



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

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA16/01588

Date and time of decision: 31 August 2017 15:38:00  
Jessica McLeod, 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 an referred applicant, or their relative or other dependant*

## Background to the review

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### Visa application

1. The referred applicant (the applicant) claims to be a citizen of Sri Lanka. [In] February 2016 he applied for a Safe Haven Enterprise visa (SHEV). The delegate accepted the applicant's claims that his [relative 1] was a member of the Liberation Tigers of Tamil Eelam (LTTE) who [suffered a medical condition] as a result of shelling in 2009. However she did not accept the applicant's [relative 2] had been in the LTTE or that he had been frequently harassed and interrogated under suspicion of LTTE involvement or support in 2011-2012. The delegate was not satisfied the applicant was of any interest to authorities when he departed Sri Lanka and found he would not be returning with a profile that would indicate he would face a real chance of serious harm or a real risk of significant harm upon return. The grant of this visa was refused [in] December 2016.

### 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). This includes an extensive bundle of country information reports and summaries of reports provided with the applicant's SHEV application, all of which I have considered. I have also considered the applicant's supporting documentary evidence that was referred in the form of identity documentation relating to his applicant and his family, medical records of the applicant's father and [relative 1], evidence of his [relative 2]'s LTTE membership and an undated letter from a Sri Lankan Member of Parliament (MP).
3. Amongst the referred material was one such bundle of country information in a document entitled '*Supporting Documents - PV Submission and COI - [date] 2016*'. While the title indicates the existence of a submission, the department has confirmed to the IAA that the file only contained country information. On this basis I am satisfied there was no accompanying submission and I have had regard to this bundle of country information.
4. On 2 January 2017 the IAA received a submission from the applicant. The submission contains arguments responding to the delegate's decision. I am satisfied this may be described as 'argument' rather than information. In part, the documents also reference country information and claims that were before the Ministerial delegate and are already before me.
5. The submission included references to country information which were not before the delegate, and which I find constitute new information.<sup>1</sup> I note that these reports were referenced to support the arguments against the delegate's findings. However, the reports relate to matters which were at issue in the SHEV interview. They are publicly available and all precede the delegate's decision by several months. A few reports also precede lodgement of the SHEV application. The applicant was represented throughout the primary process. He was not limited to providing this information prior to or at the SHEV interview and could have done so at any time until the decision was made around six months later. I am not satisfied these reports could not have been provided prior to the delegate's decision. The reports relate to the treatment of Tamils, people with suspected LTTE links and returnees however none of them are specifically about the applicant and the submission does not explain why the information may be considered credible personal information. On the basis of the

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<sup>1</sup> Human Rights Watch Annual Report 2016; Amnesty International Report 2015/2016; Canadian Immigration and Refugee Board report from February 2015; 7.30 Report (ABC) from August 2015 and a Press released entitled "Forgotten" from June 2016; UK Home Office, "Sri Lanka: Tamil separatism. Version 2.0", 19 May 2016, OGD7C848D17

information before me, I am not satisfied that the information falls within s.473DD(b)(i) or s.473DD(b)(ii), nor am I satisfied there are exceptional circumstances to justify considering the information. I have not considered the information in those reports.

6. I have obtained new information from the most recent Department of Foreign Affairs and Trade (DFAT) country report for Sri Lanka which was published on 24 January 2017.<sup>2</sup> Specifically from this report I have obtained information on the treatment of Sri Lankans of Tamil ethnicity and citizens who have departed Sri Lanka illegally and sought asylum abroad. The information obtained is not specifically about the applicant but about a class of persons of which the applicant is a member. The delegate relied on the then current 18 December 2015 DFAT report for Sri Lanka and the 2017 report was only published after the delegate's decision. I am satisfied that there are exceptional circumstances to justify considering this new information.

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

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7. The applicant's written claims can be summarised as follows:
  - He was born in [Town 1] in [year]. During the final years of the war, his family were displaced and moved around to several different places depending on army movements. His secondary education was severely disrupted. He was [number of] years old when the war ended in May 2009.
  - From April 2009 to 2011 they lived in [a refugee camp] in [Town 2]<sup>3</sup>. The Criminal Investigation Department (CID) and security forces would often attend this camp looking for LTTE people. They constantly made enquiries about whether the applicant and his [sibling] (who was [number of years] younger and [have a medical condition]) had done any work for the LTTE and whether they had LTTE connections and could identify any cadres. The applicant believed it was ludicrous for the CID to suspect his [sibling] and he strongly denied his [sibling]'s involvement. However this strengthened their suspicions against him. They interrogated him a number of times, abused him and threatened that if he withheld information he would be arrested and taken to jail never to see his parents again. He feared the government forces and also the Tamil militant groups working with the government, especially as there were many stories of the Tamil youths being kidnapped and having disappeared.
  - He left the refugee camp in 2011 believing that from then on he would face less harassment from the security forces. However in January 2012 they started making enquiries with some of his contacts and on a number of occasions he was taken for questioning about his association with certain Tamil males. They gave him a list of names and asked if he knew them and their whereabouts. He was also interrogated about the location of weapons and bombs. He denied any knowledge but they would continue to question him, abuse and threaten him in Sinhala and hit him.
  - These experiences left him very scared. His family tried to make arrangements for him to leave the country but they failed, so he instead moved to live with his [relative 3] to avoid the security forces. Eventually his father and [relative 3] made arrangements for him to leave Sri Lanka in October 2012.

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<sup>2</sup> Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

<sup>3</sup> I accept [variations of town 2 name] are transliterations of the same name

- He fears being harmed by the CID, government security forces and Tamil militant groups aligned with the government on account of his being a young Tamil male, because of his [sibling]'s links to the LTTE and because he is imputed to have supported the LTTE.

8. At the SHEV interview the applicant stated:

- His family is associated with the LTTE. His [relative 2] was a [leader] in the LTTE and had died a martyr in 2000 and his older [relative 1] was a supply officer for the LTTE and [suffered a medical condition] from shelling and hospitalised in 2009.
- It was not his [sibling] who was disabled and the subject of enquiries but was rather his [relative 1]. He also submitted a 'Form 1023: Notification of incorrect answer(s)' to correct his written statement to this effect.

## Factual findings

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### Identity and residential history

9. The applicant has provided documentary evidence to support his identity including his national identity card (NIC), a copy of his passport bio-page, translated birth certificates for himself, his parents and siblings, a translated version of a family registration card, a letter from his father asking the [Town 1] Divisional Secretary to confirm the family's residential history and a copy of a temporary identity card. He has also provided a consistent and plausible narrative of issues relevant to his identity. I accept the applicant's claims as they relate to his identity, nationality and receiving country. I accept he is a Tamil Hindu from [Town 1] district in the Northern Province of Sri Lanka. I find Sri Lanka is his receiving country and [Town 1 district] is his home region.
10. I accept the applicant's claims as they relate to the war period. I accept his family were displaced in 2007 and moved several places according to the army's movements. I also accept that between 2009 and 2011 they lived in a refugee camp in [Town 2].

### Details provided at Entry Interview

11. In his Entry interview [in] January 2013, when asked why he had left Sri Lanka the applicant stated that he had been helping his [sibling] who [has a medical condition]. He stated *"the CID and other people are assuming that [the sibling] was with the LTTE previously, though [they never were, being] too young for that. They are questioning me about [his sibling], that is why I am here. They are enquiring about me. They might kidnap me."* He stated the CID had been enquiring about him and taking him for enquiries from January 2012 – August 2012, that he had tried to come to Australia in August but did not make it and instead went into hiding at his [relative 3]'s house. He stated the CID would ask him if knew certain people, if he knew where they had hidden arms and other similar questions.
12. While he did state in his Entry interview and application that the CID had been questioning him about whether he knew certain people and about hidden weapons, the applicant made no mention of his [relative 2]'s or his [relative 1]'s LTTE involvement, nor of the fact that he had helped care for his [relative 1] and other LTTE members in the hospital for two months in 2009 or that that was the reason for the CID's interest in him. These details were not provided until the SHEV interview.

## **LTTE member [relative 1]**

### *Corrected details*

13. At the SHEV interview the applicant clarified that it was not his younger [sibling] who was disabled and the subject of enquiries as had been written in his application statement. He stated that was incorrect, that [all] of his [siblings] are healthy and well and that he had been referring to his [relative 1] who is his elder by [number of] years. He then submitted a 'Form 1023: Notification of incorrect answer(s)' correcting the record to his '[relative 1 variation]' who is [number of] years older. The delegate discussed with the applicant the fact that the details he details he was seeking to correct were not only provided in his written application but also in his Entry interview. The applicant denied he ever said it was his [sibling] or that he was younger. He stated there had been issues with the interpreter during the Entry interview but that the person he was referring to was his [relative 1]. I note in the applicant's correction form he refers to this person as his '[relative 1 variation]'. I am prepared to accept the applicant's correction that the person in question was his [relative 1] and I will herein refer to this person as such.
14. As to the [relative 1]'s age, I note the applicant was [age] years old at the time of his Entry interview and although he stated his [relative 1] was 'young', he did say he was [older age] years old which I accept makes the [relative 1] [number of] years older. I accept the applicant's correction that the [relative 1] is [number of] years older.

### *[Relative 1]'s injury*

15. The applicant claims his [relative 1] [suffered a medical condition] in a shelling incident in March 2009 and has provided documentary evidence of his [relative 1]'s injuries and hospitalisation. The documents indicate inter alia, that the injury occurred [in] March 2009, that his initial care management was in [named city] and that he was admitted to the [ward] of the [named] Hospital in [Town 3] (which is in the Western Province) from [specified dates in] 2009. I accept on the basis of this documentary evidence and because it is not implausible, that the applicant's [relative 1] [suffered a medical condition] and [was] hospitalised following a shelling incident in March 2009.

### *Authorities' interest in the applicant on account of [relative 1]'s LTTE involvement / Care of [relative 1] and LTTE members in hospital*

16. The applicant claims his [relative 1] had been a supply officer for the LTTE responsible for managing procurement and supply of various things including food. The applicant claims his [relative 1] was injured while in LTTE service and that he then cared for his [relative 1] and other LTTE members in hospital for two months from April 2009. He claims he helped by changing dressings, getting them water, moving patients and informing families if somebody died. He claims that when he went to look after his [relative 1] he was told he had to take care of the other patients as well and that some of the patients were also LTTE. He claims that his [relative 1]'s parents could not help because they were in an army controlled area near [Town 1] at the time and his own parents could not help because his father had injured his hand and his mother was looking after him.
17. I have a number of concerns about the applicant's claims. The applicant claims he was looking after his [relative 1] in hospital for two months from April 2009. However he has stated he was living in a refugee camp in [Town 2] from April 2009 – 2011 and according to the documentary evidence he provided, his [relative 1] was in hospitalised in the [named]

unit in [Town 3] hospital (in the Western Province) from April – August 2009. I have concerns about the applicant's claims that he was caring for his [relative 1] who on the evidence, at the time claimed, was in hospital in the Western province, while he was living in a refugee camp in the Northern Province.

18. I have concerns about the authenticity of a letter the applicant has provided from [a different] Hospital regarding the father's injury. The letter states his father had *"...injured his left hand, due to shell blast [in] August 2009 during the civil war"*. I have concerns about the authenticity of the letter given the war ended in May 2009 and therefore if his father was injured in August it could not have been 'during the civil war'. I note also that this injury timeline does not accord with his inability to assist the applicant's [relative 1] in April 2009.
19. I have concerns about the plausibility of the applicant, not quite [age] years old at the time and just before the end of the war being sent to help his [relative 1] in the manner claimed. I do not consider it plausible that the applicant was assisting in the way he described which included informing families when a patient had died.
20. The applicant claims that from the end of 2011 and throughout 2012 until he went into hiding, the authorities repeatedly questioned him about the identities and locations of the other LTTE members in the hospital. I have concerns about the plausibility of this taking into account that the applicant has demonstrated there are hospital records of the patients hospitalised at that time. I do not accept the authorities would not have already identified these people through other means, including the hospital records. Additionally, country information indicates that in the aftermath of the war Sri Lankan authorities maintained efforts in seeking out and arresting, detaining and remanding in rehabilitation centres both high and low-profile LTTE members as well as non-members they suspected had assisted the LTTE, even if their involvement was purely peripheral.<sup>4</sup> Many civilians were also questioned or monitored towards the end of the conflict. However, on the evidence, neither the applicant's [relative 1] (nor the other purported unidentified LTTE members) were ever formally arrested, detained or sent for rehabilitation. In 2011-12, on the evidence, the applicant's [relative 1] was living in the community until he left without telling the applicant where he was going. On the evidence I am satisfied his [relative 1] was never detained, formally charged or arrested or taken for rehabilitation and while he was called for questioning in 2011 or 2012, I am not satisfied his [relative 1] was suspected to be an LTTE member or supporter. I also do not accept that the other LTTE members patients would not have already be known to the authorities or that they would not have been detained at an earlier time. I am also satisfied on the basis of the applicant's evidence at the SHEV interview that the applicant does not claim this [relative 1] disappeared having come to harm from the authorities.
21. I have concerns about the fact that the applicant made no mention prior to the SHEV interview, of his [relative 2] or [relative 1] being in the LTTE, his care for his [relative 1] and other LTTE members in hospital or the authorities' interest in him for these reasons. The applicant has provided explanations for this. He stated at the SHEV interview that he had hidden the fact that his [relative 1] was in the LTTE during his Entry interview because he thought it would be perceived as a terrorist organisation and that he would be sent back. In responding to the delegate's decision, in his submission to the IAA the applicant reiterated with some elaboration that he had been too afraid to disclose all the relevant information in his first interview and that there had been interpreting issues. He further stated he had been

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<sup>4</sup> Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report Sri Lanka", 18 December 2015 CISEC96CF14143

told to answer only 'yes' or 'no' and that as his mental state had been affected from having spent [number range] days in an open boat he was not well focussed or ready to provide details and that he had not had legal representation at that time.

22. I note there were segments of the Entry interview where the applicant was asked yes or no questions however I reject the assertion that this applied to the relevant discussion about why he had left Sri Lanka during which the applicant mentioned his [relative 1] had been falsely imputed as an LTTE member. Prior to this discussion I note he was asked to provide this answer in brief, however when he provided his response, the interviewing officer asked follow-up questions and the applicant was given the opportunity to provide more detail. I also reject the assertion that he was asked to limit his answers at the SHEV interview. I note also that the discrepancies in the applicant's evidence arise not only from omissions or a lack of detail but from positive conflicting statements. For example, he explicitly stated in the Entry interview that his [relative 1] was 'never' in the LTTE and explicitly stated in his SHEV application that it was ludicrous that his [relative 1] was suspected of LTTE involvement.
23. As for the quality of interpreting, apart from the [relative 1 variation] issue (which I note flowed both through the Entry interview and SHEV application), no specific examples of interpretation error or omissions have been provided. Having listened to the audio recordings of both the Entry and SHEV interviews, I note there was clarification between the interpreter and the applicant at times however I am satisfied the applicant understood the questions and that his answers corresponded to those questions. I am satisfied the applicant's evidence was not affected by interpreting issues.
24. Regarding the applicant's mental state at the interview being affected by the boat journey, I note he applicant arrived in Australia [in] November 2012 and he was not Entry interviewed [until] January 2013, more than [number of] weeks after arrival. While I accept the boat journey was tough, I do not accept the boat journey or its impacts offer a satisfactory explanation as to why he omitted details about his LTTE [relative 1] and the hospital assistance in his Entry interview. Nor do I accept the boat journey is a satisfactory explanation for the omission and conflicting information in his SHEV application statement, which was prepared more than [number of] years later in February 2016.
25. I have considered that the applicant was frightened about disclosing LTTE links at the time of the Entry interview, and that he did not have legal representation at that time. However he was represented at the application stage so I do not accept that a lack of legal representation explains why he made no mention of his LTTE [relative 2] or [relative 1] in his SHEV application.
26. In addition to the earlier non-disclosure of the [relative 2]'s and [relative 1]'s LTTE involvement, there are other discrepancies in the details provided at the SHEV interview compared with those in his application. In his application he stated his problems with the authorities started while he and his [relative 1] were interned in the refugee camp in 2009-2011 during which time he was repeatedly interrogated and he had considered it ludicrous, given his [relative 1's] age and handicap that he was suspected. However at the SHEV interview he made no mention of having problems while he was in the refugee camp. Rather, he stated the authorities' interrogations of him started in late 2011 and were focused on the injured members he had helped in hospital. Additionally, it was the applicant's evidence at the SHEV interview that it was a convention that 16 year old boys were required to join the LTTE so given this evidence and the applicant's correction that his [relative 1] is [number of] years older and therefore would have been [age] during this period, I question

why in his written statement he indicated his [relative 1]'s age of [age] (along with his disability) made it ludicrous that the CID would suspect his [relative 1] of LTTE involvement.

27. I accept the applicant's [relative 1] [suffered a medical condition] in a shelling incident in March 2009. However I have outlined above my concerns about the applicant being able to assist his [relative 1] in [Town 3] while he was living in the refugee camp in the north, about the authenticity of the father's hospital letter; about the plausibility of the applicant helping the [relative 1] and other LTTE members in hospital in manner claimed, about the plausibility of the authorities needing information from the applicant about LTTE members hospitalised towards and just after the end of the war, about the omission of these claims from the Entry interview and SHEV application, about the discrepancies in terms of when and where the problems started and the focus of the CID's questioning and about why given his [relative 1] was already of the required LTTE recruitment age of 16, the applicant described the CID's interest in him as ludicrous on account of his age. In light of these numerous concerns, I do not accept the applicant's [relative 1] was an LTTE member and nor do I accept the applicant helped his [relative 1] and LTTE members in hospital or that he was ever questioned, threatened or harmed by the authorities in relation to his [relative 1's] actual LTTE involvement or other LTTE patients. I do not accept the applicant was of interest to the authorities for these reasons.
28. The applicant claims he was interrogated for information at the end of 2011 and every two to three weeks or 15 – 20 times from January – August 2012. He claims he would be called or taken to the army camp nearby where he would then be interrogated, beaten and then released around four to five hours later. He claims he was last beaten by the authorities on [a date in] August 2012. He claims this last time was different because he was given a final warning and threatened that they would torture, detain him at [a named] Camp and kill him next time if he did not provide the information. Following this father tried to arrange his departure but he was not able to leave at that time. He claims he then went into hiding at his [relative 3]'s house from [date] August 2012 – [date] October 2012 when he departed the country.
29. Many Tamils, particularly in the north and east of Sri Lanka reported being monitored, harassed, arrested and detained by security forces under the Rajapaksa government.<sup>5</sup> The applicant has been consistent in his claims that he was repeatedly taken for enquiry between January and August 2012. I am prepared to accept that the applicant was monitored and harassed during that period and that he was taken for enquiry and questioned about whether he may be able to identify LTTE cadres or had any knowledge of stored weapons. However I find that the applicant has embellished on the level and seriousness of the authorities' interest in and mistreatment against him between January – August 2012. I do not accept the authorities continually interrogated the applicant, who was only just [age] when the war ended for information. While there were young (even child) LTTE members, on the evidence the applicant had not provided any useful information to the authorities in any incidence of questioning and I have not accepted he had cared for LTTE members in hospital. From the applicant's overall evidence I am not satisfied the authorities' interest in him went beyond his profile as a young Tamil male in the Northern province. I am prepared to accept he was questioned about his [relative 1's] injuries, but given the [relative 1] was never taken into formal custody I do not accept the applicant was continually interrogated, harmed and threatened about him.

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<sup>5</sup> DFAT, "DFAT Country Information Report – Sri Lanka", 18 December 2015, CISEC96CF14143



30. I consider it implausible that the authorities would continue to regularly interrogate, beat and threaten the applicant, hold him for four to five hours and release him without ever detaining him overnight, charging, arresting or taking him for rehabilitation, particularly if they considered he was withholding information or protecting LTTE members. I do not accept the authorities carried out this sustained behaviour who had consistently been of little value to them and against whom they had not taken into longer term custody. I do not discount that the applicant suffered harm during some of these enquiries however I do not accept the authorities' interest in the applicant was to the level claimed or that it escalated in August 2012 to threats of detention, torture and death. I am satisfied the authorities' interest in him was low-level and this is supported by the fact that he was issued a passport [later in] 2012.
31. The applicant claims he was not able to attend an office to apply due to his problems with the authorities and that instead, his father and [relative 3] arranged for someone to come to the house, collect the forms and payment. I have taken this into account however I do not accept that someone who had been of sustained interest to the authorities for the past several months on account of LTTE links and had been threatened with detention, torture and death and was actively avoiding the authorities by hiding at his [relative 3's] house would engage in any process governed by the Sri Lankan authorities, particularly a process which signals an intention to leave the country. Nor do I accept that someone with the claimed level of interest from the authorities would be issued a passport.
32. The applicant claims the authorities including the CID and army and the Tamil militant groups have visited his family a number of times since his departure including four to five times while he was in immigration detention and [number of] times since his release from detention, including most recently, four to five months prior to the SHEV interview (around March-April 2016). He claims on that occasion the authorities informed his parents that people were being sent back from Australia and that they would get him at the airport upon return or if they missed him they would have to hand him over when he returned to the area. I have accepted the applicant was being monitored so is not implausible that the authorities visited his parents following this departure in the context of routine monitoring, and because the authorities became aware that he was no longer residing in that household. I am not satisfied however, that their post-departure enquiries are indicative of the authorities' interest in the applicant escalating following his departure. I do not accept the applicant was suspected of being an LTTE member or supporter in the months leading up to his departure and the applicant's own evidence is that the authorities became aware he departed to Australia. Given these factors I consider it implausible that the authorities or Tamil militant groups have continued to harass the family for information about his return seven to eight times. I find this to be an embellishment and I do not accept there have been any recent visits to the family. Given the country information below about the processing of returnees and engagement airport authorities have with law enforcement agencies including in the applicant's home region, it would be unnecessary for them to rely on such avenues for information about the applicant's return. I do not accept they visited his parents to tell them that if they missed the applicant at the airport his parents would need to hand him over when he returned.

#### **Other LTTE links**

33. I am prepared to accept the applicant's [relative 2] was a [leader] in the LTTE and died in 2000. However the applicant does not claim and there is no other evidence before me to indicate that his [relative 2's] LTTE service, rank or combat death have caused problems for the applicant or any of his family members. There is no evidence before me that he or any

member of his family have ever been questioned about her, either before or after his departure from Sri Lanka. On the evidence I am not satisfied the applicant is of interest to authorities on account of his connection to his [relative 2].

34. The applicant was asked at the SHEV interview if he had done anything duties of activities for the LTTE. He responded that when he was in school they were required to celebrate Martyrs day in November and to commemorate Black Tigers (suicide bombers) in May. He stated when he was [age] old when the Red Cross was present he used to hold the Tamil Eelam flag displaying the Tamil areas of Sri Lanka. He stated the army were present and took video coverage. When asked if any other family members were involved in the LTTE he stated it was compulsory to support the LTTE such as by doing small services to for them like moving their people to safe places and providing food. The applicant stated this occurred in the LTTE controlled areas in which most Tamils were required to interact with the LTTE's military and civil administration as a matter of course.<sup>6</sup> I am prepared to accept this claims, however as with my finding on the impact of the [relative 2's] profile, I am not satisfied these activities have previously led to any interest in the applicant from the authorities and I am not satisfied they would cause the applicant to be of interest upon return.

### **[Medical condition]**

35. I note the applicant has previously taken medication and received treatment for a [medical condition]. He states he has a [specific medical detail]. I note he also stated that he was taking medication for this in Sri Lanka until April 2012, several months before he left. There is no indication before me that he stopped the medication because he was denied medical treatment or otherwise unable to obtain it. There is no other information before me, medical or otherwise about the applicant's condition. No information has been provided which indicates the applicant would face particular risks as a result of this upon return or that it has influenced his fear of returning. I am not satisfied the applicant has raised any claims on the basis of this condition and I have not considered it in the assessment below.

### **Refugee assessment**

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36. 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**

37. 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

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<sup>6</sup> DFAT, "Thematic Report - People with Links to the Liberation Tigers of Tamil Eelam", 3 October 2014, CIS2F827D91260

- 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.

38. Since the applicant's departure, the situation for Tamils in Sri Lanka has changed considerably. Information before the delegate indicates that developments in Sri Lanka's political landscape at the national and provincial levels are significant and indicative of a more positive future for Tamils. The Rajapaksa government was defeated in January 2015 and replaced with the Sirisena government. The August 2015 Parliamentary elections (which were deemed credible by international commentators) enabled political participation for a number of Tamil political parties operating under the umbrella of the Tamil National Alliance (TNA), who is now formally in opposition. DFAT assesses that Tamils have a substantial level of political influence and their inclusion in political dialogue has increased since Sirisena came to power in 2015.<sup>7</sup>

39. DFAT assesses that under the Sirisena government, the monitoring and harassment of Tamils in day-to-day life has significantly decreased. Tamil community members reportedly describe a positive shift in the nature of interactions with authorities and feel able to question or object to monitoring or observation activities.<sup>8</sup> The Sri Lankan government is still sensitive to the potential re-emergence of the LTTE<sup>9</sup> but country information does not indicate that Tamils are currently at risk of persecution in Sri Lanka purely on account of their race, nor when they originate from, or reside in, an area that was previously controlled by the LTTE.<sup>10</sup> It no longer supports a finding that Tamil ethnicity of itself imputes LTTE membership or a pro-LTTE opinion, even when combined with other factors such as gender, age or place of origin.<sup>11</sup> That is, it does not support that the applicant would be imputed with LTTE membership or support or a pro-LTTE opinion on the basis of his being a young Tamil male from the Northern province.

40. In terms of discrimination, Tamils do maintain there continues to be systematic discrimination in university education, government employment, other matters controlled by

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<sup>7</sup> DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143; DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED850AD105

<sup>8</sup> DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143; DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED850AD105

<sup>9</sup> UK Home Office, "Country Information and Guidance, Sri Lanka: Tamil separatism (version 2.0)", 19 May 2016, OGD7C848D17

<sup>10</sup> UNHCR, "Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012 UNB0183EA8; UK Home Office, "Country Information and Guidance, Sri Lanka: Tamil separatism (version 2.0)", 19 May 2016, OGD7C848D17; DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143; DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED850AD105; United States Department of State, "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320

<sup>11</sup> UNHCR, "Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012 UNB0183EA8; United States Department of State, "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320; UK Home Office, "Country Information and Guidance, Sri Lanka: Tamil separatism (version 2.0)", 19 May 2016, OGD7C848D17; DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143; DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED850AD105

the government, land ownership and surveillance and harassment. Significantly, though, the information before me also refers to a number of positive developments for Tamils in the country politically and socially, as well as government initiatives to address these concerns. While I do accept there remains a degree of discrimination and harassment in the country towards Tamils<sup>12</sup>, having regard to the information before me I am satisfied it is low level, continues to reduce, and would not constitute serious harm, whether separately or cumulatively.

41. The UNHCR indicated in its most recent but now dated 2012 guidelines that *‘former LTTE combatants or cadres’* and *‘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’* as well as *‘persons with family links or who are dependent on or otherwise closely related to persons with’* those risk profiles may give rise to a need for international protection.<sup>13</sup> However the UNHCR also advised at that time that this depended on the specifics of the individual case. More recently the UK Home Office advised that there is an onus on Tamils to demonstrate that they will face on return ill-treatment from the current, as opposed to the previous, government. The UK suggests that persons may be at risk if they are perceived to be an LTTE sympathiser, a threat to the integrity of Sri Lanka due to a significant role in relation to post-conflict Tamil separatism within the diaspora and/or a renewal of hostilities within Sri Lanka, are journalists or human rights activists critical of the government, are individuals who gave evidence to the ‘Lessons Learned and Reconciliation Commission’ implicating the authorities in alleged war crimes, and / or are persons whose name appears on a computerised "stop" list accessible at the airport.<sup>14</sup>
42. While I accept the applicant’s [relative 2] was in the LTTE I am not satisfied the authorities have ever had, or would have upon return, an interest in the applicant on account of this. While I accept his [relative 1] was seriously injured during the war and [now has a medical condition] and that the applicant was subject to periodic questioning and monitoring in 2012, I am satisfied the authorities did not suspect him to be an LTTE member, supporter or sympathiser. I am satisfied that at the time he departed Sri Lanka the authorities’ interest in the applicant was low-level and even taking into account that he departed illegally and the authorities made post-departure enquiries, I am not satisfied their interest in the applicant had or has escalated. There is no evidence before me of the applicant having been engaged in (or suspected thereof) Tamil separatism, or activities which would impute him as an LTTE sympathiser, or threat to the state and nor does he fit within the other risk profiles identified by the UK. Even taking into account the previous times the applicant was detained, questioned and that I accept he was subject to low-level monitoring, I am not satisfied that his profile was (and would be upon return) such that he would come to adverse attention for LTTE connections upon return.
43. I accept the applicant may face discrimination as a Tamil upon return but I do not accept it will amount to serious harm. I am not satisfied that the applicant faces a real chance of harm now or in the reasonably foreseeable future on the basis of actual or imputed LTTE links arising from his [relative 2’s] LTTE membership, his activities as a child and his family’s activities during the war, his [relative 1’s] injuries any interest the authorities had in the [relative 1], his Tamil race, his origins from [Town 1] (being in the Northern Province), his gender or age (noting that he is a relatively young man), even taking into account his previous

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<sup>12</sup> United States Department of State, "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320

<sup>13</sup> DFAT, "DFAT Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143

<sup>14</sup> UK Home Office, "Country Information and Guidance, Sri Lanka: Tamil separatism (version 2.0)", 19 May 2016, OGD7C848D17

detention, questioning and monitoring and the post-departure enquiries. Even when all of these factors are considered cumulatively, I am not satisfied they bestow on the applicant a profile which indicates he will be at risk upon return of being detained under the operation of the Prevention of Terrorism Act (PTA), or that he otherwise has a well-founded fear of persecution from the authorities nor Tamil militant groups nor others, on the basis of any imputed LTTE support or links, because he would be considered a threat to the integrity of the Sri Lankan state, or for any other reason.

44. I accept that should the applicant be returned to Sri Lanka, he would be identifiable to authorities at the airport as a failed or returning asylum seeker from Australia who departed Sri Lanka illegally.
45. I accept that the applicant will be subject to police investigations to confirm his identity and to address whether he would be trying to conceal his identity due to a criminal or terrorist background or trying to avoid court orders or arrest warrants. I accept this may involve interviewing him, contacting the police in his home in [Town 1], contacting his claimed neighbours and family and checking criminal and court records. I also accept he will be checked against the authorities' sophisticated intelligence on former LTTE members and supporters, including 'stop' and 'watch' electronic databases.<sup>15</sup>
46. I accept that during the airport processing procedures, the applicant's personal history may be revealed however on the evidence, I am not satisfied the authorities would uncover anything of concern. I am satisfied that through these processes it will be revealed that although he was monitored and questioned he was never formally charged, arrested, detained overnight or taken for rehabilitation. I am satisfied that through these checks it would be determined that he has no LTTE links, no outstanding criminal matters, nor any other adverse profile of interest to the authorities. While I accept he has been subject to detention, physical harm and harassment in the past, for the reasons given above I am satisfied on return to the country he would again be assessed as having no adverse profile. I am satisfied on the evidence that he would not be listed in the stop and watch lists, and would not be identified as someone trying to conceal their identity, or who has outstanding court orders/arrest warrants or a criminal/terrorist background.
47. I note the applicant has claimed that he would be an easy target for extortion by authorities due to his returning after earning money in a 'rich western country'. On the basis of the information before the delegate including that which the applicant and his representative provided, I do not accept this claim is supported by country information.
48. Between 2008 and 2015, over 1,500 asylum seekers were returned from Australia to Sri Lanka as well as thousands from the US, Canada, the UK and other European countries, the majority of which have been Tamil. Of the thousands of returnees who have returned since 2009 there have been allegations of torture or mistreatment.<sup>16</sup> However DFAT assesses the

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<sup>15</sup> DFAT, "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143; DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105; UK Home Office, "Country Information and Guidance, Sri Lanka: Tamil separatism (version 2.0)", 19 May 2016, OGD7C848D17

<sup>16</sup>International Truth & Justice Project Sri Lanka (ITJP), "Silenced: survivors of torture and sexual violence in 2015", 7 January 2016, CIS38A801275; DFAT, "DFAT Country Report – Sri Lanka", 16 February 2015, CISC96CF1164; Sri Lanka Mirror, "10 Tamils arriving in Lanka arrested", 4 March 2015, CXBD6A0DE6065; Tamil net, "16 Batticaloa Tamils arrested within last 100 days at Colombo airport", 3 May 2015, CXBD6A0DE6027; Tamil net, "SL military continues to arrest Tamils from East returning from Middle-East", 31 May 2015, CXBD6A0DE7540; Sri Lankan Mirror, "Another Tamil returnee arrested", 1 July 2015, CXBD6A0DE16698; UK Home Office, "Sri Lanka - Bulletin: Treatment of Returns", 1 December 2012, CIS28615

risk of harm for the majority of returnees is low and continues to reduce<sup>17</sup> and I am not satisfied that these reports or allegations are informative of the circumstance that would be faced by the applicant upon return.

49. DFAT and other sources considered by the delegate advise that returnees are treated according to the standard airport procedures, regardless of their ethnicity and religion and that they are not subject to mistreatment during processing.<sup>18</sup> Reporting from the UK indicates that as the LTTE is now considered a spent force and there have been no terrorist incidents in Sri Lanka since the war's end, the Sri Lankan government's objective has shifted to identify activists in the Tamil diaspora who are working for Tamil separatism and to destabilise the Sri Lankan state.<sup>19</sup> I am satisfied that the applicant would not be perceived as an LTTE sympathiser, a journalist or human rights activist critical of the government or a threat to the integrity of the Sri Lankan state. I am not satisfied there is anything in the applicant's profile that would cause concern for the authorities, either during the airport processing procedures or after he has returned to his home region. I do not accept the applicant faces a real chance of extortion returning from a 'rich western country' or that he otherwise applicant faces a real chance of harm as a failed / returnee asylum seeker even considering his other profile factors and his history with the authorities.
50. The applicant has committed an offence under the Immigration and Emigration Act 1988 (I&E Act) in departing Sri Lanka other than via an approved port of departure. According to DFAT, returnees who have been charged under the I&E Act can remain in police custody at the airport for up to 24 hours after arrival and 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. Information from DFAT does not indicate that detention is selectively applied, that returnees are processed in any discriminatory manner or that those who committed an offence under the I&E Act face a higher risk of torture or other mistreatment.<sup>20</sup>
51. I find that while being questioned and processed at the airport the applicant will face a brief period of detention. The information before me indicates there is a possibility he may be detained more than a day while awaiting an opportunity to appear before a magistrate. While I am satisfied that this would be dependent on the timing of his arrival and that such a period of detention is likely to be remote, I accept that if the applicant's detention did extend to more than a day that it may occur in a Sri Lankan prison. Information that was before the delegate indicates that conditions in Sri Lankan prisons are poor,<sup>21</sup> however I am satisfied on the information that this is due to economic and resourcing conditions and old infrastructure, not a result of any systematic or intentional conduct by the Sri Lankan authorities. The country information before me indicates that any such detention would only continue until the applicant was given an opportunity to appear before a magistrate, and I find this would likely be brief. I also consider the information about the low risk to returnees is relevant to

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<sup>17</sup> DFAT, "DFAT Country Report – Sri Lanka", 16 February 2015, CISC96CF1164; DFAT, "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143; DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

<sup>18</sup> DFAT, "DFAT Country Report – Sri Lanka", 16 February 2015, CISC96CF1164; DFAT, "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143; DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

<sup>19</sup> UK Home Office, "Country Information and Guidance, Sri Lanka: Tamil separatism (version 2.0)", 19 May 2016, OGD7C848D17

<sup>20</sup> DFAT, "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143; DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

<sup>21</sup> DFAT, "DFAT Country Report – Sri Lanka", 16 February 2015, CISC96CF1164; United States Department of State, "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320; DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

this period. I have noted above the applicant previously received medication and treatment for a [medical condition] but there is no other information before me and on the evidence I am not satisfied it is a vulnerability which would elevate the risk of harm. Having regard to all these circumstances, even having regard to the generally poor prison conditions, I am not satisfied that the conditions will be such as to rise to the level of a threat to his life or liberty, or to significant physical harassment or ill treatment or otherwise amount to serious harm for the applicant.

52. Penalties for illegally departing can include imprisonment of up to five years and a fine of up to 200,000 LKR. There is nothing before me to indicate that the applicant would be perceived and treated as anything other than a mere passenger on the people smuggling vessel, who DFAT assesses, the Sri Lankan authorities tend to view as victims.<sup>22</sup> According to the Sri Lankan Attorney-General's Department, returnees who were merely passengers on a people smuggling venture have not been given custodial sentences for their illegal departure, but rather fined on a discretionary basis, with fines payable by instalment.<sup>23</sup>
53. Country information indicates the applicant, if he pleads guilty to departing illegally, will be required to pay a fine (which he can do by instalment) and will subsequently be released. In most cases if a person pleads not guilty, they will be granted bail on their own personal surety immediately by the magistrate, or may be required to have a family member act as guarantor and wait for their family member to collect them.<sup>24</sup> The applicant has not claimed and there is no other evidence in the referred material or submission to indicate he would not be granted bail on his own personal surety, or that he would not have a willing family member to act as guarantor if required. I note the applicant's parents and [relative 3] are all living in Sri Lanka. 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/facilitator of a boat venture. There is no general requirement to report to Police or Police stations between hearings.<sup>25</sup>
54. On the evidence before me, I find that the applicant will be issued a fine and released. If the applicant pleads not guilty, he will be released on his own personal surety. If he did need a family member (such as a parent or his [relative 3]) to act as guarantor and to come collect him, I am satisfied that my findings above regarding his not facing a real chance of serious harm while detained in waiting would also apply in this circumstance.
55. On the evidence I am not satisfied the applicant could not pay a fine, even if by instalment. There is no information before me which indicates the applicant will be prevented from obtaining employment or earning a livelihood upon return. I note he has family members in Sri Lanka who may be able to assist. I am not satisfied that the payment of a fine amounts to hardship which would threaten his capacity to subsist, or otherwise amount to serious or

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<sup>22</sup> DFAT, "DFAT Country Report – Sri Lanka", 16 February 2015, CISC96CF1164; DFAT, "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143; DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

<sup>23</sup> DFAT, "DFAT Country Report – Sri Lanka", 16 February 2015, CISC96CF1164; DFAT, "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143; DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

<sup>24</sup> DFAT, "DFAT Country Report – Sri Lanka", 16 February 2015, CISC96CF1164; DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

<sup>25</sup> DFAT, "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143; DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

significant harm, or that being held in detention for a short period at the airport, or possibly a nearby prison, cumulatively amounts to serious harm.

56. Information from DFAT does not support that the I&E Act and associated procedures are selectively enforced or that they are applied in a discriminatory manner. I find that the process leading to charge, conviction and punishment for breaching the relevant sections of the I&E Act would be the result of a law of general application applied to all Sri Lankans who depart illegally and does not amount to persecution for the purpose of ss.5H(1) and 5J(1) of the Act.
57. I accept the applicant may face discrimination as a Tamil upon return but I do not accept it will amount to serious harm. Overall, even taking into account the authorities' previous questioning and monitoring and post-departure enquiries, I am not satisfied the applicant will face a real chance of serious harm arising from: being a family member of a former LTTE combatant (his [relative 2]), real or imputed LTTE links relating to his [relative 1] nor from his being a young Tamil male from the North who left illegally and sought asylum in Australia. Even when I consider all these factors together, in the whole of the applicant's circumstances, I am not satisfied that the applicant's circumstances cumulatively give rise to a well-founded fear of persecution.

#### **Refugee: conclusion**

58. 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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59. 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**

60. 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.
61. I accept there are reports of mistreatment against Tamils accused of having LTTE links and against asylum seekers who have been returned to Sri Lanka. However country information does not support that returnees from Australia are extorted having been perceived as returnees who earned money in a 'rich western country'. DFAT reports that the risk of torture or mistreatment for the majority of returnees is low including for those suspected of an



offence under the I&E Act.<sup>26</sup> I am satisfied that even taking into account his [relative 2]'s LTTE membership, his activities as a child and his family's activities during the war, his [relative 1]'s injuries and the authorities interest in this, the questioning, monitoring and harassment he experienced including in 2012, and the post-departure enquiries, he was not of interest to authorities on account of LTTE links or being a threat to the Sri Lankan state when he departed Sri Lanka. I found above that even though the applicant would be returning to Sri Lanka with this history and as a young Tamil male from [Town 1] in the Northern Province who left illegally and sought asylum in Australia, he would also not be suspected of being an LTTE member, supporter or sympathiser or a threat to the Sri Lankan state upon return. Having regard to this and the fact that as noted above, the country situation has changed considerably under the Sirisena government, I have not accepted that he would face a real chance of harm from the authorities, nor from any other groups or individuals upon return. Based on the same information, and for the same reasons, I am also satisfied that there is not a real risk that he would face harm amounting to either serious or significant harm for these reasons.<sup>27</sup>

62. I have accepted there remains a degree of discrimination and harassment in the country towards Tamils, but having regard to the information before me I am satisfied it is low level, continues to reduce, and would not constitute serious harm, whether separately or cumulatively. I am also satisfied that any discrimination or harassment the applicant face upon return would not manifest in a way that would arbitrarily deprive the applicant of his life, result in the death penalty being carried out against him. Nor am I satisfied it would result in torture, cruel or inhuman treatment or punishment or degrading treatment or punishment intentionally inflicted. I do not therefore accept that he will face discrimination, harassment or monitoring in Sri Lanka for any reason in that would amount to significant harm for the purposes of s.36(2A). Having regard to the changed security conditions in Sri Lanka I am also satisfied the applicant does not face a real risk of significant harm arising from generalised violence.
63. As to his treatment under the criminal justice system as a person who departed illegally and any questioning and detention he may experience in relation to this, or his return as a failed asylum seeker, as set out above, I find that the applicant will be issued a fine and released, or if he pleads not guilty, he will be released pending his court date. While I have found above that the applicant will not receive a custodial sentence, I have considered the conditions the applicant may face if he is held in a nearby prison while waiting to come before the magistrate, or waiting for his family to act as guarantor and collect him. Information that was before the delegate indicates that in general, prison conditions in Sri Lanka do not meet international standards due to a lack of resources, over-crowding and poor sanitation. I have noted above the applicant previously received medication and treatment for a [medical condition] but there is no other information before me and on the evidence I am not satisfied it is a vulnerability which would elevate the risk of harm. I am not satisfied that the applicant, if subject to a short period of detention awaiting collection or prosecution under the I&E Act would be subject to the death penalty or otherwise arbitrarily deprived of their life nor tortured. The evidence also does not indicate there is an intention to inflict pain or suffering or severe pain or suffering or cause extreme humiliation. In light of this, I am not satisfied that the applicant would be subject to acts or omissions which would constitute significant harm, as defined under s.36(2A) and s.5 of the Act during his time in detention or prison while awaiting his Magistrates Court hearing or collection by a family member.

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<sup>26</sup> DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

<sup>27</sup> MIAC v SZQRB (2013) 210 FCR 505

64. In terms of punishment, I have found above that rather than receiving a custodial sentence, the applicant will likely receive a maximum fine of up to 200 000 rupees. I note that the government allows payments to be made in instalments and I am not satisfied he would be unable to pay the fine. I am not satisfied that questioning and the imposition of such fine would amount to significant harm under the definition in s.36(2A).

65. I have taken all the applicant's circumstances into account and have considered how his various profile factors and claims interact or compound affecting the risk upon return. However even taking into account the applicant's cumulative circumstances and profile, I do not accept he would face a real risk of significant harm. I do not accept that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Sri Lanka, there is a real risk that he will suffer 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.