



**Australian Government**  

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**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA19/06227

Date and time of decision: 15 April 2019 16:36:00  
R Adolphe, Reviewer

**Decision**

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

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

## Background to the review

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### Visa application

1. The referred applicant (the applicant) claims to be a Sri Lankan Tamil. He arrived in Australia [in] October 2012 as an unauthorised maritime arrival. On 8 March 2017 he made a valid application for a Class XD, Temporary Protection Visa (TPV).
2. On 9 January 2019 a delegate of the Minister for Immigration (the delegate) refused to grant the visa. The delegate was not satisfied that the applicant faced a real chance of serious harm or a real risk of significant harm upon return to Sri Lanka.

### 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 new 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 a Hindu Tamil male from [City 1], Eastern Province of Sri Lanka.
  - He had involvement with the Liberation Tigers of Tamil Eelam (LTTE) and familial association to the LTTE.
  - He and his family fled to India in 2006 to escape the civil war.
  - He returned to Sri Lanka [in] July 2012 for the purposes of visiting his mother who was unwell.
  - He was arrested at [an] airport by the Criminal Investigation Division (CID) and interrogated. He was taken in a van by the CID to [City 1] police station, tortured and held for [number] days.
  - His mother made arrangements for a bribe to be paid for his release.
  - He stayed with his brother while his family made arrangements for him to flee from Sri Lanka.
  - He departed from [a location] on people smuggling boat for Australia [in] September 2012.
  - Since he has been in Australia he has participated in Martyr's Day celebrations.

### Factual findings

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6. The applicant has been consistent in stating his identity since he arrived in Australia. He has provided a copy of his Sri Lankan National Identity Card (NIC), a copy of a Sri Lankan passport issued in his name in 2005 and an English translation of his birth certificate. I am satisfied the applicant's identity, nationality and ethnicity is as claimed. He has claimed and I accept that he has two [children]. He has provided copies of their birth certificates indicating that they were

born in [year] and [year] in India and that the applicant was married to the children's mother at the time of their births. Based on the applicant's evidence I accept the applicant is a [age] year old Tamil male from the Eastern Province of Sri Lanka and that Sri Lanka is the receiving country for the purpose of this review. I accept his claims that his marriage with the children's mother ended and she has now remarried and his children live with his sister in India.

7. I accept the applicant's evidence that he was born in [City 1] and resided there with his siblings and parents until 2006. The applicant claimed that he and his sister travelled to India by plane from [an] airport using Sri Lankan passports they had obtained the year before. He stated that his parents and brother also went to India, travelling there illegally by boat. He has provided convincing evidence to support these claims. He has provided a copy of his passport issued in 2005 from Colombo. He has also provided copies of his registration and identity documents from a refugee camp in Tamil Nadu, India. One document contains a photograph depicting a person of the applicant's likeness with another young woman of whom I accept is the applicant and his sister.
8. The applicant's displacement to India is consistent with the country information before me that reports that thousands of Tamils were displaced during the civil conflict in Sri Lanka and many fled to Tamil Nadu in India to refugee camps and were assisted by non-government organisations such and United Nations High Commissioner for Refugees (UNHCR).<sup>1</sup> I accept that the applicant departed Sri Lanka when the ceasefire ended in 2006 and both sides re-engaged in active conflict. The applicant has also claimed that the reasons he departed Sri Lanka was that he held a profile of a person of interest through an LTTE and Tamil National Alliance (TNA) association and feared harm on this basis.
9. In his written statement, the applicant said that one year prior to his move to India (2005) he had voluntarily joined the LTTE. He stated that the LTTE trained him in the use of weapons and specifically, an AK47. He also claimed to have a familial LTTE association as his uncle was a senior LTTE member named [deleted] and he was responsible for the LTTE's military intelligence. He stated that in 2006 the war reignited and the LTTE dispersed from the area and his parents, concerned for the family well-being, made arrangements for them to flee Sri Lanka for India.
10. At interview the applicant provided a significantly different version of his association to the LTTE. He told the delegate that in the years leading up to his move to India he had worked as a fisherman with his father and that he had not witnessed any active conflict. The delegate asked the applicant if he had joined the LTTE to which the applicant stated that he had not, notwithstanding one occasion in which he had participated in some self-defence training run by the LTTE. The delegate pointed out to the applicant that this information was inconsistent with his written evidence and reminded him that in that, he had claimed to have voluntarily joined the LTTE and received weaponry training. The applicant adamantly denied any LTTE membership stating again that he only participated in some basic training and that everyone living in the area was required to participate. When asked by the delegate about his [uncle], the applicant only claimed that his family had told him that he was a LTTE member from [City 1] and that he had died in 2009. Notably, the applicant stated that he had never met this man in person.

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<sup>1</sup> UNHCR, "UNHCR – Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka", 21 December 2012, UNB0183EA8; DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064

11. I accept that the applicant engaged in some self-defence training conducted by the LTTE on one occasion and I accept his evidence at interview that his personal involvement with the LTTE was limited to this group training self-defence session. However, I am not satisfied his uncle had the association with the LTTE suggested. At interview he appeared to have little knowledge of this uncle, stating he had not met him. The applicant was not able to provide the level of detail I would expect from someone purporting to have an uncle with a high profile LTTE role and who was stationed in the same city as the applicant. This is particularly so as the applicant has claimed that this family link puts him at risk. He did not claim that there were any instances where he (or his family members) had been harmed or threatened with harm on account of his association to his uncle. I am not satisfied with the applicant's evidence and do not accept that the applicant had an uncle who held a significant role in the LTTE or that he has been imputed with an LTTE association on account of his uncle.
12. His written statement the applicant claims he had an additional LTTE connection through a person named "M". He stated that M was in the LTTE and that he feared harm on account of his association to him. At interview the applicant also made some significant corrections to this information. He stated that M was his cousin and was the TNA [member] from 2002 to 2004. He retracted the claim that he had been a LTTE member. He claimed that he was very close to his cousin and attended [an event] as TNA [member]. He claimed that at this ceremony a photograph was taken of him and his cousin M and that this had been published, although no evidence of this publication has been provided. He has also claimed that he worked [for] M during the "election time" and that through the TNA he assisted in providing food and clothes to the LTTE.
13. He claimed that his cousin faced a lot of problems with the Karuna Group on account of his political position in the TNA, and on account of the published photograph and [his] association with M was known to the Karuna Group and he also faced many problems. At interview he told the delegate that he did not experience any problems while he worked [for] M, and that these had only occurred after M left office in 2004. When the delegate sought to clarify with the applicant the interactions he had with the Karuna Group he had difficulty in answering and stated that that the army had come to his house looking for him. He also told the delegate that the Karuna Group had confiscated his family home and used it as their office. I found the applicant's evidence regarding his cousin M to be confusing and I am not convinced that the applicant was imputed with political opinion on account of his cousin or that he was ever a person of interest to the paramilitary group, Karuna or the army. Country information indicates that the Karuna Group only formed in 2004<sup>2</sup> which is the same year that M's position as TNA [member] came to an end and two years after the applicant had claimed he provided assistance to [M]. His claims regarding a published photograph of the applicant and M has been poorly evidenced and his other evidence leads me to conclude he had no interactions personally with members of the Karuna Group prior to departing Sri Lanka. I am willing to accept the applicant had a cousin M who was [member] of the TNA in the Eastern Province in 2002 and that the applicant appeared in a photograph taken at the time [information deleted]. I accept that he assisted in some work [in a certain role] in the lead up to M's elected position in 2002. I also accept that the TNA party M was affiliated with may have provided food and clothes to the LTTE at the time, I am not satisfied that the applicant was targeted by Karuna or anyone else on account of his association with his cousin M or for any other reason prior to his departure from Sri Lanka. Nor am I satisfied that the applicant's family home was confiscated by the Karuna Group, noting that the applicant confirmed with the delegate that his parents

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<sup>2</sup> Austrian Centre for Country Origin & Asylum Research and Documentation (ACCORD), "Sri Lanka: COI Compilation", 31 December 2016, CIS38A80123251

and brother continue to live in this same home in [City 1] since their return to Sri Lanka in 2012.

14. I do accept that the applicant departed Sri Lanka in 2006 for India. Overall, I consider it plausible and consistent with country information that the applicant departed Sri Lanka on account of the general danger to his family living in an area ravaged by the civil war that had re-enlivened in 2006. I am not satisfied however that this departure was on account of any imputed LTTE or TNA political profile or that he or his family were specifically targeted. I consider the applicant has fabricated these claims for the purposes of his protection visa application.
15. The applicant claims, and I accept, that his parents returned to Sri Lanka after the war ended. He has provided a letter from UNHCR confirming repatriation services were being provided to his parents [in] September 2010. I also accept that his brother returned to Sri Lanka and he and his sister remained in India at this time.
16. The applicant claimed that in 2012 his mother was unwell and he travelled back to Sri Lanka with the intention of visiting her, although I note at interview he stated that he returned because both parents were unwell. The applicant's passport expired in 2010 and the applicant provided a copy of the temporary travel document he obtained to return and visit Sri Lanka. The document was issued [number] months prior to his departure [in] 2012 by the Sri Lankan authority in Chennai. He supplied evidence of his itinerary issued by a travel agency in India which indicates that he had a one way air ticket to Sri Lanka [in] July 2012. Upon return to Sri Lanka he claimed he was detained, beaten, and tortured by CID and released after [number] days when his mother paid the authorities a bribe for his release.
17. The applicant's evidence regarding the perpetrators of his detention, mistreatment and extortion was confusing and contradictory. He claimed he was arrested at [an] airport upon return to Sri Lanka by plain clothes CID officers and questioned. He told the delegate at interview that he was taken on a [number] hour drive to [City 1] by Karuna Group members. He then stated that he was held in a dark room of the [City 1] police station for [number] days, and subjected to beatings and torture. He told the delegate the Karuna officers questioned him about LTTE hidden weapons and money. He claimed that [someone] helped to negotiate his release and his mother gave this man [amount] to use as a bribe to secure his release.
18. In the applicant's written statement he stated he experienced several forms of torture during his [number] day detention at the [City 1] police station. Whilst I am conscious of the fact that torture can be a sensitive and difficult topic to discuss, I was unpersuaded by the applicant's recount of his experience. He stated briefly that he was severely beaten with a pole and a bag was placed on his head and that he suspected the men were plain clothed CID officers. This in contrast to his other evidence in which he stated the men were Karuna Group members.
19. I do note that the applicant has otherwise been generally consistent since arriving in Australia in relation to his experience upon return to Sri Lanka in 2012. He stated when he first arrived in Australia in 2012 that he was in jail in [City 1] for [number] days after returning to India because the authorities were suspicious of him and wanted to know why he had not been in Sri Lanka for a long time. However, of itself it is difficult to see how this absence would itself single out the applicant, a young Tamil male, for this level of suspicion. Country information reports that thousands of Sri Lankan's returned from the refugee camps in the southern Indian state of Tamil Nadu around this time and that that the Sri Lankan government were keen to welcome thousands of ethnic Tamil Sri Lankan refugees home, most of whom were from areas located in the Northern and Eastern Provinces including the applicant's home town of [City 1].

Whilst it is reported that returnees with emergency passports (or temporary travel documents) may have been questioned by authorities at [an] airport, this did not mean that they were harassed or detained.<sup>3</sup> I note that the applicant's parents and brother who is not dissimilar in age and profile to the applicant, returned to Sri Lanka two years earlier and the applicant confirmed that they had not experienced any mistreatment as returnees from India with the same family composition as the applicant.

20. I note that in response to a question in the TPV application form requesting details of any prior crimes or offences which have resulted in a conviction, the applicant stated: "I was on bail for a court case in Sri Lanka". In another section of the form that about the reason the applicant departed Sri Lanka, the applicant responded that "I have court documents and receipts associated with my mother". Accompanying his TPV application was documents and marked with a [City 1] Court date stamp [in] January 2017. No English translations of these documents were provided. There is also a hand written document which is also not in English. The applicant stated in the same application form that he would provide an English translation for the documents, however translations were not received. At the TPV interview the applicant provided to the delegate documents that he described as eight receipts for money that his mother paid to [City 1] courts. The documents appear to be cash receipts issued by the [Courts of City 1] to his mother (who is named). there is no evidence on the face of these documents however, that they relate to bail of the applicant. I note in this regard that the applicant had also claimed that a bribe was paid to a third party [on] behalf of his mother as a bribe. I also note that the dates of the receipts are in 2016 and 2017 for varied amounts do not support the applicant's other evidence that his mother paid a bribe in 2012 of [amount]. The applicant did not claim that he had been charged of committing an offence or further explained for what reason he would need to appear in court or why his mother would need to make any ongoing payments relating to him.
21. The applicant's evidence is that his mother and brother made arrangements on his behalf to flee Sri Lanka and that he was unaware he was travelling to Australia until the sea journey was underway. He told the delegate that he had discovered from other passengers that the boat was not bound for India but rather they were going to sail to Australia. In the arrival interview conducted in 2012 the applicant discussed at length with the interviewer the arrangements he had made for his travel to Australia and I note these are at odds with those made in his TPV application. He discussed making arrangements himself with a people smuggler that he had met through his cousin and stated that he had chosen Australia as his destination because he had heard it was a good country and that he would be well cared for. He did not mention that his mother and brother had been involved in the arrangements for his departure or that he was unaware of the destination of the boat. I also note that the applicant was not a child at the time but an approximately [age] year old man. I find it difficult to believe that he would not have had some understanding of the boat journey or that there were any reasons his mother and brother would need to deceive him in this regard. I do not accept that the applicant's account of his mother and brother arranging his journey.
22. Whilst I am willing to accept that the applicant may have been questioned at [an] airport upon return from India as a young Tamil male returning to Sri Lanka after living abroad during the end of war and years immediately following, I am not satisfied that the applicant held the profile of someone who would have been of any concern to the authorities. The applicant's claims are at odds with country information from 2012 which indicates many Tamils returned to Sri Lanka from India and that such refugee repatriation from India was welcomed by the Sri

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<sup>3</sup> UK Home Office, "Sri Lanka – Bulletin: Treatment of Returns", 1 December 2012, CIS28615

Lankan government.<sup>4</sup> Notwithstanding the applicant's variations in evidence relating to the descriptions of those who were targeting him (Karuna, CID or police) the applicant otherwise provided a generally consistent version of events whilst detained. Nevertheless I am not convinced that the applicant as an ordinary Tamil returning from India with some very low level LTTE and TNA associations was suspected of LTTE involvement to the extent claimed resulting in him being detained, mistreated and tortured as claimed. I am not satisfied by the applicant's evidence and do not accept that he was detained, beaten and tortured for [number] days by CID, Karuna or police officers or anyone else in 2012. Nor am I convinced that the applicant was released by the authorities and fled Sri Lanka in the manner in which he has claimed. The applicant has not provided English translation for some of the evidence he seeks to rely upon or provided any explanation of the documents which has prevented any meaningful assessment. I am not satisfied that a bribe was paid for his release or that he has received bail for any outstanding court hearings. I accept that the applicant departed Sri Lanka illegally by boat, however, I do not accept his claims that he was fleeing harm or that he was unaware of the plan to travel to Australia to make a claim for protection. I am not satisfied that the applicant's intention to travel to Sri Lanka in 2012 to visit his sick parent or parents is credible and find that he had planned to depart Sri Lanka by boat and travel to Australia when he departed India.

23. I accept that since the applicant has been in Australia he has associated with other Tamils in the community and that he volunteered to help set up for a Martyr's Day celebration on one occasion. I am satisfied that the applicant provided his assistance as a Tamil community member and not for the sole purposes of strengthening his claims for protection.

### **Refugee assessment**

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24. 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**

25. 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

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<sup>4</sup> UK Home Office, "Sri Lanka – Bulletin: Treatment of Returns", 1 December 2012, CIS28615

- 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.

26. I accept that the applicant is a Tamil Hindu male who originates from [City 1] in the Eastern Province of Sri Lanka. I accept that the applicant was displaced by the war and lived in a refugee camp in Tamil Nadu for six years until 2012. I accept he had brief involvement with the LTTE in the form of mandatory basic training and a familial connection to the TNA political party for whom he acted [in a certain role] for a short time in 2002. I do not accept that at the time he departed Sri Lanka for India in 2006 he had any profile whatsoever with the Sri Lankan authorities or paramilitary groups. Nor do I accept that in 2012 when he departed Sri Lanka for Australia he was a person of interest.

27. It is widely documented in the country information before me that the Sri Lankan civil war was a long and brutal war which displaced thousands of Tamils and human losses were significant on both side of the conflict.<sup>5</sup> I accept that the applicant departed Sri Lanka in 2006 and sought refuge in Tamil Nadu, India on account of the dangerous environment in Sri Lanka when active conflict reignited. The country information before me indicates that Sri Lanka has had significant improvements since the applicant departed in 2012, particularly after the 2015 election that saw the Sirisena government come into power in 2015 which has cooperated with the United Nations and taken steps towards reconciliation and transitional justice for all Sri Lankans including Tamils. The government removed military checkpoints on major roads in 2015 and monitoring of Tamils in day-to-day life has decreased significantly under the current government.<sup>6</sup>

28. Despite the progress, country information indicates that the Sri Lankan authorities remain sensitive to the potential re-emergence of the LTTE throughout the country.<sup>7</sup> The government is focussed on preventing both a resurgence of the LTTE or any similar Tamil separatist organisation and the revival of the civil war within Sri Lanka.<sup>8</sup> I accept that prior to 2006 the applicant participated in mandatory self-defence training conducted by the LTTE in [City 1]. I am not satisfied that he or any of his family members were otherwise involved or associated with the LTTE. At the height of the war the applicant and all his immediate family members were residing in India and there is no credible evidence before me that he had any real or perceived links to the LTTE at the time. I accept that since he has been in Australia, the applicant has assisted in the setting up of a Martyr's Day celebration. The International Truth and Justice Project (ITJP) publications report on cases of surveillance of diaspora events by the Sri Lankan authorities, and witnesses believed they had been abducted because of participation in commemorations in Sri Lanka in 2015 and 2016.<sup>9</sup> Other credible and more recent sources reported in 2018 that high profile leaders of pro-LTTE diaspora groups may come to the attention of the authorities because of their participation in public

<sup>5</sup> ACCORD, "Sri Lanka: COI Compilation", 31 December 2016, CIS38A80123251; US Department of State, "Country Reports on Human Rights Practices for 2017 – Sri Lanka", 20 April 2018, OGD95BE927333; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism (version 5.0)", 15 June 2017, OG6E7028826; UNHCR, "UNHCR – Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka", 21 December 2012, UNB0183EA8; DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064

<sup>6</sup> US Department of State, "Country Reports on Human Rights Practices for 2017 – Sri Lanka", 20 April 2018, OGD95BE927333; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism (version 5.0)", 15 June 2017, OG6E7028826; DFAT, "Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064

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

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

<sup>9</sup> International Truth and Justice Project (ITJP), "Unstopped: 2016/17 Torture in Sri Lanka", 14 July 2017, CISED50AD4849; ITJP, "Silenced: survivors of torture and sexual violence in 2015", 7 January 2016, CIS38A801275



demonstrations that support a separate Tamil state<sup>10</sup>, however, it does not indicate that Tamils in general or that all diaspora activity is viewed suspiciously. The Sri Lankan government gave official approval for Tamil memorial to take place in the north and east of Sri Lanka in 2015.<sup>11</sup> The UK Home Office reported in 2017 that the Sri Lankan authorities distinguish between low level volunteers/attendees such as the applicant to diaspora events and those perceived to have a significant role in post-conflict Tamil separatism.<sup>12</sup>

29. I accept that the applicant had an uncle M who held a senior position within the Eastern Provincial division of the TNA in 2002-2004. More recently, country information has indicated that Tamils have a substantial level of influence and inclusion in political dialogue in Sri Lanka.<sup>13</sup> DFAT understands that Tamils do not receive an unwarranted attention from authorities because of their political involvement or association including with the TNA.<sup>14</sup> The evidence does not suggest that the applicant's relationship to his cousin or any assistance he may have offered him in 2002 will place him at real chance of any harm. He has not claimed that he has any desire to support the TNA or any other party upon return, however, I find that even if he chooses to do so, there is no evidence to suggest that he would be prevented from doing so or that he will be placed at a real risk of any harm.
30. The applicant claimed that he fears his association with the LTTE the TNA and Martyr's Day celebrations will lead to persecution. Country information does not support that someone of the applicant's profile, who has had a very limited association to the LTTE and the TNA some fifteen years ago and spent a number of years in India in the final years of the conflict would be considered a person of interest. I am not satisfied that the applicant as a Hindu Tamil from [City 1], who in the past was displaced by the civil war, and who has very minor links to the LTTE and Tamil separatist activities in Australia and a small historical association to the TNA faces a real chance of any harm, including serious harm, upon return to Sri Lanka.
31. I am also not satisfied that the applicant faces a real chance of serious harm as a returning asylum seeker. 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. The process involves interviewing the returnee, contacting the police of their hometown, contacting their neighbours and family, and checking criminal and court records.<sup>15</sup> The airport maintains a list of persons-of-interest by law enforcement agencies that have violated Sri Lankan law, which is updated regularly.<sup>16</sup> I have not accepted that the applicant was arrested when he returned to Sri Lanka in 2012 or departed Sri Lanka whilst on bail or that there is otherwise any credible evidence before me to indicate that the applicant's name would appear on any security lists or criminal or court records.
32. The processing of returnees is undertaken in groups by different Sri Lankan agencies including the Department of Immigration and Emigration, the State Intelligence Service and the CID and individuals cannot exit the airport until all returnees have been processed. This can take several hours. DFAT understands detainees are not subject to mistreatment during this

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<sup>10</sup> DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064

<sup>11</sup> DFAT, "Sri Lanka – Country Information Report", 24 January 2017, CISED50AD105

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

<sup>15</sup> Ibid

<sup>16</sup> UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism (version 5.0)", 15 June 2017, OG6E7028826

process and that all returnees are subject to standard procedures, regardless of ethnicity and religion.<sup>17</sup> The Sri Lankan government has consistently said that refugees are welcome to return to Sri Lanka and during a visit to Australia in February 2017, the Prime Minister publicly stated that failed asylum seekers from Australia are welcomed back.<sup>18</sup> Nevertheless, DFAT have also reported that failed asylum seekers may face practical challenges on return to Sri Lanka. Returning asylum seekers receive limited reintegration assistance and many returnees have difficulty finding suitable employment and reliable housing on return, although DFAT assess that these issues relate to bureaucratic inefficiencies and limited job availability and are not due to a failure to obtain asylum. It is also stated by DFAT that some failed asylum seekers reported social stigma from their communities upon return.<sup>19</sup> I note the applicant is multi-skilled and has had varied employment experience in [various occupations] in Sri Lanka, India and Australia. I also note that he has family in [City 1] in Eastern Sri Lanka and there is no suggestion he would not return to them. I am not satisfied as a returning asylum seeker he would be unable to find accommodation or employment. I accept the applicant may be subject to a period of social stigma, however, I am not satisfied that the treatment he will experience as a person who is returning to Sri Lanka having sought asylum in Australia amounts to serious harm.

33. I accept that the applicant departed Sri Lanka irregularly by boat with the assistance of people smugglers and as such country information indicates he has committed an offence under s.34 and s.45(1)(b) of the *Immigrants and Emigrants Act (1949)* (I&E Act) of Sri Lanka.<sup>20</sup> Penalties for leaving Sri Lanka illegally can include imprisonment for up to five years and a fine. However, in practice most who are charged receive a fine that is issued to deter people from departing illegally in the future.<sup>21</sup> The Attorney-General's Department, which is responsible for the conduct of prosecutions, claims no mere passenger on a people smuggling venture has been given a custodial sentence for departing Sri Lanka illegally.<sup>22</sup> There is no evidence before me to suggest that the applicant was involved in facilitating or organising people smuggling or that he played any role other than that of a fare paying passenger.
34. DFAT reports that once it has been determined that a returnee has departed illegally he will then be transferred to the closest Magistrate's Court to have their case heard. Depending on the availability of the Magistrate the applicant may be held in an airport holding cell for a period of up to two days.<sup>23</sup> If a returnee pleads guilty, they will be issued a fine (amounts can vary from AUD 25 to AUD 1,670) which can be paid in instalments and will be free to go. Those that enter not guilty pleas will usually be granted bail on the basis of personal surety or guarantee by a family member. DFAT notes that, while the fines issued for passengers of people smuggling ventures are often low, the cumulative costs associated with regular court appearances over protracted lengths of time can be high.<sup>24</sup>
35. The applicant has family members in Sri Lanka and there is no evidence before me to indicate that they would not be able or willing to act as his guarantor should the need arise. Furthermore I am not satisfied that the applicant would not be able to pay the applicable fine. I am not satisfied that the questioning on arrival, being held at the airport, the imposition of a fine or other possible associated costs amount to serious harm for this applicant. Additionally,

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

<sup>18</sup> Ibid

<sup>19</sup> Ibid

<sup>20</sup> Ibid

<sup>21</sup> Ibid

<sup>22</sup> Ibid

<sup>23</sup> Ibid

<sup>24</sup> Ibid

country information does not support that the I&E Act is discriminatory on its face, in its application, or in its enforcement. I am not satisfied that the penalties and procedures amount to persecution.

36. I am not satisfied that the applicant faces a real chance of persecution for his illegal departure from Sri Lanka in 2012.

37. I am not satisfied the applicant has a well-founded fear of persecution.

### **Refugee: conclusion**

38. 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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39. 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**

40. 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.

41. I accept that the applicant departed Sri Lanka illegally in 2012 and that he is likely to face charges for committing an offence under the I&E Act. I accept that the applicant may be questioned, held at an airport holding cell for a short period of time and incur a fine and/or associated costs. I am not satisfied that the treatment the applicant may experience upon return amounts to significant harm in this case. Specifically, I am not satisfied that there is a real risk that the applicant will be arbitrarily deprived of his life or face the death penalty, or be subject to torture. Neither am I satisfied that these processes and the penalties are intended to inflict pain and suffering that could be reasonably regarded as cruel or inhuman in nature, severe pain or suffering or intended to cause extreme humiliation. I am not satisfied that it amounts to cruel or inhuman treatment or punishment or degrading treatment or punishment. I am not satisfied the applicant faces a real risk of significant harm for this reason.

42. I also accept that the applicant, as a person returning to Sri Lanka having sought asylum in Australia he may experience a period of social stigma from community members and he may face a period of re-establishment whilst he secures employment and accommodation. The evidence does not suggest that the applicant is at any real risk of the death penalty, arbitrary

deprivation of life, or torture as a consequence of this. I am not satisfied that this treatment amounts to pain or suffering that could be reasonably regarded as cruel or inhuman in nature, severe pain, whether physical or mental, or extreme humiliation, as required in the definitions of cruel or inhuman treatment or punishment or degrading treatment or punishment. I am not satisfied that there is a real risk of significant harm on this basis even when considered in combination with that which the applicant may face as a result of having departed Sri Lanka illegally.

43. I have otherwise found that the applicant would not face a real chance of any harm upon return to Sri Lanka for the reasons claimed. As the real risk standard is the same as the real chance standard, I am not satisfied that the applicant faces a real risk of significant harm for the same reasons.

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

44. 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.