented his vehicle. He knew the driver who rented his [vehicle] used it to transport food. When he was released, they said that he should stay in [Town] and to report to them again if they called him.
14. The applicant was extremely scared and wanted to get identity documents to flee from the danger he was facing. His neighbour, "X", helped him to travel to Colombo and speak for him in Sinhala. He went to an agent who assisted with identity documents in Colombo. For his documents, the agent drew lots for his date of birth; the applicant chose a name based on his nickname at school and the name of X's father; and he chose his parents' names as he didn't know them. The next day they went to the Passport office at a named location in Colombo and he paid 65,000 Rupees for the passport, 5,000 Rupees for the National ID card (NIC) and provided his photo. Later that day he picked up his fake NIC and passport. He fled from Sri Lanka to [Country 1] in about March or April 2007.

15. The Department of Foreign Affairs and Trade (DFAT) notes that a UN report covering the period 2002 to 2011 found frequent occurrences of extrajudicial killings, disappearances and kidnappings, particularly in the north and east. The UN report largely attributed these to government forces, the LTTE and paramilitary groups. Many Tamils, particularly in the north and east, also reported being monitored, harassed, arrested or detained by security forces during the war. The authorities also appropriated large amounts of land in the north and the east during the war.¹
16. In assessing the applicant's evidence I have taken into account the difficulties often faced by applicants for protection, particularly those for whom some period has passed since they departed their country of origin, including factors such as recall problems, misunderstandings in interpreted material, cultural communication issues, or a lack of cohesive narration due to trauma. I have also taken into account the applicant's age when these events occurred.
17. The applicant's claims about being detained by the police and paramilitary groups in round ups on several occasions is consistent with the country information about the harassment and monitoring of Tamils in the north and east during the war. However, I have significant concerns about the credibility of some of the applicant's claims.
18. In particular, he claimed in his SHEV application statement that he only ever had the fake NIC and passport, that he paid an agent to obtain just before he left Sri Lanka for [Country 1] in about April 2007. The NIC that was in his possession when he arrived in Australia, of which there is a copy in the referred material, appears to have been issued in 2005. I do not consider it credible that, if he was obtaining a fake NIC, he would get one issued with an old date. More importantly, given his claimed detention by the authorities and paramilitary groups, I do not consider it plausible that he would have been released from any of those detentions, especially the last one of three and a half months which was the trigger for him to decide to flee Sri Lanka, as a young Tamil male in the Northern Province during the war, if he was without valid identification. I also do not consider it credible that, with the sophisticated data systems and intelligence that the Sri Lankan authorities have used for many years,² that a young Tamil male would be able to depart from the airport on a fake passport. In addition, at his arrival interview the applicant said, and confirmed when the interviewer queried it [at approx. 22:30-23:45 of the recording], that he had returned from [Country 1] to Sri Lanka for a two-week period in 2009. I do not consider it credible that he could return to Sri Lanka and leave again in 2009 if he was travelling on a fake passport.
19. I do not consider it credible that his grandmother would have provided him with so little information about his parents, including not telling him their names. Given the country information about the large scale appropriation of land from Tamils in the north and east during the war, I do not consider it credible that the Sri Lankan government aligned paramilitary groups, such as the EDPD and PLOTE, would need to force him to sign over his land, rather than simply occupy and use the land. I also do not consider it credible that, if true they forced him to sign over land, they would only force him to sign over some and not all of the land.
20. The matters discussed above in relation to his evidence go beyond minor errors and discrepancies that could be attributed to factors such as recall problems, misunderstandings in interpreted material, cultural communication issues, and/or a lack of cohesive narration due to trauma, the passage of time or because of his age at the time. I am not satisfied that the

¹ DFAT, "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244.

² Ibid.

applicant has been completely truthful about his history or the events that occurred in Sri Lanka. In particular, I am not satisfied that the applicant obtained and travelled with a fake NIC and passport, rather than on genuine documents; that he was forced to sign over land to PLOTE or the EPDP; and that he was ever specifically targeted by the authorities or paramilitary groups. Based on the country information about the harassment of Tamils in the north, I am prepared to accept that he was detained in a few round ups by the authorities and paramilitary groups between about 2003 and 2007, that he was questioned, beaten and mistreated, including being subjected to some sexual abuse; and that he was released on each of those occasions. Although I am not satisfied that he has provided correct information about his parents, I am prepared to accept the other address, education, employment and family details he provided in his SHEV application and summarised above in his background details.

Asylum Seeker and return to Sri Lanka

21. The applicant claims to have left Sri Lanka in about April 2007 to travel by air to [Country 1]. I am satisfied he left on a genuine Sri Lankan passport, as discussed above. He subsequently left [Country 1] in 2012 to travel to Australia in a boat organised by a smuggler. I find that, if he were to return to Sri Lanka, he may be considered a failed asylum seeker.

Receiving country

22. The applicant said at his arrival interview that he was a Sri Lankan citizen but described himself as stateless in his SHEV application. As discussed above, I am satisfied that his NIC issued in 2005 in Sri Lanka is genuine and that he travelled on a genuine Sri Lankan passport when he left for [Country 1] in 2007 and returned, briefly, to Sri Lanka in 2009. On that basis, despite his claim of statelessness made in his SHEV application, I am satisfied that he is a Sri Lankan citizen. The applicant is a national of Sri Lanka. I find that the applicant's receiving country is Sri Lanka.

Refugee assessment

23. 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

24. 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.
25. Country information indicates that Tamils maintained they were subject to longstanding, systematic discrimination in university education, government employment, housing, health services, language laws and naturalisation procedures.³ Incidences of extra-judicial killings, disappearances and kidnapping occurred frequently in Sri Lanka during the war, particularly in the north and east, there are credible reports of torture carried out by Sri Lankan security forces both during the war and in its immediate aftermath, and many Tamils, in the north and east in particular, reported being monitored, harassed, arrested or detained by security forces during the war and under the previous Rajapaksa government. However, in 2015 there was a change of government with the election of President Sirisena, and a Sri Lankan government focussed on post-conflict reconciliation, transitional justice, democratic renewal and governance and economic reforms.⁴
26. The UK Home Office (UKHO) indicates that under the Sirisena government there were positive developments including: curtailing of executive power; attempts at the reestablishment of independent commissions, including the Human Rights Commission of Sri Lanka (HRCSL); de-proscription of a number of international diaspora organisations; and review of cases held under the *Prevention of Terrorism Act* (PTA) and release of some detainees. However, progress was slow and little improvement was reported in 2018 and 2019.⁵ The US Department of State's (USDOS) report notes that the HRCSL generally operated independently of, and with a lack of interference from, the Sri Lankan government.⁶ A 2020 UN report also noted that HRCSL continued its proactive and outspoken defence of human rights in an independent and professional manner and commended its timely interventions in the aftermath of the attacks of Easter 2019 as playing an important role in preventing resort to excessive or discriminatory measures; but expressed concern that the inability of the Sri Lankan government to deal comprehensively with impunity and to reform institutions may trigger the recurrence of human rights violations.⁷ Similarly, a 2021 UN report noted that from 2015, Sri Lanka took some important steps in strengthening democratic institutions and opening up democratic space, including for civil society and the media; but indicated significant challenges and negative trends emerged over 2020.⁸
27. DFAT assesses that Tamils face a low risk of official or societal discrimination based on ethnicity or caste, including in relation to access to education, employment, or housing. Some members of the Tamil community report discrimination in employment, particularly in relation to public sector employment. However, DFAT assesses that the limited Tamil appointments are largely the result of disrupted education because of the war and language constraints. DFAT states that Tamils have a substantial level of political influence and increased inclusion in the political dialogue since 2015. DFAT understands that Tamils do not receive unwarranted attention from the authorities because of their political involvement and assesses that there are no barriers to

³ US Department of State (USDOS), "Country Reports on Human Rights Practices for 2020 - Sri Lanka", 29 March 2021, 20210401122412.

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

⁵ UKHO, "Country Policy and Information Note Sri Lanka: Tamil Separatism", May 2020, 20200527172009.

⁶ USDOS, "Country Reports on Human Rights Practices for 2020 - Sri Lanka", 29 March 2021, 20210401122412.

⁷ Office of the United Nations High Commissioner for Human Rights (OHCHR), "Report of the OHCHR on Sri Lanka", 18 February 2020, 20200221140652.

⁸ OHCHR, "Promotion reconciliation, accountability and human rights in Sri Lanka: Report of the OHCHR", 27 January 2021, 20210203162131.

political participation by Tamils. Members of the Tamil community in the north and east continue to claim the authorities monitor public gatherings and protests, practise targeted surveillance and questioning of individuals and groups, and use more subtle monitoring methods than in the past. DFAT assesses that the monitoring of Tamils in day to day life decreased significantly under the Sirisena government, but surveillance of Tamils in the north and east continues, particularly for those associated with politically sensitive issues, and physical violence against those being monitored is not common.⁹

28. The UKHO fact finding visit to Sri Lanka in September and October 2019 indicates that all sources they spoke to had identified an improvement in the general situation since 2015, with people in general feeling no threat from the government or security forces. Several sources noted that whilst the situation improved post-2015, following the October political crisis (where President Sirisena sacked Prime Minister Wickremesinghe, replacing him with the former President Mahinda Rajapaksa) and the Easter 2019 bombings, intimidation and monitoring had increased with some civil society actors experiencing increased monitoring of their activities and multiple visits by the intelligence service or military who collected details on their programmes and funding. After the Easter bombings check points were reinstated, although they had all been removed at the time of the UKHO visit.¹⁰
29. DFAT reports that the security situation in Sri Lanka, particularly in the north and east, has improved significantly since the end of the war in 2009. There was an increase in security activity, including the use of roadblocks, security checkpoints and increased detention powers for the police and military, following the Easter 2019 bombings. However, such checkpoints had since been removed, the emergency regulations that gave increased detention powers have lapsed, and the heightened security posture in the north has subsequently eased.¹¹
30. The country information indicates that although some monitoring still occurs the monitoring and harassment of Tamils has significantly decreased, there have been significant positive developments for Tamils in the country's politics and the situation for Tamils generally has substantially improved in the years since 2015.
31. Several observers have expressed concern about changing conditions in Sri Lanka with Gotabaya Rajapaksa's rise to power, including concerns about the position of journalists, former LTTE members, the space for civil society and those who have been critical of the Rajapaksa family in the past.¹² However, notwithstanding those expressed concerns, it remains speculative to suggest that the current Rajapaksa government has or will lead to a significant change in attitude by the Sri Lanka government towards the Tamil population. Although some actions - rolling back investigations and announcing a withdrawal from a UN resolution in relation to post-war accountability, or no longer singing the national anthem in Tamil at Independence Day celebrations - are disappointing and a departure from the approach of the former government, it is also speculative to suggest those actions or announcements have or

⁹ DFAT, "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244.

¹⁰ UKHO, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928.

¹¹ DFAT, "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244.

¹² Including UKHO, "Country Policy and Information Note Sri Lanka: Tamil Separatism", May 2020, 20200527172009; "Abandoned Promises? Preserving Human Rights and Pursuing Accountability in Gota's Sri Lanka", Sri Lanka Campaign for Peace and Justice, February 2020, 20200330123213; United Nations Human Rights Council, "Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association", 5 May 2020, 20200622112923; "Sri Lanka: Economy, human rights key challenges facing Rajapaksas", Aljazeera, 18 August 2020, 20200819205836; "Rajapaksa Rule", Foreign Policy, 14 August 2020, 20200817165533; "Sri Lanka is becoming a one-family state", The Economist, 15 August 2020, 20200814111514; "Freedom in the World 2021 - Sri Lanka", Freedom House, 3 March 2021, 20210304102827; and OHCHR, "Promotion reconciliation, accountability and human rights in Sri Lanka: Report of the OHCHR", 27 January 2021, 20210203162131.

will result in a deterioration in general conditions in Sri Lanka or, more particularly, that it increases risks in Sri Lanka to those with a profile like the applicant or to Tamils generally. To the extent that there is some suggestion of an increase in monitoring, harassment and intimidation of Tamils since November 2019, country information continues to indicate that Tamils are not specifically targeted based on their ethnicity.¹³ In the circumstances, I am satisfied the DFAT 2019 report and its assessments and observations in relation to improvements in conditions for Tamils and the general country conditions in Sri Lanka, despite it being prepared just before Gotabaya Rajapaksa's election as President, remain generally valid.

32. The applicant is Hindu, but he does not claim that he experienced any discrimination or harm in Sri Lanka, and makes no protection claims, on that account.
33. I am not satisfied that the applicant's fear of harm in Sri Lanka, whether on account of his Tamil ethnicity, because of LTTE links, or for any other reasons, is well-founded. DFAT confirms¹⁴ that the Sri Lankan authorities remain sensitive to the potential re-emergence of the LTTE and collect and maintain sophisticated intelligence, including electronic stop and watch databases, on former members and supporters of the LTTE. While the UKHO also notes that persons with an actual or perceived significant involvement with the LTTE or in post-conflict Tamil separatism may be at risk, in its view simply being a Tamil does not give rise to protection claims nor, in general, does a person's past membership or connection to the LTTE.¹⁵ DFAT also considers Tamils have a substantial level of political influence; increased inclusion in the political dialogue; do not receive unwarranted attention from the authorities because of their political involvement; and have no barriers to political participation.¹⁶
34. There are still reports of torture occurring in Sri Lanka since the end of the previous Rajapaksa government in 2015, including from UN Special Rapporteurs, the HRCSL, and other sources,¹⁷ although DFAT is unable to verify allegations of torture in Sri Lanka since 2016 and the UKHO expresses a similar view to DFAT.¹⁸ There have been a few unverified torture complaints since 2016, white van abductions are no longer common, although the police continue to resort to excessive force particularly to extract confessions, and the civilian authorities generally maintain control over the security forces.¹⁹ DFAT assesses that Sri Lankans face a low risk of mistreatment that can amount to torture overall. The operation of the PTA was also suspended a few years ago for a couple of years, however, in that time it was still used in response to isolated incidents. The PTA was reinstated following the Easter 2019 bombings in Sri Lanka and action to repeal and replace the PTA has stalled, following the events of Easter 2019.²⁰

¹³ "Repression of Dissent in Sri Lanka: 1st - 31st May 2020", INFORM Human Rights Documentation Centre, 29 June 2020, 20200702160949; UKHO, "Country Policy and Information Note Sri Lanka: Tamil Separatism", May 2020, 20200527172009; and UKHO, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928.

¹⁴ DFAT, "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244.

¹⁵ UKHO, "Country Policy and Information Note Sri Lanka: Tamil separatism Version 5.0", 15 June 2017, OG6E7028826.

¹⁶ DFAT, "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244.

¹⁷ Including DFAT, "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244; UKHO, "Country Policy and Information Note Sri Lanka: Tamil Separatism", May 2020, 20200527172009; and USDOS, "Country Reports on Human Rights Practices for 2020 - Sri Lanka", 29 March 2021, 20210401122412.

¹⁸ DFAT, "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244; UKHO, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928; and UKHO, "Country Policy and Information Note Sri Lanka: Tamil Separatism", May 2020, 20200527172009.

¹⁹ UKHO, "Country Policy and Information Note Sri Lanka: Tamil Separatism", May 2020, 20200527172009; UKHO, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928; and USDOS, "Country Reports on Human Rights Practices for 2020 - Sri Lanka", 29 March 2021, 20210401122412.

²⁰ DFAT, "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244.

35. I accept that the applicant is Tamil, he was living in [Town] during the war, it was an area controlled at times by the LTTE, and that he did some odd jobs for the LTTE on occasion. I also accept that the applicant was detained in a few round ups between about 2003 and 2007, by the Sri Lankan authorities and paramilitary groups, and that while detained he was questioned and mistreated, including some sexual abuse, before he was released.
36. However, having regard to the information before me, I am not satisfied the applicant faces a real chance of harm in relation to those matters now or in the reasonably foreseeable future. First, as the UKHO report notes, residence in former LTTE controlled areas or being Tamil does not give rise to a need for protection. All those who lived in LTTE controlled areas had to interact with the LTTE on a daily basis, and the Sri Lankan authorities would be well aware that was the case. Secondly, although the applicant was detained in a few round ups between 2003 and 2007, he was always released afterwards. The applicant was never arrested, charged, taken to court, imprisoned, subject to any formal detention under the PTA or sent to rehabilitation, at any time by the authorities. Although he was mistreated while detained, including some sexual abuse, the country information indicates that such incidents were, unfortunately, not uncommon at that time as part of the widespread monitoring and harassment of Tamils. His experiences at the time were similar to those experienced by many other Tamils in the north and east, and I am not satisfied that they indicate the authorities held any interest in the applicant beyond the general harassment and monitoring of Tamils that was occurring during the war. In relation to the applicant's concerns about scars, DFAT indicates that there are reports that suggest some unidentified people were detained by the Sri Lankan authorities because their scarring was deemed evidence of LTTE membership, it was at the immediate end of the war and DFAT is unaware of more recent evidence of individuals being detained because of scarring.²¹
37. It is now over 14 years since the applicant was in Sri Lanka and during that time the general situation and country conditions for Tamils in Sri Lanka have improved substantially. Further, as the UKHO report notes, a person's past LTTE connections are not generally seen by the Sri Lankan authorities as posing a risk. The Sri Lankan authorities do remain sensitive to the potential re-emergence of the LTTE.²² Nevertheless, although the Sri Lankan authorities may monitor overseas activities, they are only interested in significant involvement in pro-Tamil separatist diaspora activities and activity such as attending demonstrations overseas is unlikely to attract adverse interest from the Sri Lankan authorities.²³ High profile leaders of pro-LTTE diaspora groups may come to the attention of the Sri Lankan authorities for taking part in demonstrations and the authorities may monitor members of the Tamil diaspora returning to Sri Lanka depending on their risk profile. DFAT understands some returnees have been subject to monitoring, including those with suspected LTTE links, but also states that Tamils who had failed to secure asylum in Australia and since returned to the Northern Province told DFAT that they had no protection concerns, had not experienced harassment by the authorities nor received monitoring visits.²⁴
38. The applicant was not of any adverse interest to the Sri Lankan authorities and paramilitary groups at the time of his departure from Sri Lanka in about April 2007, other than as part of the general monitoring and harassment of Tamils in the north that was occurring at the time. The applicant returned to Sri Lanka for two weeks in 2009 without any issues. The applicant has not been involved in any pro-Tamil separatist or pro-LTTE diaspora activities outside of Sri Lanka. I am not satisfied that the applicant's profile, is one that places him at a real chance of harm.

²¹ Ibid.

²² Ibid.

²³ UKHO, "Country Policy and Information Note Sri Lanka: Tamil Separatism", May 2020, 20200527172009.

²⁴ DFAT, "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244.

Nor am I satisfied that it will be increased by the fact that the applicant has spent more than 14 years outside of Sri Lanka, including over eight years in Australia. Nor am I satisfied, given his profile, there is a real chance that he will be monitored because of his time living outside Sri Lanka and/or as a Tamil asylum seeker, if returned.

39. The applicant does not have a profile that country information suggests would lead to a real chance of harm, now or in the reasonably foreseeable future, for his LTTE links, because of his Tamil ethnicity and/or his background. I do not consider that at the time of his departure the Sri Lankan authorities or paramilitary groups had any individual, specific adverse interest in the applicant nor that he would be of any adverse interest to the Sri Lankan authorities, or anyone else, or that he faces a real chance of suffering harm for that reason, if he returned to Sri Lanka. I am not satisfied he faces a real chance of harm for reason of his ethnicity, background, and for any real or imputed links to the LTTE.
40. I accept that, on his return to Sri Lanka, the applicant may be considered by the authorities to be a failed asylum seeker.
41. Entry and exit from Sri Lanka is governed by the *Immigrants and Emigrants Act 1949* (Sri Lanka) (IE Act). Under the IE Act it is an offence to depart other than from an approved port of departure. Given the applicant departed by air from Sri Lanka to [Country 1] in 2007 and returned and departed again in 2009, using a genuine passport, I am not satisfied that he is at risk of prosecution under the IE Act.
42. Advice from DFAT is that upon arrival in Sri Lanka, involuntary returnees are processed by agencies including the Department of Immigration and Emigration, the State Intelligence Service, the CID and, at times the Terrorist Investigation Department, who check returnees' travel documents and identity information against immigration databases, intelligence databases and the records of outstanding criminal matters. Processing can take several hours, returnees are processed as a group, and individuals need to remain until all returnees are processed.²⁵
43. For returnees travelling on temporary travel documents, police undertake an investigation to confirm the person's identity, to see whether someone was trying to conceal their identity due to a criminal or terrorist background or trying to avoid court orders or arrest warrants. This often involves interviewing the returning passenger and contacting their claimed home suburb or town.²⁶
44. DFAT states that all returnees are treated according to the standard procedures, regardless of their ethnicity and religion, and is not aware of mistreatment of returnees during processing at the airport.²⁷ The UKHO identifies a similar process for returnees at the airport, notes the various facilities available, including that medical facilities are available at the airport if required, and also makes no mention of mistreatment allegations.²⁸
45. Taking into account my findings about his profile, and the country information, I am not satisfied that the applicant will be at risk of adverse attention or that he faces a real chance of harm from the Sri Lankan authorities when scrutinised on his return to Sri Lanka, whether when processed at the airport or on his return home.

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid.

²⁸ UKHO, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928.

46. The Sri Lankan authorities may monitor members of the Tamil diaspora returning to Sri Lanka depending on their risk profile. I have found that the applicant's profile is not one that places him at a real chance of suffering harm. As discussed above, I am not satisfied that with his profile there is a real chance that the applicant will be monitored because of his background, 14-year absence from Sri Lanka, or as failed Tamil asylum seeker, if returned.
47. DFAT assesses that refugees and returnees may face re-integration issues in relation to employment and accommodation. DFAT states some refugees and failed asylum seekers have reported social stigma from their communities on return. DFAT assesses that returnees face a low risk of societal discrimination upon return to their communities, and that continued surveillance of returnees can contribute to a sense of mistrust.²⁹
48. While he was in Sri Lanka, he lived in various locations in [Town] and I am satisfied [Town] is the area to which he will return. The applicant is in [age range], he is not uneducated, and has shown himself to be resourceful and resilient by adapting to life outside of Sri Lanka in [Country 1] and in Australia. He has worked in [a certain role] and [Work sector] jobs in Sri Lanka and [Country 1]. He reads, writes and speaks Tamil, and the north is a Tamil majority area. Given those factors, I am not satisfied that the applicant will be unable to re-establish himself in [Town]. I accept that he may face some social stigma on his return as a returned/failed asylum seeker who has been away from Sri Lanka for more than 14 years. However, although social stigma, whether in the form of negative attitudes, a level of social isolation or otherwise, may be hurtful and/or upsetting, I am not satisfied, it amounts to significant ill treatment or any other type of harm that may be regarded as serious harm.
49. Having considered the applicant's circumstances and profile as a whole, in the context of the country conditions in Sri Lanka I am not satisfied that the applicant faces a real chance of persecution now or in the reasonably foreseeable future. The applicant does not have a well-founded fear of persecution within the meaning of s.5J.

Refugee: conclusion

50. 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

51. A criterion for a protection visa is that the applicant is a non-citizen in Australia (other than a person who is a refugee) in respect of whom the Minister (or Reviewer) is satisfied Australia has protection obligations because there are substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm.

Real risk of significant harm

52. 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

²⁹ DFAT, "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244.

- 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.
53. 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.
54. I accept that, if he returns to Sri Lanka, while re-integrating the applicant may face some level of societal discrimination as a returned asylum seeker, in the form of social stigma. As acknowledged above social stigma may at times be hurtful and/or upsetting, however, I am not satisfied on the evidence that any hurt and upset he may suffer from social stigma will amount to severe pain or suffering, or pain and suffering that could reasonably be considered as cruel or inhuman in nature. Similarly, social stigma may be hurtful and upsetting but it does not amount to extreme humiliation. I am not satisfied that it amounts to the death penalty, arbitrary deprivation of life or torture. I am not satisfied that any social stigma suffered by the applicant as a returned asylum seeker from Australia amounts to significant harm as defined in ss.36(2A) and 5 of the Act.
55. Otherwise I have found that there is not a real chance of harm to the applicant, now or in the reasonably foreseeable future, based on his profile and history, if he is returned to Sri Lanka. As ‘real chance’ and ‘real risk’ involve the same standard,³⁰ it follows that I am also satisfied that there is no real risk of significant harm if he is returned to Sri Lanka.
56. Having considered the applicant’s circumstances individually and cumulatively, I am not satisfied that he faces a real risk of significant harm.

Complementary protection: conclusion

57. 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).

Identity documents – request from Minister

58. Section 91W of the Act prevents the grant of a protection visa to an applicant who, without a reasonable explanation, refuses or fails to comply with a request to produce documentary evidence of their identity, nationality or citizenship, or produces a ‘bogus document’ (defined in s.5(1)) in response to the request. However, that requirement will not apply if the Minister is satisfied that the applicant has a reasonable explanation for the failure or refusal, and either provides the relevant documentary evidence or has taken reasonable steps to provide such evidence.

Application of s.91W to this case

59. In his decision record, the delegate indicated the applicant had not responded to a request under s.91W(1) to produce documentary evidence about his identity and considered s.91W(2) to apply.

³⁰ *MIAC v SZQRB* (2013) 210 FCR 505.

60. Given my conclusions that the applicant does not meet the requirements of the definition of refugee in s.5H(1) and that he does not meet s.36(2)(aa), it is not necessary for me to determine this issue.

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.