



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

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA19/07491

Date and time of decision: 20 December 2019 11:28:00  
M Wei, Reviewer

**Decision**

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

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

## Background to the review

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### Visa application

1. The referred applicant (the applicant) claims to be a national of Sri Lanka. He arrived in Australia in October 2012 and lodged an application for a Safe Haven Enterprise Visa (SHEV), Subclass 790 in April 2016. A delegate of the Minister for Immigration (the delegate) refused to grant the visa on 11 November 2016. The delegate found that the applicant did not have a well-founded fear of persecution and that there was not a real risk of significant harm upon his return to Sri Lanka. On 7 July 2017, another reviewer of the IAA affirmed the decision not to grant the applicant a protection visa. [In] November 2019 the Federal Circuit Court of Australia, quashed the IAA decision and remitted the matter to the IAA for reconsideration. This is the reconsideration of the delegate's decision.

### 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 5 December 2016, the IAA received a submission from the applicant's representative, which contains arguments and some new information. I have considered this submission, subject to the new information as discussed below.
4. As part of his response to the delegate's decision, the submission states that, although the applicant departed Sri Lanka legally, he could however be perceived as having departed illegally for various reasons. I have considered these submissions.
5. The submission refers to an article of the Colombo Telegraph of 12 November 2016. This article reports that a Buddhist Monk from Batticaloa has threatened to kill a Tamil Grama Sevaka, a governmental official, for filing several court cases against Sinhalese living in the district. It reports that the threat was made against the Grama Sevaka in the presence of several police officers on a main road and that the monk was taken away by the police. I consider this article could not have been provided to the delegate before the primary decision as it was published after the delegate's decision. The threat was made against the Grama Sevaka personally as he had filed court cases against some Sinhalese. It is also reported that the monk has been taken away by the police. Although the article suggests that the Grama Sevaka received the threats because he was a Tamil and the monk made some hate comments, this reporting was about a particular incident that occurred three years ago in Batticaloa. The applicant is from Jaffna. I consider this information has very limited value in my assessment of the applicant's claims for protection now. I am not satisfied there are exceptional circumstances to justify considering this new information.
6. The submission also refers to an IAA decision (IAA16/00603) and quoted two paragraphs from that decision, where the IAA in that matter found that the applicant, who departed illegally whilst on a weekly reporting regime, was likely to be detained and subject to significant physical ill-treatment in the course of questioning on arrival. The submission also refers to another previous IAA decision which is not new information as it was already referred to in the post interview submission which is before me. It is submitted that it is open to the IAA here to draw a similar inference as the reviewers in the previous two IAA matters. I note the new information appears to concern an applicant who left Sri Lanka illegally while on a weekly reporting arrangement, unlike the applicant in this case, as noted below, who

departed Sri Lanka legally. Given also that I am to make my own assessment of the applicant's individual circumstances on the basis of the information before me, I am not satisfied there are exceptional circumstances to justify considering this new information.

7. I have obtained and considered a report by the Department of Foreign Affairs and Trade (DFAT) published recently on 4 November 2019. The delegate considered the DFAT's December 2015 report. The 2019 report contains updated information on the situation for people with a profile similar to the applicant's in Sri Lanka. It has been specifically prepared for protection status determination purposes. I am satisfied there are exceptional circumstances to justify considering this new information.
8. I note that the previous IAA obtained the DFAT report of 24 January 2017. Given this report has been replaced and that I have obtained and considered the November 2019 report, I am not satisfied there are exceptional circumstances to justify considering the 2017 DFAT report.

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

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9. The applicant's claims can be summarised as follows:
  - He is a Sri Lankan citizen, a Tamil and a Hindu, born [on Date]. He is from Jaffna district.
  - The Liberation Tigers of Tamil Eelam (LTTE) used to have an office next to his house which was owned by his mother (House 1) before the LTTE withdrew from his area in 2007. His family's other house (House 2) was located opposite to an army camp on the other end of the same road.
  - In 2008, the army searched his House 1 for weapons.
  - In July 2010, the Criminal Investigation Department (CID) officers visited his House 2 enquiring the whereabouts of his brother and a cousin "J" and demanded his brother to report to the CID office on the same day. His brother was interrogated and severely beaten. His brother was accused of having stored weapons for the LTTE. His brother was also questioned about J.
  - J ended up in an IDP camp at the end of war as he was in Vanni that time and he left Sri Lanka for [Country 1] in 2010 after he was released from the camp.
  - His brother departed Sri Lanka for [Country 1] in December 2010.
  - He and his mother then relocated to Colombo in January 2011 and [in] February 2011, he also left Sri Lanka for [Country 1] and arrived in Australia in October 2012.
  - He fears harm as the Sri Lankan authorities suspected his family members of having LTTE involvement or links. He also fears harm because he departed Sri Lanka illegally and claimed asylum abroad.

### **Refugee assessment**

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10. 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

11. 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.
  
12. Based on the applicant's evidence including the identification documents provided, I accept that he is a [age] year old young Tamil male from Jaffna, Northern Province of Sri Lanka. I accept that he is a citizen of Sri Lanka. I find Sri Lanka is the receiving country.
  
13. The applicant's core claims for protection were premised on a story that the Sri Lankan authorities became interested in his family because the LTTE used to have a base next to their House 1, the authorities claimed to have found weapons hidden in his House 1 and that the authorities suspected that his cousin J had LTTE involvement. For the reasons below, I am not satisfied that the applicant's accounts of the problems his family faced are credible.
  
14. The applicant's evidence was that the LTTE had withdrawn from his area sometime in 2007. However, the army only came to his House 1 in search of weapons in 2008. The applicant claimed that around 20 army officers spent a number of hours digging his backyard and searching his house for weapons and after that the army began to visit his House 1 very often looking for them. His family then moved to House 2, which was located on the other end of the same road, about a 10 minute walk from their House 1.
  
15. The applicant stated in the visa application that he believed House 2 where they lived since 2008 was not known to 'the army soldiers' until July 2010. He stated that in July 2010 the CID officers came to his House 2 looking for his brother and his cousin J and asked his brother to report the CID office on the same day. When his brother reported himself to the CID office, he was interrogated and beaten. His brother was asked of other locations where weapons were stored and also about J.
  
16. At the SHEV interview, the applicant told the delegate that their House 2 was across the road from the army camp, and the army officers could monitor their House 2 from the back of the army camp. He also said that his family members, among other people in the area (anyone who were over 15 years old), were required to attend a local temple and had their ID checked every fortnight. At the same time, the applicant was attending school and on his evidence, the army officers would harass him, asking him to buy cigarettes for them and he was told to get off the road to let the army vehicles through. It was put to him at the SHEV interview that it would seem implausible that the CID did not know his family's whereabouts if they were

looking for his family. The applicant responded that they could but they had been waiting for an opportunity/ a particular time to come and catch his family. He also said that the army might not know that the CID was looking for them. The applicant also added that the CID officers informed his brother, when he attended their office, that they had found weapons in their House 1, and put to his brother that there had to be more weapons.

17. Given the applicant's evidence was that the army searched his House 1 for weapons in 2008 and the CID asked his brother in July 2010 about the weapons, I do not accept that the army might not know that the CID were looking for his family. The applicant's evidence that the CID knew their location and were waiting for the opportunity to catch his family is also vague and unimpressive. Country information before me indicates that towards the end of the conflict, a large number of LTTE members were arrested and detained by the security forces and many civilians were also questioned or monitored towards the end of the conflict (DFAT December 2015 report). Country information also indicates that a large number of former LTTE members and supporters were sent to rehabilitation centres following the war ("UNHCR Eligibility Guidelines for Assessing the international protection needs of asylum-seekers from Sri Lanka", December 2012). I have significant credibility concerns in this respect of his evidence. I consider, had the army been looking for his family and searched his House 1 often because they found weapons or claimed to have weapons in his House 1, I do not consider it is credible that it would have taken about two years before the CID to locate the applicant's family or to decide to visit his House 2 and then interrogated his brother about the location of other weapons. His evidence that his family were able to live close to an army camp during the last lap of the war and following the war from 2008 to 2010 without incidents, apart from claiming of being subject to low-level harassment from the soldiers on his way to and from school, also suggests that his family members were not considered of having LTTE links. Given the LTTE had withdrawn from his area 'sometime in 2007', his evidence also gives no insights as to why the authorities were only looking for weapons in his House 1 'sometime in 2008'.
18. The applicant also gave differing evidence as to what happened to his brother after he attended the CID office in July 2010. He stated the following in his visa application: two days after that incident, the CID officers called his brother and told his brother to meet them at a location near a cemetery where a Tamil was killed by army soldiers. His brother did not go to the cemetery to meet the CID officers. After these incidents, his brother departed Sri Lanka for [Country 1] in December 2010 as his brother was afraid to remain in the country. This version of his story suggests that nothing happened to his brother from July 2010 to December 2010 even though his did not follow the CID officers' request to meet them in July 2010. He also stated in the visa application that after his brother departed Sri Lanka, he and his mother relocated to Colombo in January 2011.
19. At the SHEV interview, the applicant said that after his brother was released on the day when he attended the CID's office in July 2010, he was required to report once every two days. On the third occasion when his brother reported for signing, his brother was beaten and had a broken nose and required hospital treatment. Only after his brother attended the CID for 5 or 6 times, his brother was asked to meet at a specific location. Within two to three hours, his mother took him and his brother to Colombo.
20. Even allowing that the applicant may not recall all the details due to the lapse of time and his young age at the relevant time, given the claimed interest the authorities had in his brother formed part of his substantial claims for protection, I do not consider it is not insignificant that the applicant could not provide a more consistent story as to when his brother left Jaffna and when he and his mother left Jaffna, and if his brother also had to report to the CID office five to six times before his brother was told to meet at the specific location. When these

discrepancies were put to the applicant at the SHEV interview, the applicant responded 'I don't know whether they made a mistake', suggesting his representative might have made a mistake. I am not persuaded with this explanation. I note his representative, who was also an interpreter, had declared in April 2016 that he had accurately and completely interpreted the contents of the applicant's written statement from English to Tamil.

21. Moreover, when the applicant was interviewed in January 2013 ('entry interview'), about three months after his arrival in Australia. He stated that his brother was living in [Town] at that time. When this was put to him at the SHEV interview, he stated that he did not think that he would have said that. This issue was not addressed in the post interview submission from his migration agent. I note that the applicant also stated in the entry interview in 2013 that his sister was living in Jaffna at that time, whereas at the SHEV interview he said that his sister left Sri Lanka and went to [Country 2] in 2004. I note at the time of the entry interview, while the applicant was relatively young, he was about [age] years old and had about 10 years of education. He had also worked in [Country 1]. That interview took place three months after his arrival. The applicant was able to provide information such as his education, his travel to [Country 1] and other details about his family at that interview. I am not satisfied such inconsistencies are explained by the reasons advanced.
22. The applicant did not mention in the 2013 entry interview that the authorities searched his House 1 for weapons and claimed to have found weapons or his brother was required to report to the CID and questioned him about any hidden weapons. When this was put to him at the SHEV interview, the applicant responded that he was told to tell his problems in a few sentences and he would have mentioned them if he was given the opportunity. The migration agent who was present at the SHEV (on behalf of his representative) also submitted that the entry interviews were normally rushed and that the applicant's young age at the relevant times might have affected his ability to present his evidence then. While the migration agent also suggested that the interpretation at that time might be substandard as a general observation based on her experience, I note that the applicant did not claim he had problems with the interpreter or that the interpreter had not interpreted his evidence at the entry interview. I am mindful that the applicant was under 18 during the period when the incidents were claimed to have occurred and he was about [age] at the time of the entry interview. I am also mindful that he was not represented at that time and he was told to provide brief reasons as to why he had left Sri Lanka, and that a formal protection application was not made until three years later. On the other hand, the applicant's evidence was that he saw from the neighbour's house that about 20 army soldiers went to his house and he also witnessed the mess in his yard and house after they left. His family had to relocate to House 2, which was in close proximity to an army camp, after that incident. He also claimed that he left Sri Lanka immediately after his brother left. I also note that, although he was young, he also showed that he was able to obtain work in [Country 1] between 2011 and 2012. I am not convinced the reasons given explain his failure to have referred to such significant incidents had they were his personal experiences.
23. The applicant's evidence about his cousin J is also problematic. He stated in the visa application that J went to the Vanni in 2006 visiting his brother. J was unable to return to Jaffna due to road closure and ended up in an IDP camp after the war. He stated that a few months after J began to reside with his family in Jaffna following his release from the IDP camp, the CID was in search of J in the area but did not come home, even though the CID had gone to J's mother's home. He also stated in the visa application that the CID asked his brother about J in July 2010. At the SHEV interview, the applicant stated that the authorities had been looking for J since 2006 as they suspected J of having involvement in the LTTE. He also said that J was released from the IDP camp in 2009 and the authorities knew he came to

Jaffna but only asked for J in 2010. Country information indicates that the authorities screened and identified LTTE suspects in the IDP camps (“Report of the OHCHR Investigation on Sri Lanka”, OHCHR, 16 September 2015). J’s ability to secure his release from the IDP camp as early as in 2009 would suggest that the authorities did not consider J had LTTE involvement. On the applicant’s evidence, J had resided with his family for a few months before the CID was looking for him. His other evidence as noted above was that all people that lived in his area during that period who were aged over 15 years old were required to report at a local temple on a fortnightly basis and have their ID checked. Had this been the case, I do not consider that the CID, who had searched for J in J’s mother’s house, would have only made enquires about J in the area and did not attend his house until July 2010.

24. A Danish Immigration Service report of October 2010 (“Human Rights and Security Issues concerning Tamils in Sri Lanka”) indicates there was still a huge army presence in Jaffna in 2010 with the potential for abusing their powers and that random checks were being carried out on people’s cars and young people were especially targeted. The same report also states that the regularity of checks at checkpoints in Jaffna was not systematic. People were only occasionally being stopped. However, people with actual or perceived links to the LTTE could be exposed to checks. Country information before me also indicates that young Tamils between the ages of 18 and 40 in Jaffna were required to register (Immigration and Refugee Board of Canada, “Sri Lanka: whether there has been increased surveillance, arrests and detentions of Tamil citizens since February 2011”, July 2011).
25. In light of the above, I am not satisfied that the applicant has provided a credible account as to what he and his family experienced in Sri Lanka. I am not satisfied he is a credible witness. I am willing to accept that the applicant, as a young Tamil boy who rode a bicycle going to school, might on occasion have been subject to some low level harassment from the soldiers on his way to and from school. I however do not accept that the applicant could not continue his schooling because of the harassment from army personnel, noting that the applicant had studied until 2010 and completed [a specified] level, shortly before he left Sri Lanka for [Country 1]. I am also willing to accept that his family members, including his brother, among other locals who were over the age of 15, were required to attend registration and ID checks before 2011. I note this practice had stopped in 2011 (DFAT December 2015 report). I am not satisfied that a cousin of his was in Vanni from 2006 and 2009 and was in an IDP camp in 2009. I am not satisfied that the authorities have had any adverse interest in J or imputed the applicant’s family with any LTTE profile due to their relationship with J. I am not satisfied that the applicant’s family owned or lived in a house next to a LTTE base. I not satisfied that the applicant’s family home was searched by the authorities for weapons. I am not satisfied the applicant’s family including his brother and himself, ever came to the adverse interest of the Sri Lanka authorities. I am not satisfied that his brother was interrogated, beaten or asked to meet at a specific place, apart from being subject to the routine registration requirement that applied in Jaffna at that time. I am not satisfied that his brother left Sri Lanka in 2010 or his sister left Sri Lanka in 2004. I am not satisfied they had left Sri Lanka before January 2013. The applicant himself was issued a Sri Lanka national ID in February 2011 and applied for his passport through official channels. He exited Sri Lanka on his own genuine passport. I am not satisfied that the authorities sought out the applicant or his family members while they were in Sri Lanka or after he left Sri Lanka. I consider that the applicant has made up the story about his family living next to a LTTE base and about the circumstances of a cousin to support a claim that his family came to the adverse interest of the authorities before he left Sri Lanka. I am not satisfied the applicant or any member of his family was of adverse interest to the Sri Lankan authorities while they were in Sri Lanka.

26. Despite stating in the written statement that he fears harm because he departed Sri Lanka illegally, the applicant's evidence was that he departed Sri Lanka on his own genuine passport and he has provided a copy of his passport application form. I do not accept that the applicant left Sri Lanka illegally. I find he left Sri Lanka legally.
27. I consider it is possible that the applicant was detained at an immigration detention centre in [Country 1] for 21 days when his visa had expired. There is no evidence this is known to the Sri Lankan authorities. Even it is known to the Sri Lankan authorities, I am not satisfied this experience would bring him to the adverse interest to the authorities or would place him on a watch or stop list (UK Home Office May 2016 report, DFAT December 2015 report and DFAT November 2019 report). As discussed below, I am also not satisfied the applicant's seeking asylum in Australia would give rise to an adverse profile.
28. The country situation for Tamils has improved significantly since the end of the conflict, in particular since the applicant's departure from Sri Lanka. The country information before me indicates that simply being a young Tamil male from a former LTTE controlled area would not give rise to perceived links to the LTTE or any other anti-government or adverse profile (UNHCR 2012 eligibility guidelines; UK Home Office: "Sri Lanka: Tamil separatism, May 2016; DFAT December 2015 and 2019 reports). The information before me does not support there is a real chance that the applicant would be imputed with an adverse profile, noting my consideration below concerning his being a returned Tamil asylum seeker.
29. The DFAT reports before me of both 2015 and 2019 note that the monitoring and harassment of Tamils has decreased since the end of the war. I note that DFAT notes there is continuing monitoring and surveillance of activities in the North, however there is no suggestion that ordinary Tamils who do not have a profile of concern to the authorities are subject to monitoring and surveillance.
30. I have had regard to other country information before the delegate, including articles and reports provided by the applicant's migration agent. I am not satisfied that the situation for Tamils has not improved as argued by the applicant's migration agent. I note that the applicant at the SHEV interview also referred to the police killing two Jaffna University students in 2016. I am not satisfied that this information supports that ordinary Tamils who hold no profile of concern are targeted by the authorities.
31. DFAT notes in 2015 that allegations of torture pertain to a relatively small number of cases compared to the total population of Sri Lanka. It considers in 2019 that the risk of torture perpetrated by security forces has decreased since the end of the war and is no longer state-sponsored, and that Sri Lankans, irrespective of ethnicity, face a low risk of torture.
32. DFAT considers that Tamils face a 'low risk' (i.e. 'DFAT is aware of incidents but has insufficient evidence to conclude they form a pattern') of official or societal discrimination based on ethnicity, including in relation to access to education, employment or housing. The applicant has 10 years of education. He discontinued his schooling shortly before he left Sri Lanka for [Country 1]. I am not satisfied he did not continue his schooling in Sri Lanka due to discrimination or harassment from the soldiers. His family also own property.
33. On the information before me, taking into account the applicant's history, I am not satisfied he faces a real chance of any harm from the Sri Lankan authorities or anyone else as a young Tamil male from the Northern Province now or in the reasonably foreseeable future.



34. I am not satisfied that the applicant, as a returning Tamil asylum seeker from Australia who departed Sri Lanka legally, faces a real chance of persecution.
35. According to DFAT, entry and exit from Sri Lanka is governed by the Immigrants and Emigrants Act. All returnees to Sri Lanka are processed at the airport on arrival by various governmental agencies, including the Department of Immigration and Emigration and the CID. For returnees travelling on temporary travel documents, police undertake an investigative process to confirm identity, which would identify someone trying to conceal a criminal or terrorist background, or trying to avoid court orders or arrest warrants. This often involves interviewing the returning passenger, contacting police in their claimed hometown, contacting claimed neighbours and family, and checking criminal and court records. All returnees are subject to these standard procedures, regardless of ethnicity and religion. DFAT understands detainees are not subject to mistreatment during processing at the airport.
36. Given my findings that none of the applicant's family members including his brother, sister or a cousin was of any adverse interest to the authorities, even if I did accept that they have left Sri Lanka and travelled to [Country 3], [Country 2] or [Country 4], there is a lack of information to support that their presence in those countries would impute them or the applicant with an adverse profile.
37. In light of the information above, in the applicant's circumstances, I am not satisfied that there is a real chance that he would be perceived as having departed Sri Lanka illegally. I am not satisfied that he would be subject to the processes that apply to those who left Sri Lanka illegally, such as being charged or going through any court or bail process. Although the applicant would be subject to questioning and required to wait for clearance at the airport, I am not satisfied that this process would expose him to serious harm or persecution, given all returnees are subject to these standard procedures and not subject to mistreatment.
38. I accept that the authorities would likely know or infer that the applicant has applied for asylum in Australia if he returns to Sri Lanka on a temporary travel document. Many Tamils have returned from Australia and European countries to Sri Lanka in the past. DFAT understands that some returnees, including returnees in the north and east with suspected LTTE links, have been the subject of monitoring by the authorities. DFAT also states that most returnees, including failed asylum seekers, are not actively monitored on an ongoing basis, and that, some Tamil returnees in the north had told DFAT they had not experienced harassment by the authorities or received monitoring visits. I note the allegations of mistreatment of returnees which have been raised by human rights groups and some media reports as referred to in the post interview submission and in the delegate's decision. However, they mostly relate to those who hold some kind of adverse profile and the applicant has no such profile of concern. There is a lack of recent reporting to support that Tamil returnees in general who have sought asylum abroad and have lived abroad for some time (and who otherwise do not have a profile of concern) are perceived to have anti-government or pro LTTE opinions or suspected of having involvement in LTTE/ pro separatist activities, or otherwise are of adverse interest to the authorities for this reason. Even accepting that the applicant may face some monitoring on return as a returning asylum seeker, with his profile I am not satisfied it will be for any prolonged period or that it amounts to serious harm or would lead to a real chance of any other harm.
39. DFAT also notes that refugees and returning asylum seekers face practical challenges to successful return to Sri Lanka. Some returning failed asylum seekers reported social stigma from their communities. DFAT also understands that societal discrimination is not a major concern for returnees, including failed asylum seekers. It assesses that returnees face a low

risk of societal discrimination upon return to their communities. Some Tamil failed asylum seekers returned to the north had told DFAT that they had not experienced societal discrimination following their return. DFAT also assesses that reintegration issues are not due to failure to obtain asylum, but rather due to the employment and accommodation difficulties they may face. While these matters are discussed in the DFAT report, the applicant has not raised particular concerns. The applicant's mother is in Sri Lanka. The applicant is returning as an adult. He has work experience outside Sri Lanka. I am not satisfied that the applicant faces a real chance of serious harm due to any difficulties or treatment that he may face, including social stigma or practical challenges of re-integration.

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

#### **Refugee: conclusion**

41. 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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42. 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**

43. 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.
44. I accept that the applicant, on return to Sri Lanka, as a returning asylum seeker travelling on a temporary document, would be subject to the standard process at the airport and may face some practical challenges in resettling and possibly social stigma and a brief period of monitoring of a kind as noted above. I am however not satisfied that the treatment or challenges would amount to significant harm. I am not satisfied that it amounts to the death penalty, arbitrary deprivation of life or torture. I am also not satisfied that it amounts to pain or suffering that could be reasonably regarded as cruel or inhuman in nature, severe pain or suffering, or extreme humiliation for the purpose of the definition of cruel or inhuman treatment or punishment or degrading treatment or punishment.
45. I have otherwise concluded that there is not a real chance the applicant would face any harm. As real chance and real risk involve the same threshold, I am not satisfied there are

substantial grounds for believing that, as a necessary and foreseeable consequence of being returned from Australia to Sri Lanka, there is a real risk that the applicant will suffer harm, including significant harm.

**Complementary protection: conclusion**

46. 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.