



**Australian Government**  

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**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA18/05259

Date and time of decision: 11 January 2019 17:42:00  
M Wei, 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

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### Visa application

1. The referred applicant (the applicant) claims to be a Tamil from [Town 1], Northern Province of Sri Lanka. He arrived in Australia [in] September 2012 and lodged an application for a Safe Haven Enterprise Visa (SHEV), Subclass 790 on 30 March 2017. A delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa on 30 June 2018. The delegate found that the applicant did not have a well-founded fear of persecution and there was not a real risk of significant harm upon his return to Sri Lanka.

### Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
3. The IAA received a written submission from the applicant's representative by email on 30 July 2018. The submission states that the applicant's brother who was arrested alongside with him has successfully sought asylum in [Country 1]. This is new information. The applicant's evidence to the delegate was that he had one brother in India and the rest of his siblings were in Sri Lanka. Reading the submission overall, I consider this is more likely to be an inadvertent inclusion by the representative rather than a genuine claim made on behalf of the applicant, as the submission appears to be based on some kind of pro forma template and does little in addressing the applicant's own circumstances. Even if these were claims made on the applicant's instructions, there is no explanation or suggestion to satisfy the IAA as to why this information could not have been provided to the delegate or to satisfy the IAA that it is credible information. Further, the matters relating to any claimed past mistreatment to the applicant and the whereabouts of his siblings were discussed at the SHEV interview. The applicant was represented at the primary level and was on notice that he might not have another opportunity to provide further information if his application were refused. The new information here is merely vague assertion and lacks any further detail or substance. The applicant has not satisfied me this new information could not have been provided to the delegate before the primary decision was made. Neither has the applicant satisfied me that this is credible personal information, in the sense of capable of being believed, which was not previously known and had it been known, may have affected the consideration of his claims. I am not satisfied that the requirements in s.473DD(b) are met. In the circumstances, I am also not satisfied there are exceptional circumstances to justify considering this new information.
4. Parts of the submission refer to country information generally without citing sources or providing extracts or copies of any report and it is unclear whether there is any new information. In the middle of the submission there is an assertion that it enclosed a number of unspecified articles that report on Tamil refugees being kidnapped, detained and tortured as recently as in 2016 and 2015, but no such articles have been enclosed and the email message to the IAA does not state there was any document attached apart from the submission itself and the IAA representative form. I consider again this statement was more likely inadvertently included. I have decided not to invite the applicant to provide these reports as they may have already been before the delegate or if not, they are unlikely to meet the requirements in s.473DD. The submission on its face does not suggest that any of the reports could not have been provided to the delegate as it refers to incidents that occurred in 2016 and 2015, or that they contain credible personal information. Furthermore,

I have a large amount of country information already before me that are from reputable sources, and some are more recent. In so far as to the reference to new country information that was not before the delegate, the provision of new information does not comply with the IAA Practice Direction for Applicants, Representatives and Authorised Recipients. There is no copy or extract parts of the information provided, neither does the submission provides an explanation why the information could not have been given to the delegate. The applicant is represented by a registered migration agent who would be aware of the practice requirement. A copy of the Practice Direction was also sent to the applicant by the IAA on 3 July 2018. The applicant was also represented before the delegate. In the circumstances, I have decided not to accept the new country information under s.473FB(5).

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

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

- He is from [Town 1], Northern Sri Lanka. He is a Tamil of Hindu religion.
- He voluntarily joined the Liberation Tigers of Tamil Eelam (LTTE) in 1986 and underwent training in 1986-1987. His duties included providing food and supplying weapons. He participated in combat twice. His brother and a first cousin were also members of the LTTE. His brother is now in India. His [sister's] husband was killed by the Sri Lankan army.
- In 1990, there was shelling in his village and he was given [specified duties by the LTTE]. It was public knowledge that he was an LTTE member.
- During his time in India he worked undercover for the LTTE.
- In 1995, he travelled from India to Sri Lanka to see [another] sister, who had been [harmed]. He took part in one battle and sustained an [injury], which eventually resulted in [specified impairment]. He returned to India for [treatment].
- He and his family returned to Sri Lanka in 2004 and sought to regain possession of a farm land that he inherited from his father. The authorities would not return the land. [Number] of his cousins were shot and killed over this dispute in 2007. After this incident, he gave up asking for the land back and remained a low profile within [Town 1] to ensure his safety.
- In 2008, while helping a friend in a paddy field, he was detained by the Special Task Force (STF) after they discovered LTTE posters in a nearby house. He was detained, beaten and tortured for eight hours and then released. After this, he was accused of being an LTTE sympathiser. He went into hiding. The Sri Lankan army would interrogate his family about his whereabouts.
- Towards the beginning of 2010, he was informed by former LTTE colleagues that he was being actively sought out by the authorities. He remained in hiding.
- In 2012 he was working in a [specified] shop when the Sri Lankan Army personnel attempted to push him into a vehicle. They left after his Muslim boss who held influential power came out and people were watching.
- He left Sri Lanka fearing he would be abducted and killed. The authorities have been looking for him since he left Sri Lanka.

- He fears harm due to his actual and perceived LTTE involvement and his brother's LTTE involvement. He fears that his [specified injury] would confirm to the authorities that he was involved in the LTTE. He also fears harm because he left Sri Lanka illegally.

## Factual findings

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6. The applicant arrived in Australia [in] September 2012. A brief arrival/biodata interview was held on 12 September 2012. A further transferee interview (transferee interview) was held in Nauru on 17 December 2012. The applicant also lodged a protection visa application in Nauru in April 2013 (Nauru visa application). He was interviewed later in September 2013 in relation to his Nauru application (Nauru visa interview). The applicant lodged his SHEV application (SHEV application) on 30 March 2017 and the SHEV interview took place on 28 February 2018.
7. A handwritten letter from a pastor of a church was included in the Nauru application. This document was not reproduced in the applicant's SHEV application (unlike the news article referred to below) and no English translation has been provided. I give it no weight for the purpose of considering this application.
8. The applicant has provided copy of identity documents to prove his identity. He has claimed that he is a Tamil from [Town 1], born in [year]. His wife and a child still live in [Town 1]. [Number] of his siblings are in Sri Lanka and one brother is in India. His parents are deceased. I accept this. I find that the applicant is a national of Sri Lanka and that Sri Lanka is the applicant's receiving country for the purposes of the Act.
9. The applicant stated that his family moved to India in 1990 and that he returned to Sri Lanka in 1995 for a brief visit before going back to India again for [specified treatment] and later returned to Sri Lanka with his family in 2004, though as discussed below I do not accept he participated in a battle fighting for the LTTE. I accept that the applicant was in India between 1990 and 2004, apart from a short visit to Sri Lanka in 1995.
10. The applicant stated in the SHEV application that his brother and a first cousin were members of the LTTE. He did not know his brother's role in the LTTE. His brother is now in India. I accept that his brother and a cousin were involved in the LTTE. However, the applicant's evidence does not suggest and I do not accept any of them were of high profile in the LTTE. He also stated at the SHEV interview that his [sister's] husband was killed by the Sri Lankan army though the applicant's evidence does not expand on how and why he was killed. I am willing to accept that his sister's husband was killed by the army. However, on his evidence, I do not accept her sister's husband was in the LTTE. There is no credible evidence to suggest that the applicant faced any difficulties with the authorities because of his relationship to these relatives, and I find so accordingly.
11. The applicant claimed in the SHEV application that he joined the LTTE in 1986 and undertook training between 1986 and 1987, which encompassed small arms training and intensive fitness training. He joined [a specified division] and was a lower rank LTTE member. His duties entailed supplying weapons and food, though he was called upon to fight in two battles against the Sri Lankan army, in 1990 and 1995. In 1990 he was given [specified duties] during the intensive shelling in his village. It was public knowledge that he was an LTTE member. He worked for the LTTE undercover during his time in India. In 1995 he travelled to Sri Lanka by boat to visit his sister who had been [harmed]. While there he was called upon by the LTTE to fight in a combat. He was injured [by] a shrapnel piece, which resulted in [specified injury].

He returned to India for treatment and he was let go by the LTTE because of his disability and the fact his brother was already with the LTTE.

12. In the SHEV application, the applicant did not claim he faced any problem from the authorities because of his past LTTE involvement from 2004 (when he returned to Sri Lanka) to 2008 (until the incident involving the STF). Rather he claimed that he and his family were involved in a land dispute with the Sri Lankan authorities and the PLOTE, a paramilitary group. He stated that a parcel of farmland he inherited from his father was occupied by the Sri Lankan army and the PLOTE when they were in India. After returning to Sri Lanka, he made many attempts to get this land back but the authorities would not cooperate and return the land to them. He stated that in 2007 members of the PLOTE shot and killed two of his cousins over this land dispute, and after this incident, he gave up asking for his land back and to ensure his safety he remained with a low profile within [Town 1]. He further stated that in 2008, he was detained by the STF because the STF discovered some LTTE propaganda posters in a house near a paddy field he was working at the time. He was released after eight hours (see below).
13. The applicant further stated in the SHEV application that, after the STF incident in 2008, the Sri Lankan army would accuse him of being a LTTE sympathiser and interrogate his family about his whereabouts. He went into hiding and tried his best to keep a low profile. Towards the beginning of 2010 he began seeing individuals that he worked with in the LTTE. His friends were telling him that the Sri Lankan army and their intelligence unit were questioning previous LTTE members about his past. He believed that someone had doxed him into the authorities as being a LTTE member and that he was being actively sought out by the authorities. He claimed that he narrowly escaped when the army personnel attempted to arrest him in 2012 while he was working in a [specified] shop.
14. As set out below, I find the applicant's evidence has been largely inconsistent over time and aspects of his claims are also not plausible.
15. The applicant also stated in the transferee interview that in 1987 he was forced to join an organisation 'ENTLF' but he was let go without joining. This evidence is not consistent with his later evidence that he joined the LTTE in 1986 and was with LTTE until 1990 when he went to India. The applicant did not refer to this claim in his SHEV or Nauru applications or the subsequent interviews. I do not accept he was forced to join ENTLF in 1987.
16. In his SHEV application, the applicant stated that he travelled back to Sri Lanka from India in 1995 to visit his sister "Y" after she was [harmed] and Y has been mentally unwell after this. He stated that it was during this visit he took part in a combat for the LTTE, and a shrapnel piece [injured him]. So he went back to India for treatment. However, in his Nauru application, the applicant stated that his sister Y was [harmed] in [2008] when [number] members of the PLOTE came to his house searching for him because of the land dispute.
17. The applicant stated in his SHEV application that because his [injury] and also his brother had already been in the LTTE, the LTTE let him go in 1995. This is inconsistent with his evidence at the SHEV interview, in which he stated despite his [injury] the LTTE did not let him go. He was given other things to do while he was in India before returning to Sri Lanka in 2004, for example, taking food items to the Indian border and sending them to the LTTE. He did this irregularly among other people. It could be once a week, five times a week or 20 times a month. He further stated at the SHEV interview that because of this work in India, the Q branch of the Indian Police found about it and started looking for him. This was the reason why he left India. This again is not consistent with what he stated in the visa application. He

stated in the SHEV application that he returned with his family to Sri Lanka in 2004 because the government had announced a cease fire and they hoped the problems and hostilities had ceased. They also did not want to face the risk of being deported back to avoid going through checks and interrogation.

18. The applicant's evidence in respect of the land dispute is also not consistent. At the transferee interview the applicant stated that after he had forced people to leave his land and they did finally, person N from PLOTE started coming to his house looking for him and threatened the family, whereas in the SHEV application the applicant claimed that he gave up seeking to have the land back after his [cousins] were killed in 2007. Significantly, in his SHEV application and at the SHEV interview, the applicant gave no indication that he or his family had experienced any further problems in relation to the land issue after he claimed to have given up asking for the land back as a result of his cousins' death in 2007. This is again inconsistent with his previous evidence given at the transferee interview and relating to his Nauru application that a range of incidents had occurred after 2007 and as late as [March] 2012, including that one of his brother was detained for [number] days and lost the use of his [arm] due to the beating by members of the PLOTE in 2008, the PLOTE also came to his house in October 2011 and caused injury to his [wife], or N threatened him [in] March 2012. The applicant also stated explicitly in the visa application that 'I' inherited the farmland from his father and that 'I' made many attempts to request their land back and 'I' gave up asking for the land back after 2007. However, when concerns were put to the applicant by the delegate as to his claims that he had been in hiding, the applicant then stated that he did not approach the authorities, rather his mother did so. I consider these matters all give rise to serious concern as to the veracity of the claimed land dispute.
19. The applicant has provided two certificates of death (with translations) and a news article (with translation) in support of his claim about the incident relating to his [cousins]. The certificates appear to be for [males] with the same parents and detail in both cases that the person died [in] April 2007 in [Village 1], [Town 1], from gunshot injuries from an unidentified gunman. The news article is undated but it refers to an incident of this kind occurring in [Village 1] in which some persons had come to the house of these brothers saying that they were taking them away for questioning, and relatives later found the brothers on the street after shots were heard. I note that the brothers' father's name carries the same patronymic as does the applicant's father's name. Even accepting that the two deceased were the applicant's cousins, the news article says nothing as to why they were taken away for questioning and by whom and how they got shot dead. I am not satisfied this evidence corroborates the applicant's claim that his [cousins] were killed because of the land dispute he and his family had with the PLOTE or authorities or the cousins' death was somehow connected to the applicant.
20. The applicant claimed in the SHEV application and SHEV interview that he was detained for eight hours and severely beaten by the STF in 2008 while working on a friend's paddy field because the STF had discovered LTTE propaganda posters in a house adjoining the field. He stated that his head was smashed against the wall and became unconscious so could not remember what happened after that. He later found out that the owner of the house had been killed. However, in his Nauru visa application, he stated that an LTTE poster was found outside his house and all the men in his house were taken for interrogation. He again gave a different story in his Nauru visa interview, during which he stated that he was arrested and taken to an uninhabited house on his way travelling to a house and nearby there was a banner having logos. He also claimed that he received hospital treatment due to the beating inflicted on him. I consider the inconsistency in his evidence raises concerns as to the reliability of this claim. When the delegate put to the applicant why the SFT personnel would

have let him go if he were considered to be a person of interest in 2008, he replied that it happened in public. There were people around. He was seriously beaten and lost consciousness. They left him probably because they thought he was dead. I find it is unconvincing that the STF personnel would have left him there even he lost consciousness if they considered him a LTTE suspect.

21. The applicant was extensively questioned and concerns were put to him by the delegate during the SHEV interview as to how he was able to evade capture during his time in Sri Lanka after returning from India given his claimed LTTE profile. The applicant stated in the visa application that he lived in the same home address in [Town 1] from 2004 (when he returned from India) to August 2012 (when he left for Australia, though from 2007 he began hiding in periods to avoid detection by authorities. At the SHEV interview he stated that he only come home once a month and would stay at different places. He also claimed that he had no interactions with the authorities during that period and never went through any checkpoints because he was in hiding. He further claimed that he was able to evade capture by the army when he was home because his dog's barking would alert him that the army was coming and he was able to escape. He stated that in 2007 and 2008 he just avoided them within a few minutes because of his dog. The applicant provided no meaningful explanation when this implausibility (he could have evaded being captured due to his dog's barking) was put to him by the delegate. I also note he stated in the visa application that there was a Sri Lankan army camp situated near his house. I do not consider it is plausible that he was able to repeatedly evade capture in this way if the authorities were seeking to arrest him.
22. As stated in his SHEV application, the applicant had been working in a [specified] shop in [Town 1] for over one year from February 2011 until May 2012. His evidence when describing the incident in 2012 suggests that he was in the front of the shop sometimes. I do not accept was in hiding as claimed.
23. The applicant's account of his further encounter with the authorities in 2012 also lacks credibility. It is not plausible the army personnel who came in an armoured vehicle and sought to take him would, if he was a suspected LTTE cadres, have let him go simply because he worked for a Muslim boss who had connection to a former [politician], because the shop was next to a Mosque or because people were watching and the army officers did not want to make a scene. I do not consider it is plausible that the applicant could have been able to evade being arrested or detained in the circumstances as described if he were ever being sought out by the authorities.
24. The applicant stated in general terms in his SHEV application that he was not made aware that the information he provided before or during the entry interview would be used for the purposes of assessing his claims for protection. While formal visa application did not take place until a later stage and some caution should be exercised in relation to omissions by the applicant of matters at the entry interview, I do not consider this explanation should account for significant discrepancies with later claims if the claims were genuine. The applicant also stated that he was not forthcoming about his association and involvement with the LTTE in his Nauru application because he was fearful that he would be indefinitely detained like other Tamils before him. He also attributed this omission of his LTTE involvement to his lack of trust in authorities, because the Australian authorities had kept him in Nauru and leaked his details in February 2014. The delegate in the SHEV interview also put to the applicant his concerns as to his failure to disclose his LTTE involvement (among other things) in the first interview and the transferee interview. The applicant again referred to fearing of being detained. I have some reservations about this explanation. I note that his Nauru application was prepared by an Australian registered migration agent and this agent also attended the Nauru protection

visa interview. I consider that the applicant had the opportunity to seek professional advice about such matters if he indeed had any such concerns. Further, the leaking of certain personal information occurred afterwards in 2014.

25. The transferee interview took place approximately three months after the applicant's arrival in Australia and he had an earlier biodata interview (from which I have not drawn any adverse inference) shortly after he arrived. He was assisted by a legal professional at the time of making the Nauru application. I am not satisfied that the inconsistency in his evidence and aspects of implausibility could be attributed to the lack of legal representation at the time of the transferee interview or fear or mistrust. I am not satisfied that such inconsistencies and implausibility can be accounted for by the applicant's low level of education (grade [number]), his work as a [occupation], or by the manner in which the delegate did not approach the questioning at the SHEV interview in a chronological order. The applicant's responses to questioning at the SHEV interview overall suggest that he understood the questions asked and the issues put to him, and the matters which the applicant has, at different times, presented involved rather than matters which might more plausibly be confused such as exact dates or months.
26. Having weighed the applicant's evidence overall, I am not satisfied that applicant has provided a reliable or credible account of his and his family's past experience/circumstances. I do not accept the applicant was ever a member of the LTTE or that he helped the LTTE while he was in India. I do not accept the injury [occurred] as a result of his serving in combat with the LTTE. I do not accept that [another] sister was [harmed] by the army. I am not satisfied that the applicant and his family were involved in a land dispute with the PLOTE, person N or the Sri Lankan authorities after he returned to Sri Lanka in 2004 and that two of the applicant's cousins were killed as a result. I do not accept that his two cousin's death had any connection to the applicant, or the applicant faced any difficulties because of these [cousins]. I do not accept his mother and other family members were threatened or harmed from PLOTE, N or anyone else. I do not accept that he was ever in hiding after returning from India in 2004 and before he left for Australia in 2012. I do not accept that the applicant was arrested by the STF in 2008. I do not accept that the applicant was sought out by the authorities as a suspected LTTE member, or that he was dobbed in by ex-LTTE members. I do not accept that the authorities searched for him in his home or that his mother was threatened on those occasions. I do not accept that the claimed incident in [specified] shop occurred. I do not accept that he was sought out after he left Sri Lanka or that his wife and children had to move to her village because the authorities had been looking for the applicant. I do not accept that the Sri Lankan authorities, the PLOTE, or anyone else had any interest in the applicant before he left Sri Lanka in 2012 or he was wanted after his departure.

### **Refugee assessment**

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27. 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

28. 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.
29. I accept that the applicant is a Tamil from Northern Sri Lanka. The applicant was in India from 1990 to 2004 with a brief visit to Sri Lanka in 1995. I accept his brother and a cousin were members of the LTTE.
30. According to DFAT, Sri Lanka had a population of 21.2 million in 2017. The majority of the population are Sinhalese. Tamils are the second largest ethnic group, having a population of 3.1 million (15.4 percent of the total population) as per the most recent 2012 censuses. Tamils comprise 93 percent of the population in the north and 39 percent of the population in the east. Sinhalese and Tamil are the two official languages, with Tamil used mostly in the north and east. English is widely spoken.<sup>1</sup>
31. Country information indicates that the Sri Lanka authorities remain sensitive to the potential re-emergence of the LTTE throughout the country. Nevertheless, recent information does not support the claim that Tamils in general are perceived to have links to the LTTE solely due to their ethnicity or their residence in northern Sri Lanka. Under the leadership of President Sirisena since 2015, the Sri Lankan government has taken a range of measures in addressing Tamil issues, including post conflict reconciliation, transitional justice, good governance, anti-corruption and economic reform, though the progress has been slow. The UK Home Office in its 2017 report also states the government's present objective is to identify Tamil activists in the diaspora who are working for Tamil separatism and to destabilise the unitary Sri Lankan state and it is persons who are perceived to be a threat to the state through having or being perceived to have a significant role in relation to post-conflict Tamil separatism would be of adverse interest to the authorities.<sup>2</sup> DFAT assesses that high profile former LTTE members (including LTTE's former leadership and former members suspected of terrorist or serious criminal offences during the conflict or of providing weapons to the LTTE) face the highest risk of monitoring, arrest, detention or prosecution. DFAT cannot verify claims that people have been arrested and detained because of their family connections with former LTTE members, but understands that close relatives of high profile former LTTE members who are wanted by Sri Lankan authorities may be subject to monitoring. DFAT assesses Sri Lankan

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<sup>1</sup> DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064

<sup>2</sup> UK Home Office, "Country Police and Information Note, Sri Lanka: Tamil separatism, version 5.0", June 2017, OGG6E7028826; DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064

authorities may monitor members of the Tamil diaspora returning to Sri Lanka, depending on their risk profile.<sup>3</sup>

32. While surveillance of Tamils in the north and east continues today, overall the monitoring of Tamils in day-to-day life has decreased significantly under the current government. Some members of the Tamil community reported they felt more empowered to question monitoring activities. Having considered the overall situation of Sri Lanka and the treatment of Tamils, DFAT also assesses that Sri Lankans of all backgrounds face a low risk of official or societal discrimination based on ethnicity, including in relation to access to education, employment or housing. It notes that members of the Tamil community reported discrimination in employment, particularly in relation to government jobs, but assesses that limited Tamil appointments are a result of other factors including education level and language constraints not official discrimination.<sup>4</sup>
33. It is reported that human rights issues remain a significant concern in Sri Lanka and security forces continued after the war to harass some civilians with impunity and resort to violence and excessive force to extract confessions. DFAT, after having considered the reports on torture from other sources, also states the risk of torture perpetrated by security forces has decreased since the end of the civil conflict and is no longer state-sponsored. It also reports that the Prevention of Terrorism Act (PTA) has been suspended since 2017.<sup>5</sup> The information before me overall suggests that while it has not been removed, the risk of torture faced by the majority of Tamils in general is remote unless arrested, detained or interrogated by the authorities for criminal or mostly terrorism related offences including those under the PTA. The information also indicates that the risk of detention faced by Sri Lankans or Tamils generally under the PTA is small.<sup>6</sup>
34. DFAT also reported that the number of incidents of extrajudicial killings, disappearances and abductions for ransom, has significantly reduced since the end of the conflict. DFAT notes that systematic abductions using white vans, often leading to enforced disappearances, occurred during the conflict and post-conflict periods. It assesses that reports of a small number of abductions involving white vans in 2016 and 2017 referred to incidents where police did not follow protocol during arrest. DFAT understands that disappearances are no longer common.<sup>7</sup>
35. While no medical evidence was provided, I accept the applicant had an injury [which] left him with permanent disability. DFAT notes that reports of people with conflict related scarring having attracted adverse attention were dated from the immediate end of the conflict and DFAT is unaware of more recent evidence of people being detained because of scarring alone.<sup>8</sup> The applicant has had the injury since 1995. He was in Sri Lanka for approximately eight years after the injury, including during period of conflict, the period towards the end of the war and in its immediate aftermath. There was also an army camp near his house. He was not suspected in the past of having been involved in the LTTE due to this injury. I note overall

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<sup>3</sup> DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> Some of the reports are: International Truth & Justice Project Sri Lanka (ITJP), "Silenced: survivors of torture and sexual violence in 2015", January 2016, CIS38A801275; ITJP, "Joseph Camp", March 2017, CISED50AD3592; Freedom from Torture, "Sri Lanka – Update on torture since 2009", May 2016, CIS38A8012881; Office of the United Nations High Commissioner for Human Rights, "Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Sri Lanka", 22 December 2016, CIS38A80123313; DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064

<sup>7</sup> DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064

<sup>8</sup> Ibid.

there is an absence of recent reporting from other sources that scarring remains a source of suspicion. Country information before me no longer supports that having scaring itself would lead to being perceived to have fought for the LTTE. I am not satisfied there is a real chance his [injury] would bring him to the adverse attention of the authorities now or in the reasonably foreseeable future.

36. I accept the applicant's sister's husband was killed by the army and his brother and a cousin were members of the LTTE. I also accept that [cousins] of his were shot and killed. The applicant's evidence does not suggest that any of his LTTE relatives had a significant role in the LTTE. Neither does his evidence suggest that he or any other members of his family were harmed in the past because of the involvement of these relatives in the LTTE or the death of his brother in law and [cousins]. I have otherwise found that the applicant was never involved in the LTTE and was not of adverse interest to the Sri Lanka authorities or anyone else. On his evidence he was from an army occupied area, rather than an LTTE one. Having considered the information discussed above, while there continue to be instances of arrests, detention, torture or other mistreatment of Tamils, in the applicant's circumstances, I am not satisfied that, if he were to return to Sri Lanka now or in the reasonably foreseeable future, there is a real chance he would come to the adverse interest to the Sri Lankan authorities or anyone else or face a real chance of being arrested, detained, interrogated or mistreated or otherwise harmed because of his Tamil ethnicity, his residence in Northern Sri Lanka, his relatives LTTE involvement and/or his and his family members' past experiences.
37. Further, I am also not satisfied that the applicant's above profile, when considered cumulatively with him being a returning Tamil asylum seeker who has departed Sri Lanka illegally and spent a number of years in India and Australia and whose certain personal data may have been leaked would give rise to a real chance of persecution.
38. Entry and exit from Sri Lanka is governed by the Immigrants and Emigrants Act (I&E Act). Returnees are subject to identity checks at the airport. DFAT understands detainees are not subject to mistreatment during processing at the airport.<sup>9</sup> Given the authorities' lack of interest in the applicant in the past, and there is nothing to suggest that the applicant would now come to the adverse interest to the authorities, I am satisfied that it is very unlikely that the applicant would be subject to anything more than administrative screening upon his return to Sri Lanka.
39. I accept that the applicant was part of the 2014 data breach incident in which the names of persons in Australian immigration detention were briefly made available online, but there is no evidence before me to indicate that any information about the applicant's claims to protection or any other matter were made public in this way.
40. The Sri Lankan government has, over recent years, consistently said that refugees are welcome to return to Sri Lanka. DFAT reported that over 2400 Sri Lankan nationals departed Australia for Sri Lanka between 2008 and 2017, and the figures also show that over 1500 failed asylum seekers were returned from Australia between 2008 and 2015, indicating there has been a larger number of returnees from Australia in recent years between 2016 and 2017. Many others also returned from the US, Canada, the UK and other European countries. Most returnees are Tamil and chose to return to the north. There have been relatively few allegations of torture or mistreatment.<sup>10</sup> While DFAT also assesses the authorities may monitor members of the Tamil diaspora returning to Sri Lanka depending on their risk profile,

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<sup>9</sup> Ibid.

<sup>10</sup> DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064; DFAT, "DFAT Country Information Report - Sri Lanka", 24 January 2017, CISED50AD105

and returning asylum seekers in the north, there is lack of recent reports to support the claim that Tamil returnees who have sought asylum abroad and have lived abroad for some time are perceived to have anti-government or pro LTTE opinion or suspected of having involvement in LTTE or pro separatism activities or face a real chance of being of adverse interest to the authorities for this reason.

41. The DFAT report refers to a UNHCR survey in 2015 which reported that 49 per cent of refugee returnees in the north had received a visit at their homes for a purpose other than registration, with almost half of those visits from the police. However, it also reported that only 0.3 per cent of refugee returnees interviewed by UNHCR (including UNHCR-facilitated and voluntary returns) in 2016 indicated that they had security concerns following their return. The DFAT report states while the government has reportedly decreased systematic surveillance of returnees, it is aware of anecdotal evidence of regular visits and phone calls by the CID to failed asylum seekers in the north as recently as 2017.<sup>11</sup> DFAT notes that refugees and failed asylum seekers face practical challenges to successful return to Sri Lanka and refugees and failed asylum seekers reported social stigma from their communities and in some communities, people resent the financial support provided to refugee returnees. DFAT assesses that reintegration issues are not due to failure to obtain asylum, but rather due to the employment and accommodation difficulties they may face.<sup>12</sup>
42. I accept that the applicant may face some monitoring on return. However, as I have found that the applicant did not have involvement with the LTTE in India, and as I do not accept that he was sought out by the Indian authorities or Sri Lanka authorities, and as the applicant's evidence does not suggest he has involved in any activities in Australia would likely to bring him to the adverse attention of the authorities, I am not satisfied on the basis of the applicant's profile that any monitoring on return would be for any prolonged period or lead to a real chance of any other harm or that it would amount to serious harm. The applicant still has his wife and child in Sri Lanka, and a number of siblings. The applicant was working before he left Sri Lanka. He has also found work in Australia. Given the applicant's demonstrated ability to find employment, and given that he would be returning to a Tamil area, and given the low levels of discrimination and/or stigma faced by Tamils and/or returning asylum seekers, and given that he has not himself indicated that his family or persons in his home area have an adverse view of such returnees, I am not satisfied there is a real chance that his capacity to subsist will be threatened or that he would suffer any kind of harm that would amount to serious harm. Overall, I am not satisfied that there is a real chance that any treatment or difficulty the applicant may face on return in his circumstances would amount to serious harm.
43. I accept the applicant left Sri Lanka by boat for India previously and more recently in 2012 for Australia, as such he may be considered as having departed Sri Lanka illegally and charged under the I&E Act. I accept he may be questioned and detained at the airport for processing by authorities for up to 24 hours with the possibility that he may be further held at an airport holding cell for up to two days, should a magistrate not available in time. As noted above, detainees are not subject to mistreatment during processing at the airport. According to DFAT, a guilty plea will attract a fine, which can be paid by instalment, and the defendant is free to go. Where a returnee pleads not guilty, the magistrate will usually grant bail on the basis of personal surety or guarantee by a family member. On the information before me, while a fine from LKR 3,000 (approximately AUD 25) for a first offence to LKR 200,000

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<sup>11</sup> DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064

<sup>12</sup> Ibid.

(approximately AUD 1,670) may be imposed (which can be paid by instalment),<sup>13</sup> I am not satisfied there is a real chance that the applicant will be subject to a custodial sentence for departing Sri Lanka illegally, merely as a passenger, though more than one time. If the applicant pleads guilty, he would then free to go. Should the applicant plead not guilty, I am also not satisfied there is a real chance that the applicant would not be able to secure bail on personal surety or guarantee by a family member (if such matters arise), as bail is usually granted. Additionally, the country information does not support that the I&E Act is discriminatory on its face or that it is applied or enforced in a discriminatory manner. I am not satisfied that the questioning, temporary detention, imposition of a fine or any other costs associated with possible bail or the court appearances if they arise and any other treatment he may experience as a result of illegal departure would constitute serious harm or persecution to the applicant.

44. In light of my consideration of the above, I am not satisfied the applicant faces a real chance of persecution for any of the reasons claimed, if he were to return to Sri Lanka now or in the reasonably foreseeable future.

#### **Refugee: conclusion**

45. 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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46. 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**

47. 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.
48. I accept the applicant might face some short period of monitoring, some social stigma and/or some practical challenges in resettling upon return as a returning asylum seeker. I also accept he is likely subject to questioning, various checks, possibly a fine and a brief period in detention at the airport and other administrative processes and costs as a returnee and as a result of his illegal departure. However, taking into account his past history and personal

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<sup>13</sup> Ibid.

circumstances, I am not satisfied the treatment the applicant may face would amount to significant harm as defined. I am not satisfied the applicant faces a real risk of death penalty, arbitrary deprivation of life or torture. I am not satisfied such experiences would involve an intention to inflict severe pain or suffering, pain or suffering that could be reasonably regarded as cruel or inhuman in nature, or an intention to cause extreme humiliation for the purposes of the definition of torture, cruel or inhuman treatment or punishment or degrading treatment or punishment.

49. I have otherwise found there is a not real chance the applicant would face any harm. As real chance and real risk involve the same threshold, I am not satisfied there are substantial grounds for believing that, as a necessary and foreseeable consequence of being returned from Australia to Sri Lanka, there is a real risk that the applicant will suffer harm, including significant harm.

#### **Complementary protection: conclusion**

50. 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**

In this Act, unless the contrary intention appears:

...

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

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

...

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

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

but does not include an act or omission:

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

...

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

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

...

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

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

...

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

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

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

...

#### **5H Meaning of refugee**

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

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

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

...

### 5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
  - (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
  - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
  - (c) the real chance of persecution relates to all areas of a receiving country.

Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.

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

### 5K Membership of a particular social group consisting of family

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

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



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

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

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

#### **5L Membership of a particular social group other than family**

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

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

#### **5LA Effective protection measures**

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

...

#### **36 Protection visas – criteria provided for by this Act**

...

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

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

...

*Protection obligations*

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

*Determining nationality*

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