



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA21/09607

Date and time of decision: 15 September 2021 16:41:00
K Allen, 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 from the Northern Province of Sri Lanka. He arrived in Australia as a child with his mother, father and [sibling].
2. On 20 September 2017 the applicant lodged an application for a Safe Haven Enterprise Visa (SHEV). His other family members lodged a separate application which he could not be part of as he is now an adult, although their claims do appear to be interrelated.
3. On 30 July 2021 a delegate of the Minister for Immigration (the delegate) made the decision to refuse the grant of the applicant's visa on the basis that he is not owed protection.

Information before the IAA

4. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
5. On 24 August 2021 the applicant's representative provided the IAA with submissions on the delegate's decision. I am satisfied that the submissions amount to argument in relation to the delegate's decision rather than new information, and I have had regard to those submissions in making this decision.

Applicant's claims for protection

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

SHEV application

- He is Tamil and was born in [Town 1] in the Northern Province of Sri Lanka in [year]. He completed [grade] at school in Sri Lanka before he departed the country.
- His father and [uncle] were members of the Liberation Tigers of Tamil Eelam (LTTE). His father was mainly involved with [ancillary tasks]. His uncle was a [Rank 1] and a high profile LTTE member. His uncle was killed in the war in 1997.
- In about 2005, he believes the Criminal Investigation Department of the Sri Lankan Police (CID) attempted to kidnap him while he was playing at home near the roadside. A group of men came up to him, attempted to grab him and take him into their van but he screamed and his mother came running out so they let him go.
- In 2009, after the war, his family was displaced to [IDP Camp 1] for about eight or nine months. During this time, his father was often detained for several days, tortured and questioned about his involvement with the LTTE and about who else was involved in the LTTE. He was threatened that if he did not answer truthfully they would detain and torture the applicant. He and his father were not in a good mental or physical state.
- When he and his family left the camp, they moved to his [Relative A's] house. The army would monitor and harass his father and would regularly come to their house looking for his father. They would detain him for several days and torture him about his involvement with the LTTE. They often made threats against his family if he did not answer their questions.

- Once, in about 2010 when the army came to their house looking for his father in about 2010 they beat him up in front of the applicant, his mother and his [sibling].
- He and his family fled Sri Lanka in 2012 because of fear of being detained or harmed by the Sri Lankan Government.
- If he is forced to return, he will be detained and tortured by the Sri Lankan authorities because his father was a LTTE member and his uncle was a high profile LTTE member and they will think that he is also involved with or a supporter of the LTTE.
- If he is forced to return, he will be detained and questioned because he is a failed asylum seeker and because he has been outside of Sri Lanka for a long time, the authorities will think that he is involved with or a supporter of the LTTE.
- If his parents' application is successful and his is not this will place him in greater danger with the authorities and he will be questioned about where his father is and his involvement with the LTTE. The authorities will know that that his father was granted asylum due to his LTTE membership and he will be seen as an LTTE sympathizer and possible threat.
- The authorities or anyone else in Sri Lanka cannot protect him.
- He will not be able to live free from harm or danger if he moves to another part of the country because the army will be able to find him anywhere he goes. There is a requirement for Tamils to be registered wherever they live.

SHEV interview

- He is involved with [Community Organisation 1] in [Australia]. He has worked for them as a photographer and helped them make and put up banners.
- He participated in the (Great) Heroes' Day or the Mullivaikkal Remembrance Day celebrations and protests. He fears harm from the Sri Lankan authorities because of these activities.

Factual findings

Identity

7. The applicant claims to be a Sri Lankan national who was born in [Town 1] in [year] and educated in Sri Lanka up until [grade] before he left the country with his family when he was about [age] years of age. In support of his claimed identity he provided a copy of his birth certificate as well as identity documents for his family members and educational documents attesting to his schooling. The applicant claims that he and his family departed Sri Lanka using their own Sri Lankan passports but that these were taken by a people smuggler in Indonesia on their journey to Australia. I am satisfied that the applicant is a national of Sri Lanka and that Sri Lanka is the receiving country for the purpose of his visa application.

Tamil from the Northern Province

8. The applicant claims to be a Tamil from the Northern Province of Sri Lanka. He speaks Tamil and I am satisfied that he is from [Town 1]. According to the most recent national census, held in 2012, Tamils constitute the largest ethnic minority in Sri Lanka, at 15.3 per cent of the

population and Tamils comprise most of the population in the Northern Province¹. Given the applicant's account of his life and his supporting documentation, I accept that he is a Tamil from the Northern Province and that he lived there with his family during the war.

Family links to the LTTE

9. The applicant claims that his father and [uncle] were members of the LTTE. In his SHEV application he stated that his father was mainly involved with [ancillary tasks]. His stated that his uncle was a [Rank 1] and a high profile LTTE member and his uncle was killed in the war in 1997.
10. The delegate asked the applicant about the LTTE links of his family members in his SHEV interview. When asked about his father he stated that his father was an LTTE combatant in the 'land base' from 1986 to 1996. When asked what his involvement during that time was, he said that his father was involved in fighting and they used to assign him various fights. The delegate asked the applicant how he would know about these events when they happened before he was born and he said that his father told him. He then explained that his father was in the movement until he got married and after that he was helping the movement by digging bunkers or [specified roles].
11. The applicant's account of his father's role at his SHEV interview was quite different to the claims made in his SHEV application. In his SHEV application he did not claim that his father was involved in combat. When asked about this at the SHEV interview I consider that the applicant was quite vague which was understandable given he had no firsthand knowledge of what his father did prior to his birth. I have had regard to the fact that the applicant's own evidence is that his father, along with the rest of the family, were released from the IDP camp after the war and allowed to settle back into their family home in [Town 1]. He did not claim that his father was ever sent for rehabilitation or that his father was ever arrested on the basis of suspicion of or actual involvement with the LTTE. I also note that not long after they returned to [Town 1] the family, including the applicant's father, were able to apply for and obtain passports in their own names which they used to depart the country. Given the lack of evidence before me about the applicant's father's claimed LTTE involvement, the applicant's inconsistent evidence, and the applicant's account of the treatment of his father at the end of the war, including his ability to travel, I do not accept that the applicant's father was an LTTE cadre or that he was suspected of being an LTTE member or cadre when the family departed Sri Lanka. Country information² is that the majority-Tamil civilian populations of the areas controlled by the LTTE were required to interact with the LTTE as a matter of course and the LTTE engaged in both voluntary and forced recruitment of Tamils. I accept that as the applicant's family lived in LTTE controlled areas during the conflict. I accept that his father may have undertaken some work for the LTTE as expected of Tamils living in LTTE controlled areas during the conflict, including [a specified role] or digging bunkers.
12. In his SHEV application the applicant stated that his uncle was a [Rank 1] and a high profile LTTE member. His uncle was killed in the war in 1997. At interview he did not appear to know much about his uncle, merely stating that he was also in the movement. I have had regard to an article provided by the applicant said to be about his uncle. The document contains a photograph of a man in Tigers uniform and it says that the man pictured was a [lower rank than Rank 1] and killed in an air attack by the Sri Lankan forces in [a named] area [in] May

¹ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

² Ibid.

1998. I accept that the applicant's uncle was a member of the LTTE and, based on the documentary evidence, I accept that he was killed by bombing [in] May 1998 and is regarded to have been martyred.

Attempted abduction

13. In his SHEV application, the applicant made the claim that in about 2005, he believes the CID attempted to kidnap him while he was playing at home near the roadside. A group of men came up to him, attempted to grab him and take him into their van but he screamed and his mother came running out so they let him go.
14. The applicant was asked about this claim in his SHEV interview. He told the delegate that he was about [age] years old and that he was playing by the roadside. When his mother came and 'they' just run away. The delegate asked the applicant how he knew this information, he said that when he grew up, his mother told him they had attempted to kidnap him.
15. The applicant does not appear to have any firsthand knowledge of such an event occurring. He has not explained why he might fear harm now on the basis of such an event. Further, the applicant appears to have recounted what his mother told him. He provided no explanation as to why the CID would attempt to kidnap a young child. He did not explain why, if they did want to kidnap him, they would have simply run away when he screamed and his mother came to out of the house. Given the applicant does not know that this occurred and he is recounting merely what has been told to him, with no corroborating evidence or logical explanation, I do not accept that the CID attempted to kidnap him as claimed. Even if I am wrong and such an event did occur, the applicant has not indicated that there was any threat to him after the claimed abduction attempt in the following years. Given these factors and that the applicant is now an adult, it is not clear to me how such a claim is relevant to his claim for protection some twenty years later.

Treatment at the end of the war

16. The applicant claims that in 2009, after the war, his family was displaced to [IDP Camp 1] for about eight or nine months. During this time, his father was often detained for several days, tortured and questioned about his involvement with the LTTE and about who else was involved in the LTTE. He was threatened that if he did not answer truthfully they would detain and torture the applicant. He and his father were not in a good mental or physical state. He also claims that when he and his family left the camp, they moved to his [Relative A's] house. The army would monitor and harass his father and would regularly come to their house looking for his father. They would detain him for several days and torture him about his involvement with the LTTE. They often made threats against his family if he did not answer their questions. He and his family fled Sri Lanka in 2012 because of fear of being detained or harmed by the Sri Lankan Government.
17. At his SHEV interview, the applicant was unable to provide any further information about his claims regarding their treatment at the IDP camp on the basis that he could not remember that time because he was a 'kid'. In terms of events after they returned home from the IDP camp, the applicant stated that he recalled seeing his father being taken away but that he could not remember the exact time or year or 'anything like that'. He said he recalled it happening two or three times.

18. DFAT reports³ that at the end of the war, security forces questioned or monitored many Tamil civilians for possible LTTE activity, and for civil resistance or anti-government sentiment. In that context I accept as plausible that the applicant's father (and most Tamil males in the IDP camp) would have been investigated in the camp for possible involvement with the LTTE to determine whether they should be released, arrested or sent for rehabilitation. I find it plausible that the applicant's father may have faced mistreatment during this process. I have had regard to the fact that subsequent to questioning, the applicant's father and his family were released from the IDP camp and resettled. I do not accept that they were of continuing interest to the authorities once this occurred. Country information does state Tamil civilians were subject to ongoing monitoring by the CID and SLA in the Northern Province. In that context I accept that the Sri Lankan authorities monitored and questioned the applicant's father once he returned home as part of their routine monitoring of Tamils in the Northern Province at the conclusion of the war. The evidence before me does not corroborate the claim that the applicant's father was detained for several days and tortured and I do not accept that this occurred.

Failed asylum seeker

19. The applicant claims that if he is forced to return, he will be detained and questioned because he is a failed asylum seeker and because he has been outside of Sri Lanka for a long time, the authorities will think that he is involved with or a supporter of the LTTE.
20. The applicant also provided evidence that he was notified that some of his personal information was inadvertently released by the Australian government in 2014. The applicant has not provided any evidence to suggest that this information has been accessed by the Sri Lankan authorities.
21. I note that the applicant and his family have advised that they departed Sri Lanka legally by air on their own passports. They have advised that the people smugglers took their passports en route to Australia. I accept that the applicant may be returning to Sri Lanka on a temporary travel document if he does not replace his passport prior to his return. I consider that his return as a failed asylum seeker and time spent in Australia would be evident due to the circumstances of his return and separate to any data breach.

Tamil activity in Australia

22. The applicant claims he is involved with [Community Organisation 1] in [Australia]. He has worked for them as a photographer and helped them make and put up banners. He claims he also participated in the (Great) Heroes' Day or the Mullivaikkal Remembrance Day celebrations and protests and he fears harm from the Sri Lankan authorities because of these activities. In support of his claim, the applicant provided a letter from [Community Organisation 1] stating that he was involved in [their] activities.
23. At his SHEV interview, the applicant was asked about his involvement with [Community Organisation 1]. He stated that he did work for them as a photographer and that he helped them to create 'these banners and other things'. He stated that he took part in protests. He indicated that he had been involved since he was [age] years old when they were celebrating 'in May and the Heroes' Day or Mullivaikkal Remembrance Day he used to go'. He explained that these events were held in the [local venue] with 20-30 people. He took photographs for the Heroes' Day celebration on either 27 December or November. The delegate asked the

³ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

applicant how the Sri Lankan authorities would know he was participating in these events, he said that there were a lot of people who do on them and that they are other people from Sri Lanka, the Sinhalese people. He did not provide any specific information about this, nor did he indicate that the attendees were unknown to him or that they were particularly suspect. He did not indicate that the Sri Lankan authorities were aware of his involvement with [Community Organisation 1].

24. Based on his account and the letter of support, I accept the applicant has been involved with [Community Organisation 1] as a volunteer by taking photos for [them] and making banners. I accept that he has participated in pro-Tamil celebrations and protests organised by [Community Organisation 1] in Australia. Based on his own testimony, I do not consider that the applicant was an organiser of any of these events or that he has a high profile role with [Community Organisation 1], rather his role has been in volunteering at a low level to support events and attending events. The evidence before me does not indicate that the Sri Lankan authorities are aware of or have taken any interest in the applicant's involvement in Tamil activities.

Refugee assessment

25. 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

26. 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.
27. The applicant claims to fear harm on his return to Sri Lanka on the basis of his ethnicity as a Tamil from the Northern Province of Sri Lanka, his actual or imputed political opinion as a result of his and his family's association with the LTTE, his political activity in Australia and as a failed asylum seeker who has spent time in Australia. I accept that the applicant has a subjective fear of returning to Sri Lanka given the experiences of Tamils during the war and in the immediate post-war period. However, over 12 years have passed since the cessation of

the conflict and country information indicates that conditions have significantly improved for Tamils including those with the applicant's profile.

28. DFAT reports⁴ that LTTE members and supporters were almost all Tamils and during the war and in the immediate post war period, security forces imputed LTTE support based on ethnicity. As a result, towards the end of the war, government security forces arrested and detained a large number of Tamils that they suspected of being LTTE members, most of whom were sent to government-run rehabilitation centres. In the immediate post-war period Sri Lankan government forces continued to detain those with links to the LTTE, imputed or otherwise, and use of torture was particularly brutal. The 2015 OISL report found that 'victims of war-related torture perpetrated by Government forces...were generally Tamil, often arrested and detained in Government controlled areas...under the PTA (Prevention of Terrorism Act) and the Emergency Regulations'. The OISL documented 'particularly brutal use of torture by the Sri Lankan security forces' in the immediate post-war period, following the LTTE's surrender. I note that in spite of these reports, the applicant does not claim that he (or any other members of his immediate family) were ever arrested or sent to a government run rehabilitation centre. Rather it would appear that his father faced interrogation and beatings in the IDP camp, designed to determine whether he was with the LTTE, he was then released and allowed to return to his home with the applicant and the other family members. Further to that, not long after he and his family were issued with passports which they were able to use to depart the country, indicating that they were of no ongoing interest to the Sri Lankan authorities.
29. DFAT reports that there have been significant improvements in the security situation for all Sri Lankans since the applicant departed Sri Lanka⁵. The number of incidents of extrajudicial killings, disappearances and abductions for ransom, including incidents of violence involving former LTTE members, has significantly reduced and DFAT understands that white van abductions and disappearances are no longer common. DFAT assesses that Sri Lankans face a low risk of mistreatment on a day-to-day basis. However, local sources told DFAT that the police routinely mistreat suspects during criminal investigations, including as a way of extracting confessions. Sources also told DFAT that mistreatment was common in prisons. Mistreatment could range from a slap to the face to severe beatings, and, in some cases, may amount to torture. According to sources, mistreatment in prison, where it occurs, does not discriminate on ethnicity. While there are some reports of mistreatment of people in detention in certain circumstances, DFAT assesses that Sri Lankans face a low risk of torture overall. I am satisfied that the applicant and his family were not of any interest to the authorities when they departed Sri Lanka and they are not wanted for any outstanding criminal activity or for working with the LTTE which would bring them to the attention of police on their return.
30. In 2015 there was a change of government with the election of President Maithripala Sirisena, and a Sri Lankan government focussed on post-conflict reconciliation, transitional justice, democratic renewal and governance and economic reforms. The UK Home Office (UKHO)⁶ found 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; de-proscription of a number of international diaspora organisations; and review of cases held under PTA and release of some detainees. However, progress was slow and little improvement was reported

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

⁵ Ibid.

⁶ UK Home Office, 'Country Policy and Information Note Sri Lanka: Tamil separatism', May 2020, 20200527172009

in 2018 and 2019. There were still reports of some ongoing monitoring and surveillance of the Tamil community, however, security measures such as military checkpoints and restrictions on travel to the north and east were lifted and monitoring in day to day life has decreased.

31. I note that Tamils had been disproportionately detained under the PTA prior to the election of Sirisena. This legislation was suspended between 2016 and April 2019, but it remains legally in force and was used, alongside the Emergency Regulations to detain persons allegedly involved in the 2019 Easter Sunday terrorist attacks⁷. The Emergency Regulations have since lapsed and most Tamils detained under the PTA have been released⁸.
32. The country information before me indicates that Tamil ethnicity no longer forms a basis for imputing LTTE involvement of itself, nor does originating from an area previously under LTTE control. The UKHO and DFAT assess that simply being of Tamil ethnicity, or a Tamil from an area formerly under LTTE control, no longer gives rise to a need for international protection, the rationale being that almost every Tamil who resided in those areas during the conflict had some sort of connection with the LTTE. The UKHO reported in January 2020 that now just having supported the LTTE is not enough to be arrested. Over 12,000 ex-LTTE members have undergone rehabilitation since 2009, the last individual was reportedly released in late 2019 and the program has ended. The Attorney General's Department and CID told the UKHO that former LTTE cadres would only be of interest if there was a pending criminal case against them and that mere membership of the LTTE would not make someone of interest. DFAT advises that former LTTE leadership and those who held senior positions in the LTTE military wing and civilian administration are at the highest risk of monitoring, arrest, detention or prosecution on return to Sri Lanka. I am satisfied that the applicant holds no such profile. In 2019, Tamils who had failed to secure asylum in Australia and since returned to the Northern Province, from where the applicant originates, reported to DFAT they had no protection concerns and had not experienced harassment by the authorities, nor received monitoring visits.
33. Former Defence Secretary Gotabaya Rajapaksa, the candidate of the Sri Lanka Podujana Peramuna (SLPP) party, was sworn in as Sri Lanka's new President after winning the elections held on 16 November 2019. On 5 August 2020, the SLPP party and his brother and Prime Minister, Mahinda, decisively won the Sri Lankan parliamentary elections, securing 145 of 225 seats in Sri Lanka's parliament. Tamils overwhelmingly voted against the ruling SLPP party in the 2019 presidential and 2020 parliamentary elections because of concerns about its treatment of minority groups. Relevantly, DFAT states that the inclusion of Tamils in political dialogue has increased since 2015 with numerous Tamil political parties. Tamils were not generally prevented from participating in the most recent elections and there are no barriers to Tamil political participation.
34. The country information before me about the Rajapaksa government indicates that the return to power of the Rajapaksa brothers has created concern amongst the Tamil community, as Gotabaya Rajapaksa was Defence Secretary, and Mahinda Rajapaksa was President during the final stages of the civil war with the LTTE, during which many thousands of Tamils were killed⁹. Since coming to power, Gotabaya and his brother, Mahinda Rajapaksa,

⁷ UK Home Office, 'Country Policy and Information Note Sri Lanka: Tamil separatism', May 2020, 20200527172009; DFAT, 'Country Information Report Sri Lanka', 3 November 2019, 20191104135244

⁸ Ibid.

⁹ International Crisis Group, "Sri Lanka's Presidential Election Brings Back a Polarising Wartime Figure", 18 November 2019, 20191119144914; Economist, The, "Sri Lanka's new president has a worrying past", 23 November 2019, 20191122115223; Foreign Policy, "Rajapaksa Rule", 14 August 2020, 20200817165533; Economist, The, "Sri Lanka is becoming a one-family

have withdrawn from undertakings made by Sri Lanka's previous government to promote reconciliation and accountability following the end of the civil war in 2009, and have appointed to senior government positions military figures alleged to have been involved in atrocities committed during the conflict. The government has also instituted new regulations that – among other things – ban hundreds of Muslim and Tamil organisations and individuals, and allow for the forced 'de-radicalisation' of individuals accused of promoting extremist ideologies. The Rajapaksas have been in power now for almost two years and the applicant has not indicated that there has been a material shift for his Tamil family in Sri Lanka since their election. Additionally the reporting before me, while it contains speculation, does not suggest that Tamils are specifically targeted by state actors or other parties solely on account of their ethnicity even following these political developments. I am not satisfied that the Rajapaksa brothers' return to power creates any particular risk to the applicant such that he may face a real chance of harm for that reason.

35. In 2021 the United States Department of State¹⁰ noted that Tamils reported suffering systematic discrimination in university education, government employment, housing, health services, language laws, and procedures for naturalization of non-citizens. DFAT have previously attributed some of these complaints as being due to disrupted education because of the conflict and language constraints, rather than being the result of an official policy of discrimination. DFAT's assessment in 2019 was that all Sri Lankans, including Tamils, face a low risk of official or societal discrimination based on ethnicity or caste, including in their ability to access education, employment or housing. The UKHO assessed overall in 2020 was that Tamils do not suffer persecution simply for their Tamil ethnicity.
36. Recent reporting¹¹ indicates that the persons most at risk in Sri Lanka are those perceived to have a significant role in relation to post conflict Tamil separatism. The Sri Lankan authorities will seek to identify those whom it perceives as constituting a threat to the integrity of the Sri Lankan state by reason of their committed activism in furtherance of the establishment of Tamil Eelam. The applicant has claimed that he attended Mullivaikkal rallies and that he photographed events and made banners for [Community Organisation 1] in Australia. I have not accepted that he has been an organiser of these events or that he has held any high-level position with [Community Organisation 1]. He does not claim to have published or promoted separatist material. The evidence before me does not suggest that he has a profile of a political activist with the Sri Lankan authorities. I note the applicant's submissions that Sri Lankan authorities monitor the Tamil diaspora for those engaged in radical activities in opposition to the government or supporting a separatist Tamil state. The evidence before me does not indicate that the applicant has been subject to such monitoring; nor does it suggest that he is engaged in radical activities opposed to the Sri Lankan government; nor does it indicate his support for a separate Tamil state. Based on the applicant's degree of claimed involvement in Tamil activities in Australia, I do not accept that he would come to the authorities' attention. I have had regard to the fact that many Tamils both within and outside of Sri Lanka participate in commemorations, celebrations and protests and therefore, the chance of the applicant being singled out, amongst many others, for his particular activity in Australia is no more than remote. Overall, I am not satisfied that the applicant already has or will have an adverse profile known to the Sri Lankan authorities for his activity in Australia or that he faces a real chance of harm on that basis.

state", 15 August 2020, 20200814111514; Aljazeera, "Sri Lanka: Economy, human rights key challenges facing Rajapaksas", 19 August 2020, 20200819205836

¹⁰ US Department of State, "Country Reports on Human Rights Practices for 2020 - Sri Lanka" 30 March 2021, 20210401122412

¹¹ UK Home Office, 'Country Policy and Information Note Sri Lanka: Tamil separatism', May 2020, 20200527172009

37. I have accepted that the applicant's father performed some work for the LTTE when they lived in an LTTE controlled area and I have found that this is consistent with the experience of other Tamils during the conflict. I have also accepted that the applicant had an uncle who was a war martyr who was killed in the conflict in 1998. I have previously found that the applicant and his family were not of interest to the Sri Lankan authorities when they departed the country in 2012, three years after the end of the war and a number of years after his uncle's death. The applicant has not indicated that his extended family who remain in Sri Lanka have been seriously harmed or have had any ongoing difficulties with the Sri Lankan authorities on the basis of having had a relative with past involvement in the LTTE. The applicant has not indicated that they have any concerns in relation to their security, wellbeing or ability to support themselves or their families. Based on the applicant's father's experience at the end of the war, and the country information considered above, I am not satisfied that the applicant would face any harm as a result of having a father who performed duties for the LTTE or an uncle who was an LTTE cadre killed in 1998 even when considered in combination with his other claims.
38. I accept that if the applicant was to be returned to Sri Lanka from Australia, he may be considered by the authorities to be a failed Tamil asylum seeker due to the manner of his return and the fact that he would be travelling on a temporary travel document and separate to the data breach which occurred in 2014. I am satisfied that there would be a record of the applicant's legal departure from Sri Lanka as a child as he and his family left on Sri Lankan passports.
39. DFAT reports that between 2010-11 and 2018-19, 3,716 Sri Lankan nationals returned from the Australian community or were removed from Australian onshore immigration detention centres to their country of origin or a third country. Many others returned from the US, Canada, the UK and other European countries. Most returnees are Tamil. The government has consistently said that refugees are welcome to return to Sri Lanka and, in August 2016, released a 'National Policy on Durable Solutions for Conflict-Affected Displacement'. During a visit to Australia in February 2017, former Prime Minister Wickremesinghe stated publicly that failed asylum seekers from Australia would be welcomed back to Sri Lanka.
40. I have had regard to the 2019 DFAT and the 2020 UKHO reports¹² which provide the most recent description and evaluation of the process of returning to Sri Lanka, including for Tamils with the applicant's profile, which have been prepared for the express purpose of assessing protection claims. Both DFAT and the UKHO report that for returnees travelling on temporary travel documents, police undertake an investigative process to confirm identity. This would identify someone trying to conceal a criminal or terrorist background or trying to avoid court orders or arrest warrants. The verification process often involves interviewing the returning passenger, contacting police in their claimed hometown, contacting claimed neighbours and family, and checking criminal and court records. All returnees are subject to these standard procedures, regardless of ethnicity and religion. The UK Home Office reported in June 2017 that there is an airport 'watch list' which is comprised of minor offenders and former LTTE cadres. DFAT assesses those on a watch list are likely to be monitored. I am satisfied that the applicant and his family were of no interest to the Sri Lankan authorities at the time of their departure and that they do not hold and would not be perceived to hold a profile of interest including a person trying to conceal a criminal or terrorist background or trying to avoid court orders or arrest warrants. The UKHO reports that the Chief Immigration Office where questioning takes place is situated opposite the immigration arrival desks. These open onto

¹² UKHO, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928; DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

the arrivals' hall, with an area to wait outside. Toilets are nearby and there is access to food, water and a prayer room. Whilst the UK fact-finding team were there, interviews were taking place and the door to the offices were open. The fact-finding team were informed, and observed, that there are no holding cells. DFAT understands that no detainees are subject to mistreatment during processing at the airport. I am satisfied that the applicant will not come to any particular attention of the authorities as a result of this investigative process. I am satisfied that he does not have any profile of interest to the Sri Lankan authorities, particularly as there was no illegal departure. I also note that the evidence before me does not indicate that the authorities are interested in the length of time an individual had lived abroad prior to their return to Sri Lanka and I am not satisfied that the applicant would face harm on that basis.

41. DFAT has assessed that refugees and failed asylum seekers face practical challenges to a successful return to Sri Lanka due to the expenses incurred to undertake their outward journey, difficulty finding suitable employment and reliable housing and delays in obtaining official documentation. The applicant has not indicated that he would be prevented from finding work on his return to Sri Lanka or that he has any conditions which would impact his ability to find work. The applicant has not indicated that he could not return to his home area with his family and to his extended family. He has not indicated that his extended family would not support him on his return. Even if he does not have family support, I consider that the applicant may be eligible for assistance from IOM which provides eligible returnees with livelihood assistance and makes regular visits to monitor the welfare of returnees. I am satisfied that the applicant has his birth certificate and he has not raised any concerns about applying for new identity documentation on his return to Sri Lanka.
42. DFAT understands that some returnees, including returnees in the north with suspected LTTE links, have been the subject of monitoring by the authorities, involving visits to returnees' homes and telephone calls by the CID. DFAT understands that most returnees, including failed asylum seekers who have spent time abroad, are not actively monitored on an ongoing basis. DFAT is unable to verify whether monitoring, where it occurs, is specific to former LTTE cadres. DFAT is not aware of returnees, including failed asylum seekers, being treated in such a way that endangers their safety and security and I am not satisfied that this treatment, if it does occur, amounts to serious harm.
43. There are reports that some refugees and failed asylum seekers faced social stigma upon return to their communities, including for being beneficiaries of financial reintegration assistance. I do not accept that any challenges that the applicant may face in terms of getting established, finding employment, or any social stigma he may experience as a returning asylum seeker who has spent time in Australia, if it does occur, would amount to serious harm.
44. Overall, I accept that serious mistreatment of some Tamils with certain links is an ongoing issue in Sri Lanka but the weight of the evidence indicates that it has significantly reduced and that the chance of such treatment for being a Tamil or a Tamil from the Northern Province with the background, profile and type of experiences that the applicant and his family have had are remote. Given the improved situation in the country, the length of time since the cessation of the conflict and the applicant's overall profile, I am not satisfied the applicant faces a real chance of harm on his return in the reasonably foreseeable future for reasons including his ethnicity, place of origin, LTTE links or actual or imputed political opinion, or his seeking asylum and activity in Australia or any combination or accumulation of those factors.

45. I am not satisfied that the applicant holds a well-founded fear of persecution.

Refugee: conclusion

46. 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

47. 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

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

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

49. 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.

50. I accept that on his return to Sri Lanka, the applicant may experience some stigma within his community as a returnee. I consider that he will likely be returning to the Northern Province where he has family which may assist his reintegration. He has not indicated otherwise. In any case, there are no longer restrictions on movement should the applicant seek to move to Colombo or another major centre for employment or education. I accept that the applicant may face some routine monitoring from the authorities, though reporting indicates for persons with LTTE connections comparable to the applicant's that this does not involve violence or undue impact of day to day living¹³. Overall, I am not satisfied that any such treatment as set out above may amount to significant harm in the relevant sense. The material before me does not suggest, and I am not satisfied, it would involve a real risk of the applicant being arbitrarily deprived of his life, being subjected to the death penalty or tortured. Nor does such treatment involve pain or suffering that could reasonably be regarded as cruel or inhuman in nature, severe pain or suffering, or extreme humiliation.

51. As 'real chance' and 'real risk' involve the same standard¹⁴, for the same reasons as given above, I am not satisfied that there are substantial grounds for believing that, as a necessary

¹³ DFAT, 'DFAT Country Information Report – Sri Lanka', 4 November 2019, 20191104135244.

¹⁴ *MIAC v SZQRB* (2013) 210 FCR 505

consequence of the applicant's removal to Sri Lanka, he will face a real risk of significant harm for any of the other reasons claimed.

Complementary protection: conclusion

52. There are not substantial grounds for believing that, as a necessary and foreseeable consequence of being returned from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm. The applicant does not meet s.36(2)(aa).

Decision

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

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly

...

cruel or inhuman treatment or punishment means an act or omission by which:

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature;

but does not include an act or omission:

- (c) that is not inconsistent with Article 7 of the Covenant; or
- (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

degrading treatment or punishment means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:

- (a) that is not inconsistent with Article 7 of the Covenant; or
- (b) that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

receiving country, in relation to a non-citizen, means:

- (a) a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or
- (b) if the non-citizen has no country of nationality—a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.

...

torture means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant;

but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

5H Meaning of refugee

(1) For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a refugee if the person:

- (a) in a case where the person has a nationality—is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or
- (b) in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Note: For the meaning of *well-founded fear of persecution*, see section 5J.

...

5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
 - (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
 - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
 - (c) the real chance of persecution relates to all areas of a receiving country.
Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.
Note: For effective protection measures, see section 5LA.
- (3) A person does not have a well-founded fear of persecution if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country, other than a modification that would:
 - (a) conflict with a characteristic that is fundamental to the person's identity or conscience; or
 - (b) conceal an innate or immutable characteristic of the person; or
 - (c) without limiting paragraph (a) or (b), require the person to do any of the following:
 - (i) alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith;
 - (ii) conceal his or her true race, ethnicity, nationality or country of origin;
 - (iii) alter his or her political beliefs or conceal his or her true political beliefs;
 - (iv) conceal a physical, psychological or intellectual disability;
 - (v) enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
 - (vi) alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.
- (4) If a person fears persecution for one or more of the reasons mentioned in paragraph (1)(a):
 - (a) that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and
 - (b) the persecution must involve serious harm to the person; and
 - (c) the persecution must involve systematic and discriminatory conduct.
- (5) Without limiting what is serious harm for the purposes of paragraph (4)(b), the following are instances of **serious harm** for the purposes of that paragraph:
 - (a) a threat to the person's life or liberty;
 - (b) significant physical harassment of the person;
 - (c) significant physical ill-treatment of the person;
 - (d) significant economic hardship that threatens the person's capacity to subsist;
 - (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
 - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.
- (6) In determining whether the person has a **well-founded fear of persecution** for one or more of the reasons mentioned in paragraph (1)(a), any conduct engaged in by the person in Australia is to be disregarded unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.

5K Membership of a particular social group consisting of family

For the purposes of the application of this Act and the regulations to a particular person (the **first person**), in determining whether the first person has a well-founded fear of persecution for the reason of membership of a particular social group that consists of the first person's family:

- (a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in paragraph 5J(1)(a); and
- (b) disregard any fear of persecution, or any persecution, that:
 - (i) the first person has ever experienced; or

- (ii) any other member or former member (whether alive or dead) of the family has ever experienced;

where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.

Note: Section 5G may be relevant for determining family relationships for the purposes of this section.

5L Membership of a particular social group other than family

For the purposes of the application of this Act and the regulations to a particular person, the person is to be treated as a member of a particular social group (other than the person's family) if:

- (a) a characteristic is shared by each member of the group; and
- (b) the person shares, or is perceived as sharing, the characteristic; and
- (c) any of the following apply:
 - (i) the characteristic is an innate or immutable characteristic;
 - (ii) the characteristic is so fundamental to a member's identity or conscience, the member should not be forced to renounce it;
 - (iii) the characteristic distinguishes the group from society; and
- (d) the characteristic is not a fear of persecution.

5LA Effective protection measures

- (1) For the purposes of the application of this Act and the regulations to a particular person, effective protection measures are available to the person in a receiving country if:
 - (a) protection against persecution could be provided to the person by:
 - (i) the relevant State; or
 - (ii) a party or organisation, including an international organisation, that controls the relevant State or a substantial part of the territory of the relevant State; and
 - (b) the relevant State, party or organisation mentioned in paragraph (a) is willing and able to offer such protection.
- (2) A relevant State, party or organisation mentioned in paragraph (1)(a) is taken to be able to offer protection against persecution to a person if:
 - (a) the person can access the protection; and
 - (b) the protection is durable; and
 - (c) in the case of protection provided by the relevant State—the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system.

...

36 Protection visas – criteria provided for by this Act

...

- (2) A criterion for a protection visa is that the applicant for the visa is:
 - (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee; or
 - (aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or
 - (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (a); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant; or
 - (c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (aa); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant.
- (2A) A non-citizen will suffer **significant harm** if:
 - (a) the non-citizen will be arbitrarily deprived of his or her life; or
 - (b) the death penalty will be carried out on the non-citizen; or
 - (c) the non-citizen will be subjected to torture; or
 - (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
 - (e) the non-citizen will be subjected to degrading treatment or punishment.

- (2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:
- (a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or
 - (b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or
 - (c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

...

Protection obligations

- (3) Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.
- (4) However, subsection (3) does not apply in relation to a country in respect of which:
- (a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.
- (5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:
- (a) the country will return the non-citizen to another country; and
 - (b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.
- (5A) Also, subsection (3) does not apply in relation to a country if:
- (a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country.

Determining nationality

- (6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.
- (7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.