



**Australian Government**  

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**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA19/06912

Date and time of decision: 27 August 2019 15:29:00  
J Maclean, Reviewer

**Decision**

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

*Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 473EC(2) of the Migration Act 1958 and replaced with generic information which does not allow the identification of a referred applicant, or their relative or other dependant.*

## Background to the review

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### Visa application

1. The referred applicant (the applicant) claims to be a Tamil Hindu born in the [District] of the Western Province of Sri Lanka. In March 2017 he lodged an application for a Safe Haven Enterprise visa (SHEV).
2. On 26 July 2019 a delegate of the Minister for Immigration (the delegate) refused to grant the visa because the delegate found the applicant is not a person in respect of whom Australia has protection obligations.

### Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. No further information has been obtained or received.

### Applicant's claims for protection

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5. The applicant's claims can be summarised as follows:
  - He is Tamil and a Hindu, who was born in the [District] of the Western Province of Sri Lanka.
  - When he was about [age] years old he moved to Colombo with his family, where he studied and later worked as a [Occupation 1].
  - In [year] he employed three Tamil men as contractors. One day after the men had been working for him for about three weeks, they asked for their wages and left. About 30 minutes later some men in a white van arrived at the house he was [working at], blindfolded him and took him away. The men did not identify themselves. He suspects they were from the Criminal Investigation Department (CID). He was taken to a house and questioned about the three Tamil men he had employed, and who were suspected of being Liberation Tigers of Tamil Eelam (LTTE) members. He was held for three days, during which he was continuously questioned and beaten, accused of being LTTE, and then released.
  - After this incident the CID came to his house once or twice a week and took him away to show him suspects they had arrested. He was asked if they were the men who had worked for him, and he was beaten. This continued for about seven or eight months.
  - As a result of him being repeatedly taken away by the CID his neighbours suspected he was involved with the LTTE and harassed, chased and hit him.
  - He decided to hide from the CID and his neighbours, and avoided Colombo, returning to his home village to stay with his [relative], and working in various locations.
  - After about six or seven months he started returning to his home at night and leaving before the morning. After another six or seven months his wife told him the men had stopped coming to the house, however he was afraid of his neighbours, and that he would be picked up by the CID.

- He came to Australia by boat, arriving [in] October 2012.
- Since coming to Australia the CID have been to his home two or three times. They implicitly threatened to deal with him on his return to Sri Lanka.
- He fears harm from Sri Lankan authorities as a result of his Tamil ethnicity, and for imputed connections to the LTTE.

## **Refugee assessment**

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6. 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**

7. 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.
8. The applicant claims he is of Tamil ethnicity and Hindu religion, and that he was born in Western Province of Sri Lanka. He has provided copies of a number of documents to support his identity. I accept his identity is as claimed, that he is of Tamil ethnicity and Hindu religion, a national of Sri Lanka from the Western Province, and Sri Lanka is the receiving country for the purposes of the Act.
9. I accept the applicant’s broadly consistent evidence regarding his early life in Sri Lanka, and his family. He was born in [year] in the [District] of the Western Province of Sri Lanka. He resided in that District until he was [age] years old and attended school until Grade [number], from approximately [year] until [year]. When he was about [age] years old he moved with his family to live in a suburb of Colombo, ‘M’. He married his wife in [year], and continued to live in ‘M’. He and his wife have [children], who have remained in Colombo. His father [and siblings] also currently reside in Colombo, in various locations. His mother died from illness in 2006.

10. The applicant's SHEV application indicates from [year] until [year] he worked doing odd jobs, and from about [year] was self-employed, or did contract work as a [Occupation 1] in Colombo. During the SHEV interview the applicant said he started [Occupation 1] when he was around [age] years old, and agreed that would have been in about [year]. He said he worked in Colombo, as well as outside Colombo, including in [Town 1], about one hour [from] Colombo, and once he worked in [Town 2] for 10 days. Although the applicant appeared to be a poor historian regarding the dates of events, he has been broadly consistent in describing working as a [Occupation 1] in various locations from at least [year], and I accept that evidence.
11. In his statement of claims and during the SHEV interview the applicant provided broadly consistent evidence about an incident in [year], when he was taken by men in a white van. While working on a contract [at] a house in [Suburb], he hired three Tamil men to work for him. One day the men asked for their wages at lunchtime, and left. Shortly afterwards men arrived in a white van and asked about the men he had employed. The applicant was blindfolded and taken away in the van. They did not identify themselves, but he suspects they were CID. They took him to his house and searched it, then took him to another location. He was questioned about that three men, where they lived and where they were hiding weapons. He explained he did not know anything and just employed them, but they did not believe him. He was taken to an isolated location and held for three days, during which he was mistreated, continuously questioned and beaten. They told him the men were LTTE from the north, and had planted a bomb in a bus and planned another terrorist attack. They accused him of being LTTE, and of helping the men by giving them employment and helping them plan their attack. He was released after three days and told they would be monitoring him, and that he could not escape from them. He never saw the three men from the north again.
12. After the incident the people he believes were CID returned to his house once or twice a week and took him away and showed him suspects they had arrested, and asked him if they were the men who had worked for him. This continued for about seven to eight months. Different people came each time, they never identified themselves, and always blindfolded him before taking him away. He was beaten on these occasions and told to tell the truth. During the SHEV interview the applicant said the men who took him wore the same kind of dress as the CID, and he thinks it was the CID. Because he kept getting taken away Sinhalese people in his area suspected he was involved with the LTTE and they would get into arguments with him, harass, chase and hit him. He decided to hide from the CID and from his neighbours, and went to live with his [relative] in his native village in [District]. He stayed away from Colombo for six or seven months, after which he started returning home at night and leaving before morning. After a further six or seven months his wife told him the men had stopped coming to the house, however he was still afraid he would be picked up and afraid of his neighbours, including that they would tell the CID he was back if they saw him. Whilst working in [Town 2] he heard about people taking a boat to Australia, and decided to come to Australia.
13. Country information reports that many Tamils reported being monitored, harassed, arrested or detained by security forces during the conflict, and that towards the end of the civil conflict in May 2009, the government security forces arrested and detained a large number of LTTE members, most of whom were sent to government-run rehabilitation centres for rehabilitation programs that were typically for one year.<sup>1</sup>

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

14. Taking into account the applicant's broadly consistent evidence on this issue, and in the context of the country information at that time, I accept the applicant was detained for three days, questioned and mistreated as claimed. I also accept he was briefly detained on a number of subsequent occasions, and that he was questioned and mistreated at those times. I consider it most likely the CID were responsible for the treatment described by the applicant. The applicant's evidence indicates the primary reason he was taken and detained related to identifying the men who had worked for him, and who were suspected of being LTTE, rather than those people having any specific interest in the applicant, or because they suspected he had any connection with the LTTE. Country information supports that such treatment was part of the troubling but routine treatment of Tamils by security forces at that time, rather than relating to any specific security threat posed by the applicant. I consider if the applicant had genuinely been suspected of having links to the LTTE at that time he would not have been released and would have been sent to a rehabilitation camp. The failure of security forces to do so, despite having ample opportunity, is indicative the applicant did not have a profile of interest to Sri Lankan authorities at that time, including as a result of any suspicion of LTTE involvement or connections. In the context of the country conditions at the relevant time, towards the end of, or shortly after, the end of the civil conflict, it is plausible, and I accept the applicant may have experienced some harassment and mistreatment from Sinhalese people in his local area. I also accept the applicant might have found it difficult to work in Colombo as a result of repeatedly being detained by authorities, and that this formed at least part of the reason the applicant went to live with his [relative] and work outside Colombo.
15. The applicant provided consistent evidence about being detained by police for 3 days in [year]. The record of the Arrival interview indicates the applicant said he was rounded up with other Tamil boys because somebody beat the police. However, in his statement of claims he claims there was a misunderstanding during that interview, and he was arrested by police because he was drinking alcohol in an area where it was prohibited, and he was released after paying a fine. During the SHEV interview the applicant confirmed he was charged with an offence, went to court, paid a fine, and that he had not been arrested again after this incident. I accept there may have been some misunderstanding regarding the reason for the applicant being detained, and I accept the applicant was arrested by police for drinking alcohol, that he was detained as claimed, attended court, received a fine, and was released. It is not apparent to me the applicant was of further adverse attention as a result of this incident, or that he claimed to fear harm as a result of it. In any event, I consider the applicant being released on this occasion is indicative that he was not considered a security risk or of adverse interest to Sri Lankan authorities at that time.
16. The applicant claims his wife told him that since coming to Australia the CID has visited his home two or three times. She told them he had moved to Australia, and they implicitly threatened to deal with him on his return to Sri Lanka. After coming to his house on those occasions they have since stopped visiting. It is not apparent to me exactly when these purported visits occurred, nor why authorities would visit the applicant's home and recommence making enquiries about him, apparently several years after the last time they had done so, some time in [year]. Nevertheless, having accepted the CID visited the applicant's home on a number of occasions after he left Colombo, I also accept it is plausible they visited again on a number of occasions as claimed. However, I do not accept these visits were recent or have been ongoing.
17. The applicant claims to fear serious harm, torture or death, from Sri Lankan authorities, in particular the CID, and from Sinhalese people in his community, because he is a Tamil, and because he will be imputed to have connections to the LTTE.

18. The applicant's representative provided detailed post-SHEV interview submissions regarding the current situation in Sri Lanka, and the delegate considered a range of current sources of country information in reaching their conclusions. The submission is critical of the most recent DFAT report on Sri Lanka, suggesting the report does not provide any new country information compared to the 2017 DFAT report, that it primarily relies on self-reporting by the Sri Lankan government and focuses on Sri Lanka's formal legal system, that it overlooks reporting by reputable human rights organisations and the United Nations, and is unduly optimistic. The 2018 DFAT report indicates it provides a general rather than exhaustive country overview, and that it is informed by on-the-ground knowledge and discussions with a range of sources in Sri Lanka, and takes into account relevant and credible open source reports, including those from various foreign governments and non-governmental agencies, relevant UN agencies, recognised human rights organisations and reputable news organisations. There are various references to events occurring in 2018, such as the president appointing Office of Missing Persons commissioners in February 2018, and to recent reports from human rights organisations, such as updated information from Amnesty International regarding imposition of the death penalty, and reference to the January 2018 report by Human Rights Watch regarding use of the Prevention of Terrorism Act (PTA). Although the 2018 DFAT report is not an exhaustive country overview, I am satisfied it is an authoritative and credible document providing recent and cogent information on the situation in Sri Lanka, and taking into account a variety of sources.<sup>2</sup>
19. There is some variance in the country information reports regarding the risk of harm in Sri Lanka for individuals with perceived associations with the LTTE. DFAT assesses that it is predominantly high profile former LTTE members at highest risk of monitoring, arrest, detention or prosecution by authorities.<sup>3</sup> However, the UK Home Office considers that generally even a person who evidences past connection to the LTTE does not face a risk of serious harm from the Sri Lankan authorities, unless they have or are perceived to have a significant role in relation to post-conflict Tamil separatism.<sup>4</sup> There are also reports suggesting there is a risk of harm to a broader group of people, including those individuals suspected of any LTTE involvement. In July 2017 the Special Rapporteur on Human Rights and Counter-Terrorism concluded that any person suspected of association, however indirect, with the LTTE remains at immediate risk of detention and torture.<sup>5</sup> An Associated Press media article from November 2017 reported ongoing torture of Tamils in Sri Lanka as recently as July 2017. Some of those interviewed said they had never worked for the LTTE, however all were accused of LTTE associations by their abusers.<sup>6</sup> There are also reports of returning Tamils being detained on arrival at Colombo airport, however those arrested were mostly known former LTTE members.<sup>7</sup> A 2015 Freedom from Torture report similarly refers to the key factor leading to detention on return being either a real or imputed LTTE association.<sup>8</sup>

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

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

<sup>4</sup> UK Home Office, "Country Policy and Information Note. Sri Lanka: Tamil separatism. Version 5.0", 15 June 2017, OGG6E7028826

<sup>5</sup> Patrick Wintour, "Torture by Sri Lankan police routine, says human rights lawyer", The Guardian, 14 July 2017, CXC90406610469

<sup>6</sup> Katy Daigle, "Dozens of men say Sri Lankan forces raped and tortured them", Associated Press, 8 November 2017, CXC90406617388

<sup>7</sup> 'Another Tamil returnee arrested', Sri Lankan Mirror, 1 July 2015, CXBD6A0DE16698, 'SL military continues to arrest Tamils from East returning from Middle-East', Tamil Net, 31 May 2015 CXBD6A0DE7540; '10 Tamils arriving in Lanka arrested', Sri Lanka Mirror, 4 March 2015, CXBD6A0DE6065

<sup>8</sup> Freedom from Torture, "Tainted Peace: Torture in Sri Lanka since May 2009", 13 August 2015, CISEC96CF13070

20. The applicant's post-interview submission also has regard to more recent reports of torture and mistreatment of Tamils in Sri Lanka, and I have taken those reports into consideration. The ITJP's 2017 'Unstopped', and 2018 'Unsilenced' reports draw on interviews with Tamil survivors of torture, the 2017 report based on 33 instances in 2015, 21 in 2016, and three in 2017, while the 2018 report covered 101 instances in 2015 and 12 in 2017. Those interviewed reported that family members of LTTE members continued to be tortured, and of the deliberate targeting of grown-up children of former LTTE cadres, indicating a high level of paranoia and persecution utterly at odds with the Sri Lankan government's rhetoric of reconciliation. Many of the victims who gave testimony to the ITJP had been involved in diaspora activities that were viewed as either separatist or a threat to national security, or were ex-LTTE, including participating in political work for Tamil parties and protesting around human rights issues, particularly regarding people who have disappeared. A number of overlapping reasons were usually given for the detention and torture of the claimed victims, including evading rehabilitation, regrouping the LTTE and financially supporting the reformation of the LTTE.<sup>9</sup> The submission also refers to the February 2019 Freedom from Torture report, which reports on 16 cases of people detained and tortured between 2015 and 2017. In all cases detention was linked to an alleged or actual past association with the LTTE, or some form of anti-government activity.<sup>10</sup>
21. It is now almost [years] since the applicant departed Sri Lanka, and over ten years since the war ended in May 2009, and the LTTE were defeated. The country information before me indicates conditions in Sri Lanka have improved since the applicant departed in [year], and since the election of the Sirisena government in 2015. President Sirisena and his government have prioritised human rights and reconciliation, and made significant progress, including engaging constructively with the United Nations, establishing the Office of Missing Persons, replacing military governors in the Northern and Eastern Provinces with civilians, removing military checkpoints on major roads, returning some confiscated land in the north and east back to the former owners, releasing some individuals detained under the PTA, and committing to reform the PTA. The overall security situation for Tamils has improved, and military involvement in civilian life has diminished.<sup>11</sup>
22. Although virtually everyone agrees there has been progress towards alleviating the climate of fear in Sri Lanka, opinions differ markedly about the extent of that progress.<sup>12</sup> One Special Rapporteur has observed that torture remains endemic and routine for those arrested and detained on national security grounds under the PTA.<sup>13</sup> Concerns have been expressed about the slow progress in implementing transitional justice measures, including repealing the PTA. Although there have been continued reports of the PTA being used to arrest and detain those suspected of any association with the LTTE, and to torture and ill-treatment in detention, those reports are inconsistent with DFAT's assessment that a person of Tamil origin, in particular a person having a low level and/or indirect association with the LTTE, would not likely be detained under the PTA on return to Sri Lanka.<sup>14</sup> DFAT reported in May 2018 that

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<sup>9</sup> ITJP, 'Unstopped: 2016/17 Torture In Sri Lanka', 14 July 2017, CISED50AD4849; ITJP, 'Unsilenced: Male Survivors Speak Of Conflict-Related Sexual Violence In Sri Lanka', 19 September 2018, CIS7B839419730

<sup>10</sup> Freedom from Torture, "Too Little Change: Ongoing Torture in Security Operations in Sri Lanka", 22 February 2019, 20190227113604

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

<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> United Nations Human Rights Council, "Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism - Visit to Sri Lanka", 14 December 2018, 20190305165949

<sup>14</sup> United Nations, "Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Sri Lanka A/HRC/34/54/Add.2", 22 December 2016, CIS38A80123313; DFAT, "DFAT Cable

the PTA is suspended, but remains in legal force. According to the Bureau of the Commissioner General of Rehabilitation in December 2017 (referred to in the DFAT report) only one rehabilitation centre with eight inmates remained open.<sup>15</sup> On the information before me I am not satisfied the applicant would be subject to detention for reason of national security. In any event, I consider the small number of detainees, who are ex-LTTE combatants, reflects there is no longer a systemic practice of detaining those suspected of any involvement with the LTTE, and only those with significant links to the LTTE are now at risk of detention under the PTA. I do not accept the applicant has such a profile, or that his risk of detention under the PTA would be heightened for being a failed asylum seeker, or as a result of him having spent several years in Australia.

23. The UK Home Office reports, that although the LTTE no longer exists as an organised force in Sri Lanka, Sri Lankan authorities remain sensitive to the potential re-emergence of the LTTE throughout the country. In contrast to their prior focus on identifying anyone with past LTTE links, the government's present objective is to identify those who pose a threat to the government or a unified Sri Lanka, through involvement with Tamil separatist activities in the country or through links to the Tamil Diaspora. Former LTTE leaders and former members suspected of committing serious criminal acts during the conflict are most at risk. The UK Home Office and DFAT have more recently confirmed the UNHCR position that simply being of Tamil ethnicity, or even a Tamil from an area formerly under LTTE control, no longer gives rise to a need for international protection, the rationale being that almost every Tamil who resided in those areas during the conflict had some sort of connection with the LTTE.<sup>16</sup>
24. The post-SHEV interview submission contends the applicant is at risk of monitoring and detention upon return to Sri Lanka. The submission refers to a number of country information reports, all pre-dating DFAT's assessment. DFAT assesses Sri Lankan authorities may monitor members of the Tamil diaspora returning to Sri Lanka, depending on their risk profile. While monitoring of Tamils in day-to-day life has decreased significantly under the current government, surveillance of Tamils in the north and east continues, particularly those associated with politically sensitive issues. Likewise, DFAT confirms that Sri Lankan authorities are likely to maintain intelligence on former LTTE members and supporters, and that high-profile former LTTE members would continue to be of interest to the authorities and subject to monitoring. Further, DFAT assesses that close relatives of high-profile former LTTE members who remain wanted by Sri Lankan authorities may be subject to monitoring.<sup>17</sup> However, the country information reports before me no longer support a finding that Tamil ethnicity of itself imputes LTTE membership or a pro-LTTE opinion, even when combined with other factors such as age or gender.
25. The applicant's post-SHEV interview submission refers to fear of persecution in the form of effective denial of access to basic services, and denial of capacity to earn a livelihood, which it is suggested would cumulatively threaten his capacity to subsist. Presumably the implication is this would occur because of his Tamil ethnicity, however the submission provides no specific details regarding this claim, and it is not apparent to me that the applicant gave any specific example of a service he had been denied previously in Sri Lanka, or would be denied in the future, or how his capacity to earn a livelihood was denied in the past, or would be in the future. During the SHEV interview the applicant described being self-employed, or

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response: UN Special Rapporteur (Ben Emmerson) on human rights and terrorism in Sri Lanka", 14 August 2017, CISED50AD5239

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

<sup>16</sup> UK Home Office, "Country Policy and Information Note. Sri Lanka: Tamil separatism. Version 5.0", 15 June 2017, OG6E7028826; DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064

<sup>17</sup> DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064



working on contract as a [Occupation 1] in various locations in Sri Lanka, and that he employed others to work with him. The country information before me indicates that official and societal discrimination on the basis of Tamil ethnicity is low and that being of Tamil ethnicity, in itself, is not sufficient to warrant international protection. DFAT advises there are no official laws or policies that discriminate on the basis of ethnicity or language in Sri Lanka, which includes education, employment or access to housing, and laws and policies are generally implemented by the current Sirisena government without discrimination.<sup>18</sup> There is no evidence before me indicating the applicant has or will experience any barriers to accessing education, employment or any government services in Sri Lanka. The applicant indicated his wife, children and his father and siblings continue to reside in Colombo, and he did not report them as being subject to harassment or discrimination from Sri Lankan authorities or within the community. I am not satisfied there is a real chance of persecution for this reason, or that the applicant's capacity to subsist would be threatened as claimed.

26. The applicant's submission also refers to recent political events in Sri Lanka, which it is suggested indicates the re-emergence of anti-Tamil elements at the highest echelons of power in Sri Lanka, and has elevated the fears of the Tamil population. Reference is made to warnings by news sources, in October 2018, of an impending political crisis in Sri Lanka, and fears that a bloodbath will ensue. It is contended that there is a real chance the Sri Lankan government will return to past abusive practices. Particular reference is made to political events last year, when on 26 October 2018 President Sirisena removed Prime Minister Wickremesinghe from office and replaced him with former President Mahinda Rajapaksa. For a brief period of time two individuals claimed to be the legitimate Prime Minister, during which the legitimacy of a number of authorities were in question. However, on 16 December 2018 Rajapaksa resigned, and the next day Wickremesinghe was once again sworn in as Prime Minister. The UN High Commissioner and Secretary-General welcomed the resolution of the 'political crisis' in Sri Lanka through peaceful, constitutional means, and applauded the resilience of the country's democratic institutions.<sup>19</sup> Reference is also made to media reports of the potential return of Rajapaksa's brother, Gotabaya, on the political scene, and his intention to run for the presidency. Gotabaya served as Defence Secretary during the Rajapaksa administration, and has been accused by rights groups of war crimes during the final months of Sri Lanka's civil war.<sup>20</sup>
27. I accept the political events described in the submission and country information occurred, however, the claims regarding the impact of those events on the Tamil population appear purely speculative. There is no credible country information before me to support that the changes to the composition of parliament or the re-emergence of political figures has resulted in harm of the type feared, or that people with a profile similar to the applicant have been harmed as a result of the events. I am not satisfied there is a risk of harm to the applicant as a result of those events, now or in the reasonably foreseeable future, if returned to Sri Lanka.
28. Overall, I am satisfied the conditions in Sri Lanka for Tamils has significantly improved since the applicant departed, and the risk of mistreatment from security forces has also decreased since the end of the conflict. I accept that serious mistreatment of some Tamils is an ongoing issue in Sri Lanka, however the weight of evidence indicates that such risk is significantly reduced, and the chance of such treatment for merely being a Tamil, with the type of

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<sup>18</sup> 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, OGG6E7028826

<sup>19</sup> United Nations Human Rights Council, "Promoting reconciliation, accountability and human rights in Sri Lanka", 08 February 2019, 20190311120409

<sup>20</sup> Aljazeera, 'Gotabaya Rajapaksa confirms presidential run in anxious Sri Lanka', 18 May 2019, 20190520124147

experiences the applicant has had, are remote. I am not satisfied the applicant had any LTTE profile whilst he was in Sri Lanka. He has not claimed he or any members of his family were associated with the LTTE, and although he may have employed a number of men who were suspected to be LTTE members, and he was detained on a number of occasions, during which he was asked to identify those men, he was released without being charged with any offence or being sent to rehabilitation on each occasion. He has not indicated he has participated in separatist activities, or spoken out against the Sri Lankan government, either in Sri Lanka or Australia. His family continue to live in Colombo and do not appear to be of any interest to Sri Lankan authorities. In all the circumstances, the chance of the applicant being harmed on the basis of any imputed connection to the LTTE, no matter how tenuous, or being subjected to monitoring on his return, is no more than remote. I am not satisfied the applicant faces a real chance of harm, now or in the reasonably foreseeable future, for any of the reasons claimed, whether these factors are considered separately or together.

29. The applicant's SHEV application indicates he departed Sri Lanka illegally, arriving in Australia by boat in October 2012, and without using his Sri Lankan passport. I consider it highly likely on return to Sri Lanka he would be identified as someone who departed Sri Lanka illegally, in contravention of the Immigrants and Emigrants Act 1949 (the I&E Act), and as someone who has lived overseas and is returning as a failed asylum seeker.
30. Country information before me indicates that on return to Sri Lanka the applicant is very likely to be questioned at the airport, that enquiries will be undertaken, and he will be charged with an offence under the I&E Act. The applicant arrived in Australia by boat as an unauthorised maritime arrival, and there is no information before me to suggest the applicant was other than a passenger on that journey. DFAT reports that passengers on people smuggling ventures, such as the applicant, are subject to a fine and not a custodial sentence. As a part of the process at the airport the applicant may be held in an airport holding cell for a period of up to two days if a magistrate is not available. The information before me does not indicate returnees are subject to mistreatment at the airport, and all returnees are treated according to standard procedures irrespective of ethnicity. Returnees who plead guilty to the offence receive a fine, which may be paid by instalments, and they are free to go. If they plead not guilty they are usually granted bail on the basis of a personal surety or guarantee of a family member. In addition, there may be ongoing costs associated with appearance at court.<sup>21</sup>
31. There is nothing in the information before me to suggest the applicant would plead not guilty. I accept it is highly likely he will be subject to questioning, a relatively brief period of detention at the airport, and a fine on his return to Sri Lanka. I am satisfied the I&E Act provisions relating to illegal departure are not discriminatory on their face, and they are not discriminatory in intent or implemented in a discriminatory manner. Overall, I am not satisfied the treatment the applicant will encounter on return to Sri Lanka, including the processes and penalty described, amounts to serious harm for this applicant.
32. I consider it highly likely the applicant would return to the Western Province, where he originates from and where his wife and children, and his father and siblings, continue to reside. As a returning asylum seeker I accept he may face practical challenges to successful return to Sri Lanka. DFAT reports that most returnees incurred significant expenses or debts to undertake their outward journey, and many returnees experience difficulty finding suitable employment and reliable housing, and there may be delays in obtaining official documentation. Overall the country information supports that the government has

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

decreased systematic surveillance of returnees. However, failed asylum seekers have reported some social stigma from their communities as they resent the limited financial support provided to refugee returnees. I consider the applicant will have stable accommodation with his wife, however I accept he may experience some social stigma from community members as a failed asylum seeker and as a person who has not lived in Sri Lanka for a long time. The applicant previously supported his family working as a self-employed [Occupation 1], and since [year] in Australia has been working on contract [Occupation 2]. I am not satisfied the applicant would be unable to resume the work he previously did in Sri Lanka, or utilise the skills obtained in Australia to obtain other work. Overall, I am not satisfied that any challenges the applicant may face in re-establishing himself in Sri Lanka, and finding employment, or any social stigma or surveillance he may experience as a returning asylum seeker from Australia amounts to serious harm for this applicant.

33. I have accepted the applicant departed Sri Lanka illegally and would be returning to Sri Lanka as a failed asylum seeker after spending several years in Australia. However, considering the country information and the applicant's evidence, I am not satisfied there is a real chance of serious harm to him as a result of his illegal departure, or because he is a returning asylum seeker, now or in the reasonably foreseeable future, whether those factors are considered separately or together.
34. I am not satisfied the applicant has a well-founded fear of persecution.

#### **Refugee: conclusion**

35. 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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36. 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**

37. 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.
38. I accept on return to Sri Lanka the applicant may face some social stigma as a returning asylum seeker, and as a person who has not lived in Sri Lanka for a period of time, he may

also face some challenges in re-establishing himself and finding work. It is also likely he will be subject to a series of administrative processes at the airport on return which may include a brief period of detention at the airport, and he may receive a fine as a result of his illegal departure. Although experiencing social stigma may be hurtful, and the processes associated with returning to Sri Lanka after an extended period of time abroad and receiving a fine, may be stressful, I am not satisfied such treatment would amount to significant harm for this applicant. There is no evidence to indicate the applicant faces a real risk of the death penalty for any reason, and I do not accept there is a real risk the applicant will be arbitrarily deprived of his life or tortured during or as a result of his treatment on return. I am also not satisfied that the processes, or social stigma, the applicant may be subject to amounts to pain or suffering that is cruel or inhuman in nature, severe pain or suffering, or extreme humiliation for the purposes of the definition of cruel or inhuman treatment or punishment or degrading treatment or punishment, as set out in the Act, whether considered separately or together.

39. I have otherwise found there is not a real chance the applicant will face any harm on return to Sri Lanka, and for the same reasons, I am also not satisfied there is a real risk of any harm, including significant harm, should he be returned to Sri Lanka.

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

40. 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.