



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

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA19/06807

Date and time of decision: 30 July 2019 12:29:00  
J Jennings, 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 citizen of Sri Lanka. He applied for a protection visa on 22 March 2017. A delegate of the Minister for Immigration refused to grant the visa on 3 July 2019.

### 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. On 17 July 2019 the IAA received a submission which addressed the delegate's decision and findings. I have had regard to the submission.

### Applicant's claims for protection

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4. The applicant's claims can be summarised as follows:
  - The applicant is a Tamil and Hindu from the Eastern Province in Sri Lanka. He was born in and initially lived in [Village 1] and later moved to [City 1] and then [another city]. [Village 1] was in an area controlled by the Liberation Tigers of Tamil Eelam (LTTE) and the Sri Lanka authorities are suspicious of people from this area who they viewed as being LTTE members or supporters.
  - In 1988 the applicant's father was working [using an equipment] when he was shot and killed by army soldiers engaged in fighting with the LTTE. He believes his father was killed by the army who were suspicious of his father because he was a Tamil living in [Village 1].
  - The LTTE took and used the family [equipment] on multiple occasions. This came to the attention of the army who questioned the applicant about the [equipment]. On one occasion he was beaten by the soldiers who questioned him. In 1995 he decided to sell the [equipment] but the army did not believe he had sold it and continued to harass him about the [equipment].
  - In 2000 the applicant moved to [City 1]; he trained and worked as a goldsmith and opened his own business.
  - The LTTE kept stocks of gold and some of the local goldsmiths cleaned or restored the gold for the LTTE. Because he had family care responsibilities the applicant did not provide these or any other services to the LTTE.
  - The authorities became aware of the LTTE gold stocks in the area and because of his trade as a goldsmith the applicant was suspected of being an LTTE member or supporter. He was threatened by soldiers, accused of supporting the LTTE, asked where the gold was hidden and beaten on occasions. This became worse after the defeat of the LTTE in 2009. Army soldiers also came to his shop for goods and services and refused to pay him for these; this was a form of extortion.
  - [In] 2012 he was stopped when travelling to his shop and taken by people who showed him their Criminal Investigation Department (CID) identification. He was kept in a house and questioned and assaulted. They threatened to kill him if he did not tell them where

the LTTE gold was hidden. He begged them to release him and offered to pay them money. He organised with his wife to give the CID officers [amount] and he was then released.

- He was fearful for his safety and stayed in hiding; he arranged to close his shop. Soon after the applicant departed Sri Lanka leaving illegally.
- In September 2012 his wife told him the CID had visited the family home and asked about him. They told his wife she should inform them when he returned.
- The applicant fears further harm should he return to Sri Lanka. He fears the authorities are still interested in him and believe he has LTTE links and have imputed him with having anti-government views. Goldsmiths were suspected of having LTTE links and the applicant fears he will be harmed because he is a goldsmith and a member of the guild.
- The applicant would have to register in Sri Lanka and pass through checkpoints and he would not be safe in Sri Lanka.
- The applicant's representative submitted that the applicant would experience harm as a member of a particular social group being a Tamil from the Eastern Province of Sri Lanka imputed with a political opinion as a suspected LTTE member or supporter due to his; father being killed during the civil war; the Eastern Province being at the centre of fighting during the conflict in Sri Lanka and [Village 1] where the applicant was born being controlled by the LTTE; being a goldsmith and goldsmiths being suspected of LTTE links; the army believing he has LTTE connections; gold being found at [Village 1] thereby increasing the suspicion of LTTE links; the use of the family [equipment] by the LTTE during the civil war.

## **Refugee assessment**

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5. 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**

6. 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.
7. The applicant has consistently claimed to be Tamil from the Eastern Province, Sri Lanka and has provided identity documents in support of his claimed identity. I accept the applicant's identity as stated and that Sri Lanka is the receiving country for the purpose of this review.
  8. The applicant has not made any claims on the basis of his Hindu religion, nor does the country information before me indicate that there is a real chance he would be harmed on this basis.<sup>1</sup>
  9. I accept that the applicant was born in and grew up in an LTTE controlled area and lived in areas in the Eastern Province which witnessed the civil war conflict. I accept that his father was killed in 1988 by army soldiers engaged in fighting with the LTTE. The applicant claims that his father's death certificate recorded his death as the result of being caught in crossfire but he believes his father was murdered by the army as they were suspicious of him. The applicant's claim in this regard appears to be speculative and there is no other indication that prior to being shot the army suspected his father or that his father had been detained, or questioned in the past, or otherwise came to the adverse attention of the authorities which might support his contention regarding his father's death being a murder. Estimates vary but the UNHCR reported up to 40,000 civilian deaths in the long running civil war<sup>2</sup> and from the applicant's account, and supported by the information he advised has been recorded on the death certificate, his father was a civilian casualty in the war. While the applicant may believe his father was murdered his account remains that his father's death was the result of him [using this equipment] when fighting broke out between the army and the LTTE and I do not accept from this description that his father was murdered by the army, or targeted by them. Even if the army had suspected the applicant's father, there is no indication that this resulted in any harm to the applicant at this time or any suspicion on him or his family. While the applicant was only around [age] years of age at this time the LTTE had begun recruiting child soldiers in the 1980s<sup>3</sup> and his young age would not have been a restraining factor from the authorities taking any action had they suspected the applicant of having any LTTE links, yet there is no indication that he, or his mother, or other extended family members came to adverse attention because of any suspicion of the applicant's father, or for his death.
  10. I accept that the LTTE made use of the family [equipment] and that this came to the attention of the authorities and that the applicant was questioned as a result. I accept as plausible that on these occasions the soldiers threatened him and physically assaulted him; the abuse of the general Tamil population by the authorities during the civil war is widely documented.<sup>4</sup> I also accept as plausible that the soldiers continued to ask about the [equipment] after the family sold this. However, it is important to note that beyond this general abuse, however abhorrent, the applicant was not arrested or detained or charged with any security or other

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<sup>1</sup> Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064; US Department of State, "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320

<sup>2</sup> UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka", 21 December 2012, UNB0183EA8

<sup>3</sup> Joanne Richards - Centre on Conflict, Development and Peacebuilding (CCDP) - Graduate Institute of International and Development Studies, Geneva, CCDP Working Papers, "An Institutional History of the Liberation Tigers of Tamil Eelam (LTTE)", 1 November 2014, CISA447F082828

<sup>4</sup> UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka", 21 December 2012, UNB0183EA8; Amnesty International, "Locked away: Sri Lanka's security detainees", 1 March 2012, CIS22722

offences, despite the wide sweeping emergency powers in place during the civil war which enabled the authorities to detain people on mere suspicion.<sup>5</sup>

11. The applicant moved from [Village 1] to [City 1] in 2000. Although his statement of claims indicated he did not have any trouble with the authorities until after the end of the war in 2009 he clarified at the SHEV interview that he was harassed throughout his time in [City 1] and that what he meant was that this treatment became worse after 2009.
12. At the SHEV interview the delegate sought to clarify with the applicant his experiences at this time. The applicant initially stated that when he moved to [City 1] the army monitored and followed him. The delegate asked the applicant how he knew or suspected he was being followed and in response the applicant stated they knew he had relocated and asked to see his identity documents and when they identified him as being from [Village 1] they suspected he was LTTE. When asked again how he knew he was followed the applicant recounted the experience of other goldsmiths taken by the LTTE to the place the gold was stored to clean the gold and that the army suspected he been taken there. The delegate gave the applicant a further opportunity to explain his claim that he was followed by the authorities and the applicant stated that whenever they came to his shop they did not pay him for his work, that they questioned him and said he may have links to the LTTE. From the applicant's account for the period from the time he moved to [City 1] in 2000 until the abduction claim in 2012 his experience was that soldiers who came to his shop refused to pay for goods or services, and effectively extorted him, that they asked to see his identity documents and questioned him and said he may have LTTE links, asked where the LTTE gold was stored and that on occasion they threatened him and physically assaulted him. In response to questions regarding whether he had been arrested, detained or taken in rehabilitation during this period he stated that he had not. Overall I find his experience is indicative of the monitoring and intimidation of the general Tamil population that was prevalent in Sri Lanka during the civil war and in the immediate aftermath, particularly in the former LTTE strongholds such as the east. I accept that the applicant may have found this distressing but the applicant's account does not support his contention he was "followed" by the authorities. I accept that as a goldsmith he may have been asked about the LTTE gold stocks and that as a Tamil and being specifically from [Village 1] he may have been questioned about any LTTE links or associations, but I am not satisfied that this points to any more interest than the general monitoring of the civilian Tamil population at this time of stringent security measures. I accept that he was threatened and assaulted on some occasions and that he was effectively extorted by soldiers who refused to pay for goods and services; this account is consistent with the impunity with which the authorities acted in abusing the general Tamil population at this time.
13. I have had regard to the Biodata report dated 6 September 2012 which was included in the referred materials. In the accompanying case assessment to this report it is stated that the applicant was detained in gaol in Colombo for four days in 2006. It is important to note that in the statement of claims the applicant does not claim to have been arrested or imprisoned and at the SHEV interview he confirmed this was the case. It is not clear if this case assessment was completed with the benefit of an interpreter, as was the biodata report, and the applicant has not signed the case assessment, whereas he did sign the biodata report. Taking into account that the applicant has not claimed he was detained in gaol and that he

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<sup>5</sup> UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka", 21 December 2012, UNB0183EA8; Amnesty International, "Locked away: Sri Lanka's security detainees", 1 March 2012, CIS22722

confirmed this when asked a specific question at the SHEV interview I am not satisfied that the information in the case assessment is an accurate reflection of the applicant's experience.

14. It is the applicant's claim that he is interest to the authorities for reason of being a goldsmith and goldsmiths are viewed as being LTTE supporters and knowing the location of hidden LTTE gold stocks. The IAA submission commented that the "generalised ... non specific reports" in the delegate's decision do not address the applicant's specific profile and the submission refers specifically to the delegate's comments that she was "unable to locate any reports indicating that goldsmiths from [Village 1], the Eastern Province or anywhere else in Sri Lanka were or continue to be specifically targeted by the Sri Lankan authorities as they are allegedly aware of the storage location of the LTTE gold reserves". From the country information before me it is apparent that various agencies have over time identified profiles of persons who attracted adverse attention in Sri Lanka or may do so now. The UNHCR set out profiles of concern in its Guidelines published in 2012; in part these were specific to the person's LTTE connections and were detailed as to what may constitute a "risk profile" based on LTTE connections. These Guidelines also address other risk profiles in detail, including politicians, media, human rights activists, witnesses to human rights violations and went on to address the situation for women, children and LGBTI persons.<sup>6</sup> Despite outlining profiles in some detail the UNHCR did not recognise goldsmiths as being of concern. In 2010 the Danish Immigration Service also noted the risk profile of those with LTTE connections and additionally noted that political activists, human rights defenders and journalists may be at risk of adverse attention.<sup>7</sup> The UK Home Office in various reports has highlighted persons likely to be of interest to the authorities and Amnesty International reported on the profile of persons held in various forms of detention in Sri Lanka.<sup>8</sup> These and other reports, despite identifying interest groups by profiles, do not point to goldsmiths being of specific concern.<sup>9</sup> I consider it significant that while the IAA submission disputes the delegate's finding in this regard the applicant has not provided any evidence beyond his own statements in support of the contention goldsmiths are, or were, suspected of having LTTE links. I note that Tamilnet reported attempts by members of the air force in 2018 to excavate LTTE arms or weapons dumps in the Vanni region and while Tamilnet reported the excavation squads seemed to have advance knowledge of sites to excavate there is no indication in the reporting of any involvement of goldsmiths in the identification of such sites.<sup>10</sup>
15. The indications are that despite the applicant being a Tamil, and a young man, and being from [Village 1] which was an LTTE controlled area and the east which was a centre of civil war fighting, he was not detained or arrested at this time, even with him being a goldsmith and the use of the family [equipment] by the LTTE and his father's death, indicating that he was not imputed with a profile or concern. I accept that he was harassed, questioned, threatened, extorted and assaulted by army soldiers but noting he was not charged, or detained or taken in rehabilitation I am not satisfied that he was imputed with an LTTE profile

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<sup>6</sup> UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka", 21 December 2012, UNB0183EA8

<sup>7</sup> Danish Immigration Service "Human Rights and Security Issues concerning Tamils in Sri Lanka", 1 October 2010, CIS19345

<sup>8</sup> UK Home Office, "Report of a Home Office Fact-Finding Mission Sri Lanka: treatment of Tamils and people who have a real or perceived association with the former Liberation Tigers of Tamil Eelam (LTTE)", March 2017; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OGD6E7028826; UK Home Office, "Sri Lanka March 2012", 7 March 2012, 3523; Amnesty International, "Locked away: Sri Lanka's security detainees", 1 March 2012, CIS22722

<sup>9</sup> Landinfo, "Sri Lanka: Human rights and security issues concerning the Tamil population in Colombo and the Northern Province", 1 December 2012, CIS25286; US Department of State, "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320

<sup>10</sup> Tamilnet, "Continuing military excavations in Vanni indicate existence of secret detention of ex-LTTE members", 23 June 2018, CXBB8A1DA30054

or other profile of concern at this time. Rather this indicates the monitoring and checking of civilians in the context of the stringent security environment. Although the soldiers said to the applicant they suspected he was LTTE because he was from [Village 1] I consider it significant that they did not act on this beyond putting to this the applicant and he was allowed to continue living and working in the general community.

16. The applicant's account is that [in] 2012 he was taken by the CID to a house where he was questioned and assaulted. I have noted the applicant's prior interactions with the authorities in Sri Lanka and found that these were the result of the monitoring of the general Tamil population and that beyond being asked to show his identity and being questioned about any LTTE links and told that because of his residence in [Village 1] he was suspected of being LTTE and asked about LTTE gold because he was a goldsmith, he was not arrested or detained, indicating the authorities were willing for him to continue living and working openly in the general community. Similarly when taken in [2012] he was not formally arrested or charged with any offences, indicating he was not detained because he was considered to be a security concern. Rather this incident appears to have been an opportunistic attempt to extort the applicant.
17. In part I have some concerns about the plausibility of the applicant's account of this incident, particularly that his wife was able to raise [amount] by selling jewellery from his shop so quickly and pay this to his abductors the next day and that within a short space of time from this incident the applicant was able to close his business and locate a people smuggler and arrange his passage by boat to Australia. However, despite these concerns the country information reports incidents at this time of abduction by the authorities, or groups acting in concert with the authorities, and associated extortion or ransom demands and I accept the applicant's claim that he was taken as claimed, questioned and assaulted and that he paid [amount] to secure his release. I also consider it plausible that after his departure from Sri Lanka the CID visited the family home and asked about him and told his wife she should inform them when he returned and I accept this claim.
18. I accept that from his experience the applicant may be concerned about further mistreatment from the authorities should he return to Sri Lanka, however the assessment of well-founded fear of persecution is a future test and considering the significant change in the security situation in Sri Lanka since the applicant left in 2012, and since the change of government in 2015, as discussed below, I am not satisfied that his fear is well-founded.
19. Throughout the period of the civil war and during the repressive Rajapaksa government following the defeat of the LTTE the Tamil population was subject to scrutiny, monitoring, harassment and ongoing checks for links with the LTTE and it was in this environment that the applicant was harmed by the authorities. However, there has been a significant change in the country circumstances since the end of the war and the defeat of the Rajapaksa government in 2015<sup>11</sup>, and I am not satisfied that there is a real chance he would experience harm on return to Sri Lanka. The Emergency Powers used to detain people arbitrarily have been allowed to lapse and application of the Prevention of Terrorism Act has been suspended and the number of people detained under the Prevention of Terrorism Act has reduced

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<sup>11</sup> US Department of State, "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320; DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism (version 5.0)", 15 June 2017, OG6E7028826; UK Home Office, "Report of a Home Office Fact-Finding Mission Sri Lanka: treatment of Tamils and people who have a real or perceived association with the former Liberation Tigers of Tamil Eelam (LTTE)", March 2017, CISED50AD3780

significantly. The government has closed most rehabilitation sites.<sup>12</sup> DFAT reports the improvement in the security situation has resulted in a decrease in Tamils held in detention and the election of the Sirisena government in 2015 has led to greater political cooperation. The monitoring of Tamils from the former LTTE areas has decreased under the Sirisena government which has adopted a more proactive approach to human rights and reconciliation and has been engaging constructively with the Tamil political parties.

20. I note the applicant's concern regarding security checkpoints and the military presence in his area and the need to register his residence with the authorities. DFAT assessed that military involvement in civilian life has diminished, and although military involvement in some civilian activities continues in the north the government no longer restricts travel and has removed military checkpoints on major roads. While the military maintains a strong presence the armed forces personnel are generally restricted to their barracks and the Sri Lankan police are now responsible for civil affairs across Sri Lanka. Overall the Sirisena government has taken steps to curb the excesses of military power exercised under the authoritarian Rajapaksa government. Registration of residence has ceased and DFAT assessed that monitoring of Tamils in day-to-day life has decreased significantly and while surveillance of Tamils in the north continues this is reported to be largely of those associated with politically sensitive issues, public gatherings and protests.<sup>13</sup>
21. The delegate noted the appointment of former President Rajapaksa as Prime Minister in October 2018 and concerns expressed by some that this may lead to a return of repressive practices against Tamils and human rights abuses.<sup>14</sup> However it is important to note the context of the repressive actions of the former Rajapaksa government being at the end of the civil war and in the aftermath of the war and there is no information before me to indicate that Mr Rajapaksa or his political supporters, including those who successfully contested the February 2018 local government elections under the Rajapaksa sponsored Sri Lanka Podujana Peramuna (SLPP) party intend to introduce repressive policies that would impinge on the Tamil population in general or Tamils with a profile similar to that of the applicant, or that such has been the result since the SLPP's success at the February 2019 local elections and ongoing political influence.
22. I note the representative's comments as to the applicant's "unique profile" and the contention that as a result he would be imputed with an LTTE/anti-government profile, however I am not satisfied that he was so imputed while in Sri Lanka. As already noted I have found the harm he experienced up to 2012 was the result of the monitoring of the Tamil population for LTTE links and the general intimidation of Tamil civilians and the CID interest/extortion in 2012 was the result of lawless activity which was largely unchecked at this time. I place significant weight on the applicant's account that he was not arrested, charged or detained under the Emergency Powers enacted by successive Sri Lankan governments to control LTTE operatives, or suspected operatives.
23. Considering the significant change in the security situation and the greater accountability of the authorities for their actions I am not satisfied that there is a real chance the applicant

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<sup>12</sup> UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism (version 5.0)", 15 June 2017, OGE7028826; UK Home Office, "Report of a Home Office Fact-Finding Mission Sri Lanka: treatment of Tamils and people who have a real or perceived association with the former Liberation Tigers of Tamil Eelam (LTTE)", March 2017, CISED50AD3780; UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka", 21 December 2012, UNB0183EA8

<sup>13</sup> DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064

<sup>14</sup> Aljazeera, "What happens if Rajapaksa heads Sri Lanka's government", 1 November 2018, CXBB8A1DA37739; Daily Mirror (Sri Lanka), "Gotabaya Rajapaksa confirms presidential run", 19 May 2019, 20190520124147



would experience harm should he return to Sri Lanka. I note he would be returning as a failed asylum seeker but there is no indication on the evidence before me that the applicant's status as a failed asylum seeker would bring him to adverse attention on return to Sri Lanka. I accept that there are reports of mistreatment of returned asylum seekers who have an actual or imputed profile of concern to the authorities<sup>15</sup>, but I have not accepted that the applicant was so imputed or that he would be now or in the foreseeable future as a returning asylum seeker

24. I have accepted that the applicant exited Sri Lanka illegally and as such he would be subject to the provisions of the Immigrants and Emigrants Act 1949 (I&E Act) on return. Penalties for persons who leave Sri Lanka illegally include imprisonment of up to five years and a fine of up to 200,000 Sri Lankan rupees (around AUD 1,670). In practice, penalties are applied to such persons on a discretionary basis and are almost always a fine.<sup>16</sup>
25. Returnees travelling on temporary travel documents, such as the applicant would, are subject to an investigative process to confirm identity on arrival which may take several hours to complete. As involuntary returnees are processed in groups further delays may occur until all returnees are processed. DFAT assesses that returnees are treated according to these standard procedures, regardless of their ethnicity and religion, and are not subjected to mistreatment during their processing at the airport.<sup>17</sup>
26. As a returnee, I accept that the applicant may be questioned by police at the airport and charged under the I&E Act. As part of this process, most returnees will be fingerprinted and photographed, then transported to the nearest Magistrates Court at the first available opportunity. However, returnees may be required to remain in police custody at the CID Airport Office for up to 24 hours if a Magistrate is not available before this time, such as a weekend or public holiday, and may be held in an airport holding cell.<sup>18</sup> The applicant may be detained in crowded and unsanitary conditions while detained.
27. DFAT reports that as a deterrent fines, rather than custodial sentences, are issued to persons who were passengers on a people smuggling boat with the amount of the fine varying on a case-by-case basis and payable by instalment if the returnee faces difficulty with payment. DFAT advises that the Sri Lankan Attorney-General's Department has directed that all passengers of people smuggling ventures be charged under the I&E Act and appear in court. The country information indicates that if a person who departed illegally pleads guilty, they will be fined and released. In most cases, if they plead not guilty, they are immediately granted bail on personal surety by the Magistrate, or may be required to have a family member act as guarantor. They may sometimes need to wait until a family member comes to court to act as guarantor. Bail conditions are imposed on persons who departed illegally on a discretionary basis, although DFAT understands that conditions are rarely applied, and a person will only need to return to court when the case against them is being heard. Persons are required to appear in court in the location where the offence occurred and may incur legal and transport costs to travel to the point of departure for court appearance. The applicant was only a passenger on the boat. The Sri Lankan authorities claim no mere passenger on a people smuggling venture has been given a custodial sentence for departing Sri Lanka illegally.<sup>19</sup>

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<sup>15</sup> DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064

<sup>16</sup> *ibid*

<sup>17</sup> *ibid*

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28. Should the applicant be held over a weekend or public holiday until seen by a Magistrate, I am satisfied he would face only a brief period in detention. Even having regard to general detention conditions, I do not consider that a brief period in detention would constitute such a level of threat to his liberty as to amount to serious harm, or significant physical harassment or ill treatment or otherwise amount to serious harm for the applicant for the purposes of s.5J of the Act. Similarly, I do not consider any likely questioning of the applicant by the authorities at the airport on arrival, any surety imposed, or the imposition of a fine, to constitute serious harm.
29. Additionally, the country information states that all persons who depart Sri Lanka illegally are subject to the I&E Act and possible detention on return. That law is not discriminatory on its terms, and the evidence does not support a conclusion that the law is selectively enforced or that it is applied in a discriminatory manner. I find that the investigation, prosecution and punishment of the applicant under the I&E Act would be the result of the non-discriminatory application of a generally applicable law and does not amount to persecution for the purpose of ss.5H(1) and 5J(1) of the Act.
30. I am not satisfied the applicant would be prevented from working as a goldsmith should he wish to do so should he return to Sri Lanka and noting the improvement in the security situation I am not satisfied he would be extorted or harmed as a goldsmith. Considering the totality of the material before me, I am not satisfied that the applicant would experience persecution on return to Sri Lanka for this reason or for reason of religion or race or political opinion of membership of a particular social group being a Tamil from the Eastern Province of Sri Lanka imputed with a political opinion as a suspected LTTE member or supporter, even considered together with his father being killed and possibly suspected by the army; being from the Eastern Province or [Village 1]; for the use of the family [equipment] by the LTTE; being a goldsmith and a guild member; being mistreated by the authorities and extorted by army soldiers refusing to pay for goods and services and abducted by the CID and paying [amount] to secure his release or for their further visit to ask about him; and for being a failed asylum seeker who left Sri Lanka illegally.

#### **Refugee: conclusion**

31. 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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32. 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**

33. 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.
34. I accept that the applicant will be identified on return as a person who departed illegally and that he will be investigated and detained for several hours at the airport, and possibly detained on remand for some days pending bail, and then fined. I accept that the applicant may be subjected to poor conditions during any possible brief period of detention but country information confirms that this is due to overcrowding, poor sanitation and lack of resources. I have also accepted that the applicant will be questioned, charged, briefly detained and fined under the I&E Act with the offence of leaving Sri Lanka illegally. But this questioning, charges and fine or briefly being detained does not amount to the death penalty, arbitrary deprivation of life or torture and the evidence does not indicate there is an intention to inflict pain or suffering or severe pain or suffering or cause extreme humiliation. I am not satisfied that this treatment, either during the investigation process or while being held at the airport or on remand, amounts to significant harm.
35. I have otherwise found there is not a real chance that the applicant faces harm on any of the bases claimed. Noting that the “real risk” test for complementary protection is the same standard as the “real chance” test,<sup>20</sup> and based on the same information, and for the reasons set out above, I am also satisfied that there is not a real risk that he would face significant harm for these reasons.

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

36. 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.

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<sup>20</sup> *MIAC v SZQRB* (2013) 210 FCR 505

## 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.