



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

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA18/05426

Date and time of decision: 28 February 2019 17:09:00  
R Adolphe, 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 Sri Lankan Tamil. He arrived in Australia [in] April 2013 as an unauthorised maritime arrival. With the assistance of a migration agent allocated to him under the Primary Application Information Service (PAIS), he made a valid application for a Class XE, Subclass 790. Safe Haven Enterprise Visa (SHEV) on 8 August 2016.
2. On 31 July 2018, a delegate of the Minister for the Immigration and Border Protection (the delegate) refused to grant the visa. The delegate accepted the applicant was a Tamil from the Eastern Province of Sri Lanka who had faced some minor issues with the Sri Lankan authorities, but did not accept that he was accused of being a supporter of the Liberation Tigers of Tamil Eelam (LTTE), that the authorities continued to pursue him, or that his brother was abducted by the authorities. The delegate concluded the applicant was not a person in respect of whom Australia has protection obligations for the purposes of s.36 of the *Migration Act 1958* (the Act).

### Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the Act.
4. On 27 August 2018 the IAA received a submission (IAA submission) from the applicant's authorised representative and a statement made by the applicant (IAA statement). To the extent that the submission and the statements restate the applicant's claims, make arguments in support of those claims and express concern regarding the delegate's decision, including the fact that a different case officer decided his case to the one who interviewed him, I have had regard to it. I have noted that the applicant has stated that since receiving the decision he is very depressed and has not been able to sleep or do anything. I understand that the visa refusal may have caused the applicant some distress however his reaction to the delegate's decision is not relevant to my assessment.
5. The IAA submission refers to a 2 August 2018 Migration Alliance article. This is new information. A quote has been included but the Migration Alliance article itself has not been provided to allow any meaningful assessment of the information. The submission indicates the quote attributed to the Migration Alliance is commentary of a Federal Circuit Court of Australia (FCCA) judgment, and an extract attributed to that judgment has also been included. The information has been provided in the context of argument that disagrees with the delegate's assessment as to the applicant's credibility. The submission urges the IAA to consider the comments taken from the article as well the observations attributed to the Court stating that it is very relevant for the consideration of the applicant's case. I note that the text quoted and purported to be an extract from the judgment is not actually contained in the FCCA matter referenced. Nevertheless I have considered whether there are any reasons for accepting and considering the information around the issue of credibility assessments. The submission does not particularise which elements of the applicant's claims he believes have been rejected on account of an unfair credibility assessment and the decision record notes there are more than one. The quoted paragraphs are essentially opinion on the assessment of applications by the tribunal, specifically perceptions on the frequency of the disbelief of applicants by the tribunal, and the likelihood of applicants "making it all up". It is of no real practical assistance in this case. Even if I were to exercise my discretion under to accept the

new information, I am not satisfied that in this particular case there are any exceptional circumstances to justify considering the new information.

6. The IAA statement claims that Tamil young people have been interrogated by government forces and are really suffering after they have been forcibly sent back to Sri Lanka. It further states that government forces, agencies and stooges of the government come to know about Tamils being deported and they are following them to the villages threatening and demanding money and extorting. The IAA submission also mentions this claim and states that it indicates there are still continued human rights violations occurring in Sri Lanka. The applicant has not provided any identity details of these young Tamil people or provided any information regarding any association to them or how he obtained knowledge of these experiences. Very little meaningful information has been provided and I regard the applicant's claims as little more than bald assertions. I have before me a range of information from credible reliable sources regarding the situation for Tamil asylum seekers returning to Sri Lanka. I have considered whether there are any exceptional circumstances to consider these new claims but I am not satisfied that there are any.
7. A word document with the title "Current Country information articles" was also provided to the IAA on 27 August 2018. In addition to a copy of Special Rapporteur report, the document contains copies of two articles which were not before the delegate, and are new information. Apart from the inclusion of the author of one, the document does not identify the publications from which the articles emanate or when they were published. The applicant was provided with information relating to the giving of new information to the IAA and the requirements of the Practice Direction, as was the representative, a Registered Migration Agent who prepared the submission. The contents of the articles report on the situation for a certain Tamil asylum seeker returning to Sri Lanka. There has been no indication that the applicant has any personal connection to this person or that their personal circumstances are similar. I am satisfied that I have a range of credible sources in the review material that report on the situation for returning asylum seekers including Tamil males returning from Australia. Even if I were to exercise my discretion under s.473FB of the Act and accept the articles, I am not satisfied that there are any exceptional circumstances to justify the consideration of the information.

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

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8. The applicant's claims can be summarised as follows:
  - He is a Tamil male of Hindu faith from the Eastern Province of Sri Lanka
  - In 1992 his father was shot and killed by the Criminal Investigation Division (CID). The CID informed the family the Liberation Tigers of Tamil Eelam (LTTE) had killed his father.
  - The CID also shot and killed his [relative].
  - His brother was abducted by the CID.
  - In 2003 his mother died of a heart attack.
  - Between 2003 and 2009 he lived in an orphanage and an Internally Displaced Persons (IDP) camp.
  - In 2010 he was arrested by the CID and taken to prison. He was questioned and tortured on LTTE suspicions. His sister engaged the assistance of persons from the International Organisation for Migration (IOM) who secured his release.

- In 2012 he was caught in a CID round up and taken to a location in the jungle. He was tortured and questioned regarding LTTE suspicions. Two of his friends who were also detained, tried to escape and were shot. In the chaos of the shooting the applicant escaped into the jungle and hid for two weeks.
- He stayed with a friend in [City 1] and hid before engaging people smugglers and departing Sri Lanka illegally by boat.
- The CID have targeted his family and questioned them about his whereabouts since he left Sri Lanka.
- His brother has been arrested and tortured in 2017 by the CID in attempt to obtain information of his whereabouts.

## Factual findings

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9. The applicant contends that the interpreter provided at the SHEV interview did not do a proper interpretation. The applicant has not provided any examples of misinterpretation of his evidence. The Department provided an accredited interpreter in the Tamil language for this interview. At the beginning of the interview the delegate asked the applicant if he could understand the interpreter to which he confirmed he could. He was asked if he consented to the use of the interpreter to which he stated he did. The delegate told the applicant to indicate to her during the interview if he had any problems understanding the interpreter. I have listened to the audio of the SHEV interview and it is not evident that the applicant experienced any problems with the interpretation. A Registered Migration Agent attended the interview with the applicant and it was not raised at interview or in the lengthy post interview submissions that the applicant had concerns with the interpretation. I am not satisfied the applicant was prevented from effectively putting forward his claims at the interview.
10. The applicant's claim as to his identity and nationality has been consistent since he has arrived in Australia. He participated in interviews with the Department of Immigration / Home Affairs in Tamil and he has provided copies of identification documentation including National Identity Card (NIC) and birth certificate. I accept the applicant is a [age] year old Tamil male from the Eastern Province of Sri Lanka. I am satisfied that Sri Lanka is the receiving country for the purposes of this review.
11. The applicant has provided an untranslated copy of his father's death certificate. At interview the interpreter confirmed with the delegate the document stated the cause of death in 1992 is listed as *"gunshot from LTTE"*. The applicant has consistently denied that he or any of his family including his father were members of the LTTE, assisted the LTTE or were supporters of the LTTE. In his arrival interview and written statement the applicant claimed that his father was murdered by the CID and they then informed the family that he was killed by the LTTE. The applicant did not explain, nor is it apparent to me, why the authorities would kill his father and then state the LTTE were responsible. I have had regard for the fact the applicant was only [age] years old at the time of his father's death and his knowledge of the circumstances are likely to be largely, if not wholly, reliant on information given to him from others, however even in taking this into account I am unpersuaded by the applicant's claim that the authorities killed the applicant's father for imputed LTTE links.
12. His written evidence also states in general terms that his [relative] was also killed by the CID. The applicant has not elaborated on his [relative's] death or provided any further detail or circumstances. On the evidence before me I do not accept his [relative] was killed by the CID.

13. The applicant's written evidence states that his brother [A] was abducted by the CID in early 2003 for reasons of suspected LTTE links and released after one month. This is broadly consistent with information provided at arrival interview in which he stated his brother had been detained in 2003, although on this occasion he stated this had been by the military and not the CID. At the SHEV interview the applicant told the delegate that the period [brother] was missing was only five or six days, which is quite different to the one month stated in his written evidence.
14. There was confusion in the interview regarding the applicant's family composition. Sibling details in his SHEV application were consistent with that provided in his arrival interview. In the information provided in his application he stated that he has [a number of brothers and sisters]. The applicant informed the delegate at interview that [one of the brothers] was not in fact his brother but was his "[cousin]" and clarified that he was the son of his mother's [relative]. I do not accept this is true given that he stated that [the stated brother] is a maternal cousin but his surname is the same as the applicant and the applicant's father.
15. At SHEV interview the applicant also told the delegate that [brother A] was abducted a second time in 2011 and has not been seen since. This information had not previously been provided. The delegate asked the applicant what had been done to find his brother to which he meagrely stated that his sister had made some efforts. Given the seriousness of the claim, I find it surprising that this was the first time the applicant had mentioned it, particularly given his brother's 2003 abduction was a key part of his statutory declaration submitted for the purpose of his SHEV application. The delegate conveyed similar concerns in the SHEV interview and invited the applicant to provide reasons for this significant omission. The applicant had obvious difficulty doing so and reasoned only that he had just thought he would provide this information in the SHEV interview. I note that the applicant, in his statutory declaration, after having named [all] siblings, including one 'brother [A]', stated that "[all] my siblings still live in Sri Lanka". I also note that that he told the interviewer at the arrival interview that all his siblings lived in Sri Lanka and made no mention that his brother was missing.
16. The applicant stated there was an interaction between the CID and his brother [A] in 2017. The delegate pointed out that it was clearly not feasible for brother [A] to be missing if he was involved in an incident with the CID in 2017 as claimed. The applicant explained that it had not been his brother [A], but rather his "[cousin]" who he described as his mother's [relative's]. The applicant was evasive in his responses to the delegate's request for details of this relative and simply replied "he is my cousin brother". The post interview submission described this cousin as having always lived with the applicant's family. I am not satisfied with the applicant's explanations regarding the obvious issues with his evidence regarding his brother, [A]. The omission of such a significant event and the deficiencies in his other evidence around this issue has led me to conclude these claims are not credible. I do not accept that his brother, [A] was abducted in 2003 or 2011 nor do I accept that he is missing.
17. The applicant claimed that in May 2003, due to the shock from the abduction of his brother [A], his mother had a heart attack and passed away. An untranslated death certificate was provided which the interpreter confirmed in the SHEV interview indicates that the cause of death was a heart attack. At the SHEV interview the applicant also provided a document that he stated was a police report. The document is not in English and a translation to English has not been provided. He told the delegate at interview that he was unaware of the contents of the document but understands it was obtained from the police to allow the release of his mother's body from the hospital but did not explain why the police may have been involved or whether this was a standard procedure. The delegate confirmed with the applicant that his mother died of a heart attack and he did not seek to rely upon the document to support any of

his claims to protection. In the absence of a translation I am unable to verify in what context it may have been provided. I am not satisfied it supports the assertion that his mother's death was somehow linked to her son [A] I accept the applicant's mother died in May 2003 of a heart attack and consider this to be related to natural causes. I do not accept this was because she experienced a shock in the manner claimed.

18. The applicant claimed that between 2009 and 2013, he was specifically targeted and on more than one occasion suffered harm at the hands of the Sri Lankan authorities.
19. The first incident is said to have occurred in 2009. The applicant stated he was visiting his sister in [a location] and the CID came to her house at night and arrested him. He was held in a house in the jungle. They questioned him about LTTE involvement, assaulted him using batons and kicked him with their boots. After three days he was released and thrown onto the roadside. Passers-by noticed him and informed his sister who then came and took him to hospital. The applicant has not provided any medical documents to corroborate this claim.
20. His written evidence states that in those eight months after this event, whilst living in [City 1], the CID found him and questioned him around five or six times in 2009 and 2010. Contrary to this the applicant later told the delegate during the SHEV interview that he had never had any interactions with the CID in [City 1].
21. The most significant incidents from the applicant's written claims occurred in December 2010 and May 2012. In December 2010 he stated he was arrested by the CID, again whilst visiting his sister [Sibling 2], and taken to prison. He stated that he was detained for three months and endured torture. He provided specific details such as having a gun barrel held to his mouth, was denied food for three days, forced to walk on concrete whilst on his knees and subjected to officers urinating on him. He claimed his sister [Sibling 2] had contacted International Organisation for Migration (IOM) who arranged for him to be released.
22. The recount at the SHEV interview of his 2010 arrest was remarkably different. He stated that a close friend of his had informed him that his sister had been arrested and she [was] held by the CID for two days. He claimed the CID had said that they were not going to release her unless he reported to them. He told the delegate he was held in an army camp whereas his written evidence he had claimed he was in prison. The delegate noted it was unusual for IOM to assist in the release of a detainee and asked the applicant about their involvement. The applicant was unable to provide any meaningful detail of their role in his release or how this had been negotiated mentioning only that his sister had requested the IOM assist him. He made no mention of the descriptive torture that was detailed in his SHEV statement, despite the events being discussed at length.
23. The applicant stated that in May 2012 he was again visiting his sister when he was caught in a round-up of community members by the CID. He claimed he was taken into the jungle about 20-30 kilometres away and tortured with gun barrels held in his mouth. He stated that two of his friends were also detained with him. He was unconscious when his two friends made an attempt to escape but were shot and killed. He further claims that in the chaos of the shooting, he managed to escape into the jungle for two weeks.
24. I have difficulty believing the applicant's narrative of his arrests and detentions and I am not convinced that the applicant was a person of interest during this period. His shifting evidence about his interactions with the CID in [City 1] (from five or six interactions to none) is I consider indicative of the reliability of his evidence around the events around 2010-2012. The contradiction between the applicant's oral and written evidence regarding his 2010 detention

including the location of his detention and evidence regarding his experience of torture which he failed to raise at all at the SHEV interview leads me to significantly doubt the applicant is retelling a genuinely lived experience. There is no information before me that indicates IOM assisted in the release of Tamil detainees in 2010 as the applicant claims he experienced, and his evidence regarding their involvement lacked any meaningful detail.

25. The applicant's evidence regarding the 2012 detention contained less obvious inconsistencies however I found the responses he gave at interview to be rehearsed. Importantly, I am not of the view that the applicant was a person or held the profile of a person who was of interest to the authorities and have difficulty in accepting that some three years after the war had ended the Authorities had sought him out and detained him. His work history maintains that he had the same residence and the same employer between 2009 and 2013 in [City 1] and I consider that had he of been of interest to the authorities he would have been easily located. I am also mindful that there was no mention of this (or the 2010) incident in the applicant's arrival interview when the applicant first arrived in Australia.
26. Having listened to the interview and considered the applicant's other evidence, I am not satisfied that the applicant was recounting a lived experience regarding either of the claims of arrest and detention he alleged occurred in 2010 and 2012. I find the applicant has manufactured these claims for the purposes of claiming protection.
27. The applicant claimed that between May 2012 and March 2013 he worked as a [Occupation 1] and an [Occupation 2]. He claimed also to be living with a friend as he was in hiding from the authorities. In the SHEV interview the applicant told the delegate that during this time he was grabbed by the authorities and assaulted many times but he does not remember when. I do not accept that if the applicant was in hiding he was able to perform work as a [Occupation 1] and an [Occupation 2]. Moreover, In contrast to these very general claims made by the applicant relating to the period immediately before he departed to Sri Lanka, a very specific and detailed account of an event was provided at his arrival interview. He told the interviewer that he was arrested [in] January 2013 and tortured by the military for three days because the authorities suspected he was a LTTE member and he was going to prevent the Sri Lankan Independence Day. This very specific [date in] January claim was not mentioned at any stage of the SHEV application or mentioned by his legal representative. In the applicant's statement of claims he sought to correct some of the information provided during his arrival interview, however this was not part of that information. I am conscious that the arrival interview was conducted a number of years before the visa application was made and much closer in time to the claimed events. Nevertheless the applicant was clearly aware of the contents of that interview when making the visa application. Given that these claimed events would constitute his most recent experiences in Sri Lanka, it is surprising he was unable to offer more information in his application and to the delegate. I am satisfied that the applicant had sufficient opportunity to raise all of his claims during the process of his SHEV application. I am not satisfied that the applicant was arrested in January 2013 on suspicions he was linked to the LTTE or for any other reason. I am not satisfied that prior to departing Sri Lanka the applicant was a person of any interest to the authorities, or that he was suspected of any LTTE connections and I do not accept that he was concealing his whereabouts from the authorities or anyone else prior to his departure in 2013. Moreover, the applicant's evidence that he was grabbed and assaulted many times and lacked any meaningful detail and I am not satisfied that these events transpired.
28. The applicant made claims that he generally experienced mistreatment by the authorities in Sri Lanka in the post conflict period. His written evidence states that he was constantly questioned, arrested and tortured by the authorities. He stated in his SHEV interview that

when the authorities were patrolling they would note from his National Identity Card (NIC) that he originated from Trincomalee and ask him questions. He also claimed that the authorities always suspected Tamils were involved in the LTTE. It is widely documented that even in the post-war period during President Rajapaksa's government, many Tamils were monitored, subject to surveillance operations, harassed, intimidated and even detained by security forces, with LTTE involvement being at times imputed on the basis of Tamil ethnicity.<sup>1</sup> I accept that in post conflict Sri Lanka the applicant was stopped, questioned and harassed particularly when passing through security checkpoints, I consider that he experienced these difficulties as an ordinary Tamil male. I do not accept that he had any other profile that resulted in any heightened interest by the authorities. I find the applicant has exaggerated his experiences and his profile for the purposes of strengthening his claims.

29. On the basis of information contained in the review material I am satisfied that the applicant sought the assistance of people smugglers and departed Sri Lanka illegally by boat.
30. As mentioned earlier, the applicant claimed that in January 2017 the CID visited his sister and his brother [A] and questioned them about the applicant's whereabouts. He also claimed that in an attempt for the CID to obtain information about him they arrested his brother and tortured him. The applicant later clarified that these interactions involved his cousin, not his brother [A]. He has also claimed that prior to 2017 family members had been targeted and questioned on at least two or three other occasions. I do not accept the applicant was a person of adverse interest to the authorities when he departed Sri Lanka in 2013 and I do not accept that four years later the CID came in search of him as claimed. I do not accept that [A] or a cousin or anyone else has been detained and tortured in efforts to obtain information about the applicant.

### **Refugee assessment**

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31. 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**

32. 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

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<sup>1</sup> Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064



- 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.

33. I accept that the applicant is a Tamil Hindu male who hails from the Eastern Province of Sri Lanka. I accept that towards the end of the war he was displaced. I accept that in the years immediately after the war the applicant, as a young Tamil male was questioned and harassed by the authorities and that young Tamil men were treated with suspicion of LTTE links on that basis alone. However, I do not accept the applicant's encounters arose above this incidental suspicion. I do not accept he was identified as having specific LTTE links or that he was a person of interest to the authorities prior to departing Sri Lanka.

34. After the war ended in May 2009 and the Sri Lankan government took complete territorial control over Sri Lanka, security checkpoints were set up. It is widely documented that during the war and in the years immediately after the war security forces questioned or monitored many Tamil civilians for possible LTTE activity, and for civil resistance or anti-government sentiment.<sup>2</sup> The UK Home Office's most recent report on Tamil separatism states that the LTTE in Sri Lanka itself has not held any military power or political authority since the end of the civil war. It states that those most likely to be at risk of persecution on the basis of political opinion are persons 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 within the diaspora and/or a renewal of hostilities within Sri Lanka.<sup>3</sup> There are credible reports that if detained in these circumstances an individual may be severely mistreated by the authorities.<sup>4</sup> The applicant has said neither he nor any family member had any involvement with the LTTE during the conflict, and beyond the general suspicion as Tamils during that period, I do not accept the applicant or his family members were perceived as such.

35. The applicant has claimed that the authorities will impute him with LTTE involvement because he sought asylum in Australia. Country information from 2015 and earlier reported that Sri Lankan authorities screened the Tamil population in order to identify individuals with links to the LTTE. It indicates that failed asylum seekers were more likely to be readily associated with the LTTE either by virtue of the fact that they sought asylum or because of a presumption of involvement in Tamil diaspora activities which were viewed by the then Sri Lankan government as being supportive of the LTTE.<sup>5</sup> More recent country information indicates that Tamil asylum seekers are not routinely imputed as having LTTE links for that reason alone.<sup>6</sup> In this case I am

<sup>2</sup> DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064

<sup>3</sup> UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism (version 5.0)", 15 June 2017, OG6E7028826

<sup>4</sup> UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism (version 5.0)", 15 June 2017, OG6E7028826; International Truth and Justice Project (ITJP) "Unstopped: 2016/17 Torture In Sri Lanka", 14 July 2017, CISED50AD4849; Office of the High Commissioner for Human Rights OHCHR, "Human rights and counter-terrorism UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism concludes visit to Sri Lanka preliminary report", 14 July 2017, CXC90406610453; OHCHR, "Report of the Special Rapporteur on the promotion and protection of human rights while encountering terrorism – Mission to Sri Lanka", 23 July 2018, CIS7B839411830

<sup>5</sup> Canadian IRB: Immigration and Refugee Board of Canada, "Sri Lanka: Treatment of suspected members or supporters of the Liberation Tigers of Eelam (LTTE), including information about how many are in detention, whether the government continues to screen Tamils in an attempt to identify LTTE suspects", 11 February 2015, OGFDFC61A5; Tamils Against Genocide, "Returnees at Risk: Detention and Torture in Sri Lanka", 1 September 2012, CIS24826

<sup>6</sup> DFAT, "DFAT Sri Lanka – Country Information Report", 23 May 2018, CIS7B839411064; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism (version 5.0)", 15 June 2017, OG6E7028826

not satisfied that the applicant has any LTTE links, familial or otherwise and there is no evidence or claims that he has engaged in any pro-Tamil activities since arriving in Australia.

36. Country information from DFAT and UK Home Office which discuss at length the treatment of returnees state that the screening process for returnees is for the purpose of confirming returnees identities and identify if someone was trying to conceal a criminal or terrorist background or trying to avoid court orders or arrest warrants. Information from 2015 suggests this process is assisted by electronic databases used by the authorities that contain the names of persons of interest.<sup>7</sup> Those on the 'watch list' are persons that are of interest to the authorities for minor offences or are former LTTE cadres; those on the 'stop list' are persons who have committed serious crimes, have a warrant outstanding or perceived to be connected to terrorism. Returnees are checked against these systems upon return to Sri Lanka.<sup>8</sup> There is no credible evidence to suggest that the applicant's name would appear on such a list or that the applicant would be perceived to be someone of adverse interest to the authorities. I am not satisfied that being a returning Tamil asylum seeker from Australia in of itself will impute the applicant with LTTE involvement or any anti-government political opinion. Between 2008 and 2017 it is estimated that over 2,400 Sri Lankan nationals departed Australia for Sri Lanka. Many others returned from the US, Canada, the UK and other European countries, and most returnees are Tamil.<sup>9</sup> The Sirisena government has publicly encouraged all Sri Lankans living overseas to return and during a visit to Australia in February 2017, Sri Lankan Prime Minister stated publicly that failed asylum seekers from Australia would be welcomed back to Sri Lanka.<sup>10</sup> I am not satisfied the applicant would be perceived as having LTTE involvement or as having engaged in activities that would be seen as Tamil separatist or a threat to the state.
37. A significant portion of the country information supports that the situation for Tamils has significantly improved since the end of the war and also since the applicant departed Sri Lanka. In 2015 the Sirisena government was established and brought new hope for reconciliation and progress, promising an ambitious set of constitutional and governance reforms. There has been some recent criticism of the current government's slow progress on commitments such as its commitment to repeal the Prevention of Terrorism Act (PTA) and implementing commitments under a resolution in the UN Human Rights Council.<sup>11</sup> The UK Home Office however assesses that being of Tamil ethnicity would not in itself warrant international protection.<sup>12</sup> The US Department of State has also reported that incidents of unlawful arbitrary arrest and detention had decreased compared with 2015.<sup>13</sup> DFAT too has assessed that monitoring of Tamils in day-to-day life has decreased significantly under the current government and that some members of the Tamil community reported they felt more empowered to question monitoring activities.<sup>14</sup> Although the PTA is yet to be repealed, steps have been taken to have new legislation drafted and the government has engaged in the

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<sup>7</sup> DFAT, "DFAT Sri Lanka – County Information Report", 23 May 2018, CIS7B839411064; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism (version 5.0)", 15 June 2017, OG6E7028826

<sup>8</sup> UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism (version 5.0)", 15 June 2017, OG6E7028826

<sup>9</sup> DFAT, "DFAT Sri Lanka – County Information Report", 23 May 2018, CIS7B839411064

<sup>10</sup> UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism (version 5.0)", 15 June 2017, OG6E7028826

<sup>11</sup> OHCHR, "Report of the Special Rapporteur on the promotion and protection of human rights while encountering terrorism – Mission to Sri Lanka", 23 July 2018, CIS7B839411830; Amnesty International, Amnesty International Report 2016/17", 21 February 2017, NG2A465F55

<sup>12</sup> UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism (version 5.0)", 15 June 2017, OG6E7028826

<sup>13</sup> US Department of State, "Sri Lanka 2016 Human Rights Report", 3 March 2017, OGD95BE926876

<sup>14</sup> DFAT, "DFAT Sri Lanka – County Information Report", 23 May 2018, CIS7B839411064

international community and increased transparency to policies and laws that affect human rights issues.<sup>15</sup>

38. In light of this and the applicant's background and profile, I am not satisfied that the applicant, a Tamil male from the Eastern province will be imputed as an LTTE supporter or that he faces a real chance of harm of harm on these bases..
39. I accept the applicant is not in possession of a valid passport and would return to Sri Lanka on temporary travel documents. I accept given the applicant's method of return the Sri Lankan authorities may determine that he is a person who is returning to Sri Lanka after having sought asylum abroad. I accept he will be processed as a returnee at the airport in Sri Lanka. As the delegate noted, all returnees are subject to standard procedures, regardless of ethnicity and religion and understands detainees are not subject to mistreatment during their processing at the airport. The police conduct an investigative process to confirm returnee's identity which involves interviewing the returnee, contacting the person's claimed hometown police, contacting the person's claimed neighbours and family. Once identity is confirmed, the authorities carry out criminal and court record checks.<sup>16</sup>
40. Country information suggests that the Sri Lankan airport maintains a list of persons of interest by law enforcement agencies that have violated Sri Lankan law at the airport.<sup>17</sup> The evidence does not suggest the applicant is a person who is known to the authorities, or that his name would appear on a criminal or court record search or any other list maintained by the authorities of persons that may be of interest.
41. For the reasons stated above I do not accept the applicant will be imputed to have LTTE involvement as returning Tamil asylum seeker. DFAT reports that while the government has reportedly decreased systematic surveillance of returnees, it is aware of anecdotal evidence of monitoring of returnees that has occurred in the north as recently as 2017. The evidence does not suggest that this is occurring in the applicant's home province of the East, and I am not satisfied there is a real chance he faces such treatment. DFAT states that the biggest problems for returnees are bureaucratic inefficiencies and social stigma which can affect a returnee's ability to secure housing and employment and that costs for their boat journey to Australia may need to be paid. I note the applicant has siblings living in the Eastern Province of Sri Lanka and there is no information to suggest that the applicant would not reside in his home area upon return to Sri Lanka, and I do not accept he would be unable to find accommodation. I also note that the applicant is qualified and experienced as an [Occupation 2] and a [Occupation 1] and he has not claimed any vulnerability that would prevent him from obtaining employment, and I am not satisfied he would be denied employment or that his capacity to subsist would be threatened. I am not satisfied that the treatment mentioned above amounts to serious harm. I am not satisfied that there is a real chance the applicant will face serious harm on return to Sri Lanka on account of having sought asylum in Australia.
42. I accept the applicant departed Sri Lanka irregularly by boat via an unauthorised port in 2012 and country information indicates that consequently he committed an offence under the Immigration and Emigrants Act (I&E Act).<sup>18</sup> Those suspected of committing this offence are

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<sup>15</sup> OHCHR, "Human rights and counter-terrorism UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism concludes visit to Sri Lanka preliminary report", 14 July 2017, CXC90406610453;

<sup>16</sup> DFAT, "DFAT Sri Lanka – Country Information Report", 23 May 2018, CIS7B839411064

<sup>17</sup> UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism (version 5.0)", 15 June 2017, OG6E7028826

<sup>18</sup> DFAT, "DFAT Sri Lanka – Country Information Report", 23 May 2018, CIS7B839411064

usually arrested and charged by the police at the airport upon arrival. At the earliest opportunity after investigations have been completed, police transport those charged to the closest Magistrate's Court who then make a determination as to the next steps for each individual. Those arrested can remain in police custody in an airport holding cell for up to two days until a magistrate becomes available.<sup>19</sup>

43. The penalties for illegal departure under the I&E Act can include imprisonment of up to five years and a fine of up to 200,000 Sri Lankan rupees. The Sri Lankan Attorney-General's Department distinguishes between those suspected of being passengers and those suspected of facilitating or organising the irregular migration of people from Sri Lanka.<sup>20</sup> There is no evidence to suggest that the applicant was involved in people smuggling. The Attorney-General's Department have stated that no returnee who was a mere passenger on a people smuggling venture has been given a custodial sentence for departing Sri Lanka illegally. A guilty plea will attract a fine which is usually issued on a discretionary basis and to act as a deterrent towards departing illegally in the future. The fine can be paid in instalments and amounts vary from AUD 25 to AUD 1,670. Not guilty pleas are usually granted bail on the basis of personal surety or guarantee by a family member.<sup>21</sup> Although DFAT notes that the fines issued for illegal departure to passengers of people smuggling ventures are often low, the cumulative costs associated with regular court appearances over protracted lengths of time can be high.<sup>22</sup>
44. I accept that on account of the applicant's illegal departure in 2012 he may be questioned detained briefly at the airport and charged under the I&E Act. There is no evidence to suggest that the applicant would not be able secure bail (if needed) or pay a fine which has been noted can be paid in instalments, or if necessary any associated bail costs.
45. 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 it is systematic and discriminatory conduct. I am also not satisfied that the questioning, temporary detention, fine or any other costs associated with bail or court appearances if they arise constitutes serious harm for this applicant. I am not satisfied that the applicant faces a real chance of persecution for reasons of his illegal departure.

#### **Refugee: conclusion**

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

#### **Complementary protection assessment**

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

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<sup>19</sup> DFAT, "DFAT Sri Lanka – County Information Report", 23 May 2018, CIS7B839411064

<sup>20</sup> DFAT, "DFAT Sri Lanka – County Information Report", 23 May 2018, CIS7B839411064

<sup>21</sup> DFAT, "DFAT Sri Lanka – County Information Report", 23 May 2018, CIS7B839411064

<sup>22</sup> DFAT, "DFAT Sri Lanka – County Information Report", 23 May 2018, CIS7B839411064

## Real risk of significant harm

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

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

49. I accept that the applicant may be charged, briefly held, fined, attend court and meet costs associated with this on account of departing Sri Lanka illegally in 2013. I am not satisfied that the treatment the applicant may experience upon return as a consequence of his illegal departure amounts to significant harm. I am not satisfied that there is a real risk the applicant will be arbitrarily deprived of his life, be subject to the death penalty, or be subject to torture. Nor does the evidence before me indicate that these processes, or the penalties implemented as a result, involve any intention to inflict pain and suffering that could reasonably be considered cruel or inhuman in nature, severe pain or suffering or to cause extreme humiliation. I am not satisfied that it amounts to cruel or inhuman treatment or punishment, or degrading treatment or punishment. I am not satisfied the applicant faces a real risk of significant harm for this reason.

50. As discussed above, I accept the applicant may experience some social stigma and may face an initial period of reestablishment upon return to Sri Lanka. However, I am not satisfied that these circumstances, even when considered in combination with that which he may face on account of his illegal departure, would amount to significant harm, as I do not consider the applicant will suffer the death penalty, arbitrary deprivation of life or torture as a consequence. I am not satisfied that this treatment amounts to pain or suffering that could be reasonably regarded as cruel or inhuman in nature, severe pain or suffering or extreme humiliation, as required in the definitions of cruel or inhuman treatment or punishment or degrading treatment or punishment.

51. I have also concluded, for the reasons given earlier that the applicant would not otherwise face a real chance of harm for any other reasons including s a consequence of his experiences in Sri Lanka, his ethnicity or his familial relationships. As the real risk standard is the same as the real chance standard, I am not satisfied that the applicant faces a real risk of significant harm on these bases.

## Complementary protection: conclusion

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

## Decision

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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.