



**Australian Government**  
**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA16/00490

Date and time of decision: 06 September 2016 15:52:29  
Mark Oakman, Reviewer

**Decision**

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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 Trincomalee, Eastern Province, Sri Lanka. He arrived in Australia [in] September 2012 and he lodged an application for a Safe Haven Enterprise visa (SHEV) (XE-790) [in] December 2015. [In] July 2016 a delegate of the Minister for Immigration and Border Protection (the delegate) refused the visa.

### **Information before the IAA**

2. I have had regard to the material referred by the Secretary under s.473CB of the Migration Act 1958 (the Act).
3. On 30 August 2016 the IAA received a submission and further information from the applicant's representative. To the extent the submission discusses evidence, including country information, which was before the delegate and responds to the delegate's decision based on that material, I consider this does not constitute new information and I have had regard to it.
4. Part of the further information consists of references to reports and news articles not before the delegate and is new information. The new information pre-dates the delegate's decision. The applicant did not provide any explanation as to why the new information was not and could not have been provided to the delegate, or why it may be regarded as credible personal information that was not known, and had it been known it may have affected the consideration of the applicant's claims. I am not satisfied in relation to the matters set out in s.437DD(b) of the Act and am prevented from considering those articles and reports.
5. The applicant also provided information that was not before the delegate as to the Karuna Group's (TMVP) possible motivation for abducting, and remaining interested in, the applicant's [relative]. These issues were raised with the applicant by the delegate at the SHEV interview and there is nothing in the explanation provided by the applicant that suggests it was not possible to provide it prior to the delegate making a decision. Additionally, the information on its face is simply speculation on the part of the applicant. I am not satisfied there are exceptional circumstances that justify considering the information concerning a possible motive held by the TMVP.

### **Applicant's claims for protection**

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6. The applicant's claims are contained in the information referred and subsequently given to the IAA. They can be summarised as follows:
  - He believes his life is in danger from the TMVP as he is closely connected to his [relative] who is a deserter from the TMVP and helped to harbour his [relative]. He was detained, beaten and questioned by the TMVP in 2011. His [relative] was detained, hurt and escaped from the TMVP in 2010 and escaped abduction in 2012.
  - He fears he is at risk of serious harm from the Sri Lankan authorities and the Sinhalese people as he originates from a Tamil village that is surrounded by Sinhalese people and they perceive the Tamils to be Liberation Tigers of Tamil Eelam (LTTE) supporters.

- The Sri Lankan authorities may believe he has LTTE links because he claimed asylum in a western country and left Sri Lanka illegally.

## **Factual findings**

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### **Receiving country**

7. On the basis of the documents and oral evidence given by the applicant, I accept that the applicant is a national of Sri Lanka who has lived in the Trincomalee, Eastern Province. I find that the applicant's receiving country is Sri Lanka. The applicant has consistently claimed, and I accept, he is Tamil and Hindu.

### **Adverse attention from the authorities**

8. The applicant claims that the village he lived in was a majority Tamil area but the area is surrounded by Sinhalese people who are hostile towards Tamils. He always lived in fear because the Sri Lankan authorities, including the TMVP, and the local Sinhalese harmed many Tamils in that area who they suspected belonged to the LTTE. During 2006 to 2010 many incidents took place. Several Tamils were shot and killed by the TMVP for suspected links to the LTTE, including a man who he knew who lived close to his residence and, as far as he knows, was not connected to the LTTE. There were frequent round ups of Tamils in the area by the Sri Lankan security forces.
9. He says in 2007 two police officers were killed by LTTE members and security forces conducted a search that found a cache of arms and grenades within about 50 metres of their home. At the SHEV interview he said the reference in his 2015 written statement to not being troubled when others were arrested and the authorities asking others about him was wrong. He was taken in the round up after that incident but released unharmed because of his age. The authorities asked others in later, subsequent round ups about him, and he understands those questioned would say he had no time for being involved in anything because he worked in [workplace] (from January 2010).
10. He claims that in 2008 or 2009 his [relative] was forcibly recruited by the TMVP when he went into Trincomalee. His [relative ] underwent six months of initial training, during which time he made a failed attempt to flee the TMVP but was picked up by the Sri Lankan Army (SLA) and returned to the TMVP. The [relative] completed his training and was posted to the TMVP [office]. Sometime later the [relative] deserted his post and returned to his home for a few days before moving to [a family member]'s house in [Town 1].
11. Towards the end of 2009 his [relative] moved back to their village. He learnt that within a few days of arriving in the village his [relative] managed to escape when the TMVP came in search of him. His [relative ] came to his house but his family were afraid to harbour the [relative] so he made arrangements for his [relative] to stay that night at a friend's house and the [relative] returned to his [family member] in [Town 1] the next day, sometime in January 2010. At the SHEV interview the applicant claimed his [relative] was taken by the TMVP at gun point and beaten but managed to escape that night from the TMVP camp, which was [number] or [number] kilometres from his house. When the [relative] arrived at his house he had swollen legs and feet and was unable to walk. His [relative] did not actually tell him he had escaped, because his [relative]'s mouth was swollen as well from his injuries, but as his [relative] turned up alone, unable to walk, limping, he must have escaped. His family did not take his [relative]

to hospital because they were afraid of what might happen so they treated the [relative] with alcohol, ointments and home remedies before he took him to a friend's house.

12. He says the [relative] remained in [Town 1] until mid-2010 when the [family member] asked him to leave. The [relative] returned to their village and he started work at the same [workplace] as the applicant. He and his [relative] would travel to and from work together when the opportunity arose but they did not always work the same shifts.
13. In June 2011 he was heading to work at the [workplace], alone, at around 7:30am when he was targeted by two members of the TMVP. They took him by motor bike to their office, in the SLA camp, where he was detained for two days, beaten and questioned. He was repeatedly asked if he knew other former LTTE cadres in the area. There are some differences about whether he was asked about his [relative] in the questioning and whether he had to report regularly when released between his 2013 and 2015 written statements. He said at the SHEV interview that he was asked about his [relative] but was not required to report to the TMVP regularly, he was just told when released that he must report to them if he sees any former LTTE cadres in the future. He confirmed that he and his family were not involved with the LTTE.
14. Sometime in late August 2012, during the evening, he, his [relative] and some other workers were returning home from the [workplace] when his [relative] lagged behind to buy cigarettes and chat to friends. The applicant says it was only when he arrived home that day he learnt there was an attempt by the TMVP to abduct his [relative], but his [relative] managed to flee the abduction attempt and went to the applicant's house. His [relative] stayed one night at his house and then left for a friend's [place] the next day. Sometime during the evening of that same day, while the applicant was at work, Tamil speaking men dressed in civilian clothing came to the area where he lived and asked for the applicant by name. He was told this by a girl who lived in the area when he returned from work later that evening. The men did not go in search of the applicant and as far as he is aware have not searched for him since he came to Australia.
15. He says it was after this incident that his parents made plans for him to leave Sri Lanka.
16. Country information indicates that under the former Rajapaksa government the security forces in the north and east were known to monitor any possible LTTE activity and other forms of civil resistance or anti-government activity.<sup>1</sup> Many Tamils, in the north and east in particular, reported being monitored, harassed, arrested and/or detained by security forces under the Rajapaksa government.<sup>2</sup> The TMVP, active in the East of the country, was reported<sup>3</sup> as being involved in terror and crime as well as being responsible for extrajudicial killings, deaths in custody and abductions, apparently carried out with the knowledge and tacit agreement of Governments actors and local authorities.
17. Having considered his two written statements, from 2013 and 2015, his evidence from his SHEV interview, and the available country information, I accept that the applicant was picked up by the security forces in a round up, but released unharmed, in 2007 and detained for two days, beaten and questioned about whether he knew any former LTTE cadres by the TMVP in June 2011.

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<sup>1</sup> Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report Sri Lanka" 18 December 2015, CISEC96CF14143, 2.39.

<sup>2</sup> Ibid 3.7.

<sup>3</sup> United Nations High Commissioner for Refugees (UNHCR), "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012, UNB0183EA8, p19.

18. However, I do not accept the majority of his evidence where it concerns his [relative]. The applicant was consistent in his evidence about the [relative] joining the TMVP and, after an initial failed attempt, deserted sometime in 2009. In his written statements he identified the 2009 and 2012 incidents between his [relative] and the TMVP as a search that the [relative] escaped from and abduction attempt that he fled, respectively. He mentioned for the first time at the SHEV interview that his [relative] was detained and severely beaten by the TMVP in the 2009 incident rather than just evading a search. Besides the inherent implausibility of the [relative] travelling the [number] or [number] kilometres from the TMVP camp to his house with the injuries described by the applicant, it is implausible that he would not recall and mention, if it actually happened, his [relative]'s severe beating when detailing the incident in his evidence in his 2013 and 2015 written statements. He says his [relative] lived in the same village and worked at the same [workplace] as the applicant from mid-2010 until the August 2012 incident and the TMVP office is in the SLA camp [number] or [number] kilometres away from his house. Yet the applicant does not claim that the TMVP made any enquiries about his [relative] between the 2009 and 2012 incidents, other than asking him about his [relative] in his own 2011 detention by the TMVP. Similarly, he does not claim there were any enquiries by the TMVP about his [relative] just after the [relative] deserted or since the 2012 incident. I consider it implausible that if the TMVP were interested in the [relative], either as a deserter or for some other reason, they would not make more extensive and active enquiries with the [relative]'s family and friends, including the applicant and his family (other than a question in 2011 to the applicant when he was interrogated about knowing former LTTE cadres). I also consider it implausible that the TMVP, if looking for the [relative], would not be able to locate him when he lived in the same village and worked in the same [workplace] from mid-2010 to August 2012.
19. I accept that his [relative] was in the TMVP. I do not accept that his [relative] was a deserter from the TMVP; the TMVP was otherwise interested in the [relative]; nor the incidents with the TMVP and the [relative] in 2009 and 2012 occurred. It follows that I also do not accept that the applicant was asked about his [relative] when detained in 2011 nor that any men came searching for the applicant in August 2012.
20. The applicant has not claimed that the Sri Lankan authorities or TMVP have attempted to contact any of his family or friends about his whereabouts since he left Sri Lanka. In the absence of any evidence to the contrary, I accept that the authorities and the TMVP have made no enquiries about the applicant since he left Sri Lanka.

### **Failed Asylum Seeker**

21. The applicant claims to have left Sri Lanka [in] September 2012 to travel to Australia as a passenger on a boat organised by a smuggler. He does not have a passport. Because he does not have a passport he will return to Sri Lanka with temporary travel documents. I find that, if he were to return to Sri Lanka, he will be considered a failed asylum seeker who departed illegally by the Sri Lankan authorities.

### **Refugee assessment**

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22. 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**

23. 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.

### *Young Tamil Male from the east and imputed LTTE links*

24. The applicant claims to fear harm on the basis of his Tamil ethnicity and being imputed with an association with the LTTE.

25. On 8 January 2015, Maithripala Sirisena defeated President Mahinda Rajapaksa in the presidential election winning 51.3 per cent of the vote, with a historically high voter turnout of 81.5 per cent. The Tamil vote was significant in Sirisena's victory. Sirisena's campaign was run on a platform of democratic reform, good governance and anti-corruption. A peaceful parliamentary election on 17 August 2015 reinforced the outcomes of the presidential election and ushered in a 'national unity government' of major parties and the Tamil National Alliance (TNA) now formally leads the opposition. The TNA currently has 16 members of parliament and holds the majority of seats in the Northern Provincial Council.<sup>4</sup>

26. While Sinhala remains the first official language, the Trilingual Policy introduced in 2012 and overseen by an Official Languages Commission provides that all people have the right to communicate in Sinhala, Tamil or English throughout all of Sri Lanka and requires civil servants employed post-2007 to learn the other national language, Sinhala or Tamil, in order to receive annual salary increments, with only low level violations of the policy reported.<sup>5</sup> DFAT assesses there are currently no official laws or policies that discriminate on the basis of ethnicity or language.<sup>6</sup>

27. DFAT considers the Sirisena government has a more proactive approach to human rights and reconciliation than the previous government. Since January 2015, the new Government has replaced military governors in the Northern and Eastern Provinces with civilians, reduced High Security Zones and released land held by the military, released some individuals held under the *Prevention of Terrorism Act 1979* (Sri Lanka) (PTA), engaged constructively with the TNA, the

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<sup>4</sup> DFAT, "DFAT Country Information Report Sri Lanka" 18 December 2015, 2.2, 2.26 and 2.27.

<sup>5</sup> Ibid 3.2.

<sup>6</sup> Ibid 3.3.

UN and other international partners and established the Office of National Unity and Reconciliation.<sup>7</sup>

28. DFAT reports that many Tamils, particularly in the north and east, reported being monitored, harassed, arrested and detained by security forces under the former Rajapaksa government. During the war, more Tamils were detained under emergency regulations and the PTA than any other ethnic group. This was primarily due to LTTE members and supporters being almost entirely Tamil, but DFAT notes that there were also likely instances of discrimination in the application of these laws, with LTTE support at times imputed on the basis of ethnicity. Although there are no published statistics on the numbers or ethnicity of those arrested under the PTA, DFAT assesses that there are currently fewer individuals detained under the PTA than there were during the conflict. The Sirisena government has undertaken to review the list of detainees under the PTA and has released some detainees, including Tamils. The cessation of the forced registration of Tamils suggests the trend of monitoring and harassment of Tamils in day-to-day life has generally eased since the war ended.<sup>8</sup>
29. DFAT assesses<sup>9</sup> that monitoring and harassment of Tamils has decreased under the Sirisena government and, on a day-to-day basis, the Tamil community feels more confident to refuse or question the motives of monitoring activities undertaken by authorities, if it occurs.
30. DFAT acknowledges that there is a moderate level of societal discrimination between ethnic groups resulting largely from the war.<sup>10</sup> However, the report does not identify the affected ethnic groups or the nature of this discrimination. The applicant claims the Sinhalese people in the local area are hostile to Tamils and refers, without specifics, to their harming Tamils. The only specific incidents of harm or potential discrimination that the applicant suffered were his 2007 arrest during a round up and his detention, questioning and beating by the TMVP in June 2011 when he was interrogated about knowing former LTTE cadres. I note the applicant was living in the same village in Trincomalee and able to pursue his [studies], complete a twelve months [course] and work from January 2010 to August 2012 in a [workplace]. The country information discussed above indicates monitoring in the north and east has significantly decreased, there have been significant positive developments for Tamils in the country's politics and the situation has generally improved.
31. I find that there is not a real chance the applicant would, as a young Tamil male from the east, face serious harm upon his return to Sri Lanka, now or in the foreseeable future on this basis alone.
32. The UNHCR's current Eligibility Guidelines for Sri Lanka<sup>11</sup> note that a person's real or perceived links with the LTTE may give rise to a need for international refugee protection. However, originating from an area that was previously controlled by the LTTE does not in itself do so. Although the nature of these links can vary, this may include:
- Persons who held senior positions with considerable authority in the LTTE civilian administration, when the LTTE was in control of large parts of what are now the northern and eastern provinces of Sri Lanka;
  - Former LTTE combatants or "cadres";

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<sup>7</sup> Ibid 2.31.

<sup>8</sup> Ibid 3.7 and 3.8.

<sup>9</sup> Ibid 3.9.

<sup>10</sup> Ibid 3.3.

<sup>11</sup> UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012, UNB0183EA8, pp26 and 27.

- Former LTTE combatants or “cadres” who, due to injury or other reason, were employed by the LTTE in functions within the administration, intelligence, “computer branch” or media (newspaper and radio);
  - Former LTTE supporters who may never have undergone military training, but were involved in sheltering or transporting LTTE personnel, or the supply and transport of goods for the LTTE;
  - LTTE fundraisers and propaganda activists and those with, or perceived as having had, links to the Sri Lankan diaspora that provided funding and other support to the LTTE; or
  - Persons with family links or who are dependent on or otherwise closely related to persons with the above profiles.
33. DFAT refers to the UNHCR’s guidelines and notes<sup>12</sup> that accurately identifying people according to those categories can be difficult and the UNHCR recognises that each case will depend on its individual circumstances.<sup>13</sup> DFAT also confirms<sup>14</sup> that the Sri Lankan authorities remain sensitive to the potential re-emergence of the LTTE and monitor former members and supporters of the LTTE.
34. DFAT assesses<sup>15</sup> the number of incidents of extra-judicial killings, disappearances and kidnappings for ransom, including ones involving former LTTE members, has considerably fallen since the end of the war. DFAT also assesses<sup>16</sup> that there are credible reports of torture carried out by Sri Lankan security forces both during the war and in its aftermath, including its use to extract information and confessions from suspects. Verifying more recent reports of torture is difficult as many allegations are made anonymously, and to third parties, and DFAT has no information on the overall incidence of torture among people suspected of LTTE links.<sup>17</sup> DFAT assesses that the risk of torture or mistreatment of high profile former LTTE supporters who are suspected of committing serious crimes as reduced under the Sirisena government, although it remains higher overall than the risk to the majority of low profile people with LTTE links, and notes the allegations of torture pertain to a relatively small number of cases compared to the total Sri Lankan population.<sup>18</sup>
35. The US Department of State (USDOS) 2016 report notes there were no substantiated reports of extra-judicial killings in 2015 in Sri Lanka but the use of force against civilians, though rare, remains a problem.<sup>19</sup> There are credible reports that the military and security forces have abducted, tortured, raped and sexually abused citizens and in the north and east security forces are responsible for detaining those accused of LTTE connections, with observers reporting that interrogations sometimes included mistreatment and torture.<sup>20</sup>
36. I accept the applicant’s evidence that he and his family have no actual links to the LTTE. He was detained briefly in a general round up by the Sri Lankan authorities in 2007 but released unharmed. He was detained, beaten and questioned by the TMVP about former LTTE cadres in June 2011. Neither the Sri Lankan authorities nor the TMVP made any further enquiries about the applicant prior to and after his departure from Sri Lanka. He has lived in Trincomalee, parts

<sup>12</sup> DFAT, “DFAT Country Information Report Sri Lanka” 18 December 2015, CISEC96CF14143, 3.35.

<sup>13</sup> UNHCR, “UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka”, 21 December 2012, UNB0183EA8, p25.

<sup>14</sup> DFAT, “DFAT Country Information Report Sri Lanka” 18 December 2015, CISEC96CF14143, 3.36.

<sup>15</sup> Ibid 4.1.

<sup>16</sup> Ibid 4.17 and 4.19.

<sup>17</sup> Ibid 4.18 and 4.20.

<sup>18</sup> Ibid 4.18, 4.20 and 4.21.

<sup>19</sup> USDOS, “Sri Lanka - Country Report on Human Rights Practices 2015”, 13 April 2016, OGD95BE926320, p2.

<sup>20</sup> Ibid pp7-9.



of which were previously controlled by the LTTE. However, as the UNHCR Guidelines note, mere residence in a former LTTE controlled area does not in itself give rise to a need for protection. The applicant, whether due to his residence in a possible LTTE controlled area, the 2007 round up, his 2011 detention by the TMVP or for those reasons together, does not have a profile that country information suggests he is at risk of harm. I do not consider that the authorities or the TMVP would have had any adverse interest in the applicant had he remained in Sri Lanka or that he would be of any adverse interest to the current Sri Lankan authorities or the TMVP on return.

37. I am satisfied that the applicant will not face a real chance of persecution from the Sri Lankan authorities or the TMVP due to any imputed political opinion on return to Sri Lanka now or in the reasonably foreseeable future.

*Failed asylum seeker and illegal departure from Sri Lanka*

38. I accept that, on his return to Sri Lanka, the applicant would be considered by the authorities to be a failed asylum seeker who departed Sri Lanka illegally.
39. The *Constitution* (Sri Lanka) entitles any citizen to ‘the freedom to return to Sri Lanka’. 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, such as a seaport or airport. Penalties for leaving Sri Lanka illegally include imprisonment of up to five years and a fine of up to 200,000 Sri Lankan rupees (around AUD 2,000). In practice, penalties are applied on a discretionary basis and are almost always a fine.<sup>21</sup> Returnees are generally considered to have committed an offence under the IE Act if they departed Sri Lanka irregularly by boat.<sup>22</sup>
40. Advice from DFAT is that upon arrival in Sri Lanka, involuntary returnees are processed by the Department of Immigration and Emigration (DoIE), the State Intelligence Service (SIS) and a unit of the Criminal Investigation Department (CID) based at the airport. Processing arrivals can take several hours, primarily due to the administrative processes and staffing constraints at the airport.<sup>23</sup> During the processing of returnees, DoIE officers check travel document and identity information against the immigration database. SIS checks the returnee against intelligence databases. The CID verifies a person’s identity to determine whether the person has any outstanding criminal matters.<sup>24</sup>
41. For returnees travelling on temporary travel documents, police undertake an investigative process to confirm the person’s identity, which would address 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, contacting the person’s claimed home suburb or town police, contacting the person’s claimed neighbours and family and checking criminal and court records. DFAT assesses that returnees are treated according to these standard procedures, regardless of their ethnicity and religion, and are not subject to mistreatment during their processing at the airport.<sup>25</sup>
42. Most Sri Lankan returnees, including those from Australia, are questioned by police on return and, where an illegal departure is suspected, are charged under the IE Act. DFAT understands

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<sup>21</sup> DFAT, “DFAT Country Information Report Sri Lanka” 18 December 2015, CISEC96CF14143, 5.27.

<sup>22</sup> Ibid 5.28.

<sup>23</sup> Ibid 5.29.

<sup>24</sup> Ibid 5.30.

<sup>25</sup> Ibid 5.31.

that in most cases, these individuals have been arrested at Colombo International Airport. As part of this process, most returnees will be fingerprinted and photographed. They are transported by police to the closest Magistrates Court at the first available opportunity once investigations are completed, after which custody and responsibility for the individual shifts to the courts or prison services. The Court then makes a determination as to the next steps for each individual. Those arrested can remain in police custody at the CID Airport Office for up to 24 hours. Should a Magistrate not be available before this time – for example, because of a weekend or public holiday – those charged may be held at a nearby prison.<sup>26</sup> DFAT rates<sup>27</sup> general prison conditions in Sri Lanka as not meeting international standards because of a lack of resources, overcrowding and poor sanitary conditions.

43. DFAT understands that no returnee who was merely a passenger on a people smuggling venture had been given a custodial sentence for departing Sri Lanka illegally. However, fines had been issued as a deterrent towards joining boat ventures in the future. Fine amounts vary on a case-by-case basis and can be paid by instalment. If a person pleads guilty, they will be fined and are then free to go. In most cases, when a returnee pleads not guilty, returnees are granted bail on personal surety immediately by the Magistrate, or may be required to have a family member act as guarantor. Returnees may sometimes need to wait until a family member comes to court to collect them. If bailed, there are rarely any conditions, and if there are, they are imposed on a discretionary basis. An accused will only need to return to court when the case against them is being heard, or if summonsed as a witness in a case against the organiser or facilitator of a boat venture. DFAT assesses that ordinary passengers are generally viewed as victims and penalties are more likely to be pursued against those suspected of being facilitators or organisers of people smuggling ventures.<sup>28</sup>
44. The Sri Lankan authorities collect and maintain sophisticated intelligence on former LTTE members and supporters, including 'stop' and 'watch' electronic databases. It is reported that those on a watch list are not reasonably likely to be detained, including on arrival at the airport, but are likely to be monitored.<sup>29</sup> DFAT has been advised that no returnees from Australia to Sri Lanka have been charged under the PTA. DFAT cannot verify that claim, but says it is credible.<sup>30</sup>
45. I accept that the applicant will be considered a failed asylum seeker on his return. DFAT reports that there have been thousands of asylum seekers returned to Sri Lanka since 2009, including 1500 from Australia, with relatively few allegations of torture and mistreatment and assesses the risk of harm for the majority of returnees as low.<sup>31</sup> While DFAT notes there are a small number of reports of mistreatment upon return by asylum seekers, they cannot verify these reports, which are often anonymous and made to third parties.<sup>32</sup> Country information containing such reports was considered by the delegate.<sup>33</sup> I accept that an asylum seeker with actual or perceived links to the LTTE may be at risk of harm when processed at the airport. As discussed above, I found that the applicant and his family have no actual links with the LTTE and he was not of interest to the Sri Lanka authorities and the TMVP after his release by the

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<sup>26</sup> Ibid 5.32.

<sup>27</sup> Ibid 5.13.

<sup>28</sup> Ibid 5.33.

<sup>29</sup> Ibid 3.36.

<sup>30</sup> Ibid 5.34.

<sup>31</sup> Ibid 4.23 and 5.37.

<sup>32</sup> Ibid 4.22.

<sup>33</sup> Asylum Research Consultancy (ARC), "Sri Lanka: (1) Information on Tamils who have returned (voluntarily or forced) to Sri Lanka since August 2014 and who were subjected to detention and/or torture and/or ill-treatment; (4) Any information on recent arrest/detention/ill-treatment/torture...", 1 March 2016, CIS38A801250; and "Swiss NGOs warn 'too early' to send Sri Lankans home", Swiss Info, 4 March 2016, CX6A26A6E1916.

TMVP in June 2011. Taking into account those findings and the country information, I do not accept that the applicant, as a young Tamil male from the east who left Sri Lanka illegally, will be at risk of adverse attention from the Sri Lankan authorities when scrutinised on arrival in Sri Lanka or by the TMVP after he returns home.

46. I am not satisfied that there is a real chance that the applicant would face serious harm on his return as a failed Tamil asylum seeker.
47. I accept that the applicant, if returned to Sri Lanka, will face action under the IE Act. The country information confirms that the applicant is likely to be detained and questioned at the airport, possibly up to 24 hours, before being conveyed by the police to the nearest Magistrates Court.
48. Once before the Court, and if not dealt with on the spot if the applicant were pleading guilty, the applicant would ordinarily be released unconditionally or be bailed to return to Court at a later date. If a Magistrate is not available at that time, for example due to the weekend or a public holiday, the applicant could be held in a nearby prison for a short time. Although the maximum penalty includes five years imprisonment, the country information indicates custodial sentences are not imposed on returnees who were merely a passenger on a people smuggling boat but that fines are issued to act as a deterrent.
49. The applicant's evidence is that he was only a passenger on the boat. I find, based on the country information discussed above that the applicant may be detained and questioned at the airport for up to 24 hours, faces a fine for breaching the IE Act and, depending on the availability of a Magistrate at the time he is charged under that Act, may face a short period of being held in prison.
50. The High Court endorsed in *MIBP v WZAPN*,<sup>34</sup> the position taken in *SZTEQ v MIBP*,<sup>35</sup> that whether a risk of loss of liberty constitutes serious harm required a qualitative judgment, including an evaluation of the nature and gravity of the loss of liberty.
51. Should the applicant be held over a weekend or public holiday until seen by a Magistrate, I am satisfied the applicant would face only a brief period in detention. Even having regard to general poor prison conditions, I do not consider that a brief period – one to three days – in detention would constitute the necessary level of threat to his life or liberty, or to significant physical harassment or ill treatment under s.5J(5) of the Act or otherwise amount to serious harm for the applicant.
52. Similarly, whether considered separately, together or cumulatively with a brief period of detention, I do not consider any likely questioning of the applicant by the DoIE, SIS or CID at the airport on arrival, any surety imposed, or the imposition of a fine under the IE Act, to constitute a threat to his life or liberty, or to be significant physical harassment or ill treatment under s.5J(5) of the Act or otherwise amount to serious harm.
53. Additionally, the country information states that all persons who depart Sri Lanka illegally are subject to the IE Act on return. That law is not discriminatory on its terms. Case law states that a generally applicable law will not ordinarily constitute persecution because the application of such a law does not amount to discrimination.<sup>36</sup> In this case, the evidence does not support a conclusion that the law is selectively enforced or that it is applied in a discriminatory manner. I

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<sup>34</sup> *MIBP v WZAP; WZARV v MIBP* [2015] HCA 22.

<sup>35</sup> *SZTEQ v MIBP* [2015] FCAFC 39.

<sup>36</sup> *Chen Shi Hai v MIMA* (2000) 201 CLR 293, at [20]; and *Applicant A v MIEA* (1997) 190 CLR 225, at p233.

find that the investigation, prosecution and punishment of the applicant under the IE Act would be the result of a law of general application and does not amount to persecution for the purpose of ss.5H(1) and 5J(1) of the Act.

54. I am not satisfied that the applicant faces a real chance of persecution on the basis of being a failed young male Tamil asylum seeker who departed Sri Lanka illegally, now or in the reasonably foreseeable future.

#### *Cumulative circumstances*

55. I accept that the applicant may experience some societal discrimination as a young Tamil male from the east. I also accept that he will face some non-discriminatory penalties because to his illegal departure from Sri Lanka. However, considering the applicant's circumstances as a whole I am not satisfied that the applicant faces a real chance of persecution now or in the reasonably foreseeable future, either in the period following his arrival or on his return home, whether because of his illegal departure, having made a claim for asylum in Australia, for any perceived links to the LTTE, or as a young Tamil male from the east or any combination of these. The applicant does not have a well-founded fear of persecution within the meaning of s.5J.

#### **Refugee: conclusion**

56. The applicant does not meet the requirements of the definition of refugee in s.5H(1). The applicant does not meet s.36(2)(a).

#### **Complementary protection assessment**

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

#### **Real risk of significant harm**

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

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

59. I have found that there is not a real chance of serious harm, now or in the reasonably foreseeable future as a returned young male Tamil failed asylum seeker from Australia, or for any perceived links to the LTTE, except for the possibility of questioning, brief detention and a fine for charges under the IE Act for his illegal departure. As 'real chance' and 'real risk' involve the same standard, it follows that I am also satisfied that there is no real risk of significant harm if returned to Sri Lanka.

60. As discussed above, DFAT has advised that, once a person is found to have departed illegally, they will be arrested by the police at the airport, have their fingerprints taken and be photographed. Returnees may be questioned for up to 24 hours at the airport and, subject to the unavailability of a Magistrate over a weekend or due to a public holiday, may be detained in prison for a brief period while waiting to appear before a Magistrate. DFAT has assessed the risk of torture or mistreatment of people suspected of an offence under the IE Act as low.
61. The applicant may be subjected to questioning on his arrival and poor prison conditions during any brief detention. Country information indicates that the poor prison conditions are due to overcrowding, poor sanitation and lack of resources. I am not satisfied, on the evidence, that there is an intention to inflict pain or suffering or extreme humiliation in any questioning or brief detention. These circumstances do not amount to the death penalty, an arbitrary deprivation of life or torture. I am not satisfied that being questioned, arrested, finger printed and photographed, any bail surety imposed and the poor prison conditions, to which the applicant may be briefly subjected, of themselves constitute significant harm as defined under s.36(2A) of the Act. For these reasons, I am not satisfied the applicant will face a real risk of significant harm during any questioning and processing at the airport or brief period of detention.
62. The applicant will be charged under the IE Act and will be fined for his illegal departure. I find that the imposition of a fine does not amount to significant harm under s.36(2A) of the Act.
63. I accept that the applicant may face some level of societal discrimination as a young Tamil male from the east. Having considered the evidence discussed above however, I am not satisfied that the discrimination the applicant may face amounts to significant harm as defined in ss.36(2A) and 5 of the Act.
64. There is no suggestion that the applicant faces the death penalty for any reason. I do not accept that there is a real risk that the applicant would face being arbitrarily deprived of life or tortured for any reason as a returned Tamil failed asylum seeker, for any perceived links to the LTTE or as a young male Tamil from the east. Nor do I accept that there is a real risk that he would be subjected to pain or suffering or extreme humiliation intentionally inflicted, or caused for any of those reasons. I am not satisfied that there is a real risk that the applicant will suffer significant harm based on his Tamil ethnicity.
65. 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**

66. 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**

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

## Applicable law

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### ***Migration Act 1958***

#### **5 (1) Interpretation**

...

***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.