



**Australian Government**  

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**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA19/06231

Date and time of decision: 20 February 2019 10:53:00  
J Jennings, Reviewer

**Decision**

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

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

## Background to the review

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### Visa application

1. The referred applicant (the applicant) claims to be a Tamil from Jaffna, Sri Lanka. On 20 March 2017 he lodged an application for a Safe Haven Enterprise Visa (SHEV), Subclass 790. He claims that he fears harm from the Sri Lankan authorities because of his father's Liberation Tigers of Tamil Eelam connections and from extortionists.
2. On 10 January 2019 a delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa. The delegate was not satisfied that the applicant had a profile that would indicate he would face a real chance of serious harm or a real risk of significant harm in 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. The IAA received a submission dated 1 February 2019 on behalf of the applicant. The submission addressed the delegate's decision and findings and explained why the applicant disagreed with these. I am satisfied this is essentially argument about matters that were before the department and therefore not new information and I have had regard to the sections of the submission that address the decisions and findings.
5. In her submission the applicant's representative commented that that the delegate relied upon the older, 2015 version of the Sri Lanka Crime and Safety Report as opposed to the most recent one from 2018 and that an essential part of protection assessment is to ensure that the most recent country information is used. She further commented that the 2018 report states that while there have been improvements to the Sri Lankan police force, police officers often lack resources and training, especially at the lower ranks and that the police have detained third country nationals of Sri Lankan origin for extended periods and without consular notification. This information was not before the Minister and is new information. The IAA must not consider any new information from an applicant unless satisfied there are exceptional circumstances to justify considering the new information and the new information was not and could not have been provided to the Minister, or is credible personal information which was not previously known and had it been known may have affected the consideration of the applicant's claims.
6. I have had regard to the delegate's decision and his reference to the 2015 Sri Lanka Crime and Safety Report issued by the US Department of State and it is important to note that the delegate referenced this report in discussing the motives for kidnappings and ransoms. I take into account the representative's comments regarding the importance of sourcing recent country information and in this regard I note that the information in the 2018 version of the US Department of State report regarding the motives for kidnappings and ransoms is identical to that in the 2015 report. As such I am not satisfied that there are exceptional circumstances that warrant the IAA having regard to the 2018 report. Furthermore the information the representative has cited from the report relates to other matters and not the motives for kidnappings and ransoms. In this regard I take into account information about resourcing of police and training was before the Minister in the Department of Foreign Affairs and Trade (DFAT) country report and I am not satisfied that there are exceptional

circumstances that warrant the IAA having regard to this information from the 2018 US Department of State report. There is no information before me to explain how the information regarding the detention of third country nationals for extended periods without consular notification is relevant to the applicant's protection claims. Taking account of the applicant's protection claims I do not consider that this information is relevant. It is therefore not new information as defined in s.473DC and I have not had regard to it. Even if it did satisfy that threshold, for the same reasons I would not be satisfied that there are exceptional circumstances to justify considering it.

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

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7. The applicant's claims can be summarised as follows:

- The applicant is a Tamil and Christian from [Town 1] in the Northern Province, Sri Lanka.
- His family was displaced for periods due to the civil war.
- The applicant's father was a fisherman who transported [supplies] for the LTTE.
- The authorities regulated the activities of fishermen and in 2008 the applicant's father and older brother were arrested after having stayed out at sea overnight. They were accused of supporting the LTTE and were physically mistreated. They were released following the intervention of a local priest and after paying a bribe.
- Soon after this authorities came to the family home and further accosted the applicant's father and brother. The applicant's father and brother were concerned for their safety and departed Sri Lanka in 2009 and came to Australia. They were granted protection in Australia and the applicant's brother has since become an Australian citizen.
- After their departure the applicant's mother in Sri Lanka began to receive threatening telephone calls and demands for money. The family was known to be wealthy and his mother made a number of payments. The applicant believes the extortionists were linked to the authorities and possibly associated with the Criminal Investigation Department (CID) or other authorities.
- In 2010 the applicant's father sponsored remaining family members in Sri Lanka to migrate to Australia under the Global Special Humanitarian Programme; being the applicant, his mother and his [brother]. The applicant's sister was already married and was not included in the application. The applicant's mother and [brother] were granted visas and they travelled to Australia in 2011. The applicant was refused a visa as he was over 18 years of age.
- The applicant remained in Sri Lanka alone. He began to receive threatening telephone calls from people demanding money. He was told if he did not pay he would be abducted or arrested under the Prevention of Terrorism Act (PTA). At the demand of the extortionists the applicant left an amount of money, along with his National Identity Card, in a bag in a tree for them to collect.
- He received further demands for money and he decided to leave Sri Lanka. The applicant already had a passport which was issued in 2007. He paid a person to assist him to travel to Colombo and exit via the airport. He travelled to [another country] and from there onto Australia.
- The applicant fears that should he return to Sri Lanka he would be stopped at the airport and he does not have a National Identity Card to present. He fears if he is

arrested he will not have anyone to assist with bail. He fears he will be imputed as an LTTE supporter because of the activities of his father and brother and as an asylum seeker and that he will be harmed by the authorities. The military retain a strong presence in the north.

- He fears further extortion and harassment and that he will face significant economic hardship. He fears he will have difficulty finding employment. His father has sold the family property in Sri Lanka and the applicant is not in contact with his sister or other extended family in Sri Lanka.
- He fears harm due to an imputed political opinion, his Tamil race and his membership of the particular social group or failed asylum seeker from a wealthy family who are abroad and sought asylum and have been granted protection in Australia. The Sri Lanka authorities may assume his immediate and family members have been granted protection due to LTTE links and the applicant will be imputed as being an LTTE supporter.

### **Refugee assessment**

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8. 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**

9. 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.
10. The applicant has consistently claimed to be Tamil from [Town 1], Northern Province, Sri Lanka and has provided identity documents in support of his claimed identity. I accept the applicant’s identity as stated and that Sri Lanka is the receiving country for the purpose of this review.
11. I accept that the applicant and his family were displaced time during the civil war.

12. The applicant fears he will be imputed as an LTTE supporter and harmed because of his father's assistance to the LTTE. I accept that the applicant's father was a fisherman and I accept as plausible that the applicant's father transported goods for the LTTE; the 2002 ceasefire saw the ban on the LTTE lifted<sup>1</sup> and the UNHCR reported that "at the height of its influence in Sri Lanka in 2000-2001, the LTTE controlled and administered 76% of what are now the northern and eastern provinces of Sri Lanka. Therefore, all persons living in those areas, and at the outer fringes of the areas under LTTE control, necessarily had contact with the LTTE and its civilian administration in their daily lives."<sup>2</sup>
13. I accept that the activities of fishermen were closely monitored by the authorities during the civil war and that from around 2003 his father was subject to the controls put into place by the Sri Lankan Navy.<sup>3</sup> Night fishing was banned and curfews were in place<sup>4</sup> and it is plausible that the applicant's father and his brother were stopped and arrested in 2008 after having stayed at sea overnight and that the authorities made a follow-up visit to the home to question or caution them after this incident and that they were physically mistreated in these interactions with the authorities. However I place significant weight on the fact that from the applicant's account his father came to the attention of the authorities on the one occasion only in 2008 and furthermore that on that occasion he was questioned, including about any support of the LTTE and physically mistreated, but that he was released and was able to proceed on his way.
14. The applicant stated at his SHEV interview that he was not aware if his father had any LTTE goods with him at the time he was stopped in 2008; having noting that he was not detained or charged with any offences and was not prevented from further fishing I am satisfied that he was not identified as having supplied/transported goods for the LTTE. There is no indication that his permission to fish was rescinded or curtailed in any. Noting the strict regulation of the fishing industry and noting that [Town 1] is in the north of Sri Lanka and was a stronghold of the LTTE at various times<sup>5</sup> I am not satisfied that someone who was imputed as being linked to the LTTE would have been able to continue fishing openly. I accept that he would have been questioned about any LTTE activities or any support provided to the LTTE and I consider that this would have been common practice in the north during the civil war, but the fact that he was able to continue in his fishing role indicates that there was no ongoing interest in the applicant's father or his brother. I note the comment that he and the applicant's brother were only released after the intervention of the local priest and the payment of a bribe and I accept that these occurred, however I am not satisfied that such would have been sufficient to secure their release if the authorities believed they were working with the LTTE. It is important to note that this event occurred in 2008 which was a time of heightened conflict; the ceasefire was broken and from January 2008 the Sri Lankan government was committed to eradicating the LTTE and end the long-running civil war.<sup>6</sup> In this context it is simply not plausible that a fisherman who was suspected of supplying or transporting goods to the LTTE would have been released into the community and able to continue fishing as the applicant claims. Throughout the civil war the authorities had access to the wide-sweeping Emergency Powers to detain people for questioning on mere suspicion<sup>7</sup>

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<sup>1</sup> UK Home Office, "Sri Lanka", 18 February 2010, 1595

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

<sup>3</sup> UN High Commissioner for Refugees, "UNHCR Eligibility Guidelines Sri Lanka July 2010", 6 July 2010, 1698; UK Home Office, "Sri Lanka", 18 February 2010, 1595

<sup>4</sup> ibid

<sup>5</sup> Ibid

<sup>6</sup> UK Home Office, "Sri Lanka", 18 February 2010, 1595

<sup>7</sup> UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka", 21 December 2012, UNB0183EA8

and had his father and/or brother been suspected of supporting the LTTE as claimed I find that they would have been detained by the authorities. I do not accept the assertion in the IAA submission that the visit of the authorities to the family home indicates that the authorities were aware the applicant's father and brother were assisting the LTTE; at this time of heightened hostilities with the LTTE I do not accept that persons so suspected would not be detained or charged.

15. In this regard I also place significant weight on the fact that the applicant's father and brother were able to leave Sri Lanka in 2009 legally using their own passports. It is important to note the applicant stated they left Sri Lanka before the end of the civil war and I do not accept that at such a critical time of the civil-war that the authorities would have allowed them to leave the country had they considered them to be connected with the LTTE and to have transported goods for the LTTE. Information contemporary to their departure indicates that the State Intelligence Service could inform airport Immigration Officers of individuals suspected of terrorist activity and those on a wanted list.<sup>8</sup> While I accept that the applicant's father and brother were subject to close scrutiny by the authorities as fisherman during the civil war and experienced some harm in Sri Lanka in 2008 I am not satisfied that they were of ongoing interest to the authorities and that they were imputed as an LTTE supporters. I accept that the applicant's father and brother came to attention in 2008 but I find that this was in the context of a curfew breach for having been fishing at night. As I have not accepted that the applicant's father or brother were of interest to the authorities as LTTE supporters I do not accept that the applicant would be so imputed because of these familial links.
16. I accept that the applicant's father and brother came to Australia and have been granted protection and that his brother is now an Australian citizen.
17. It is plausible that the applicant's mother received extortion demands after the departure of the applicant's father and brother and that she paid these. Country information reports that during and in the aftermath of the civil war various groups, including paramilitary groups often linked to the authorities, carried out such demands and acted with impunity.<sup>9</sup>
18. I accept that the applicant's mother and [brother] migrated to Australia in 2011 after having been sponsored by the applicant's father. I accept that the applicant was refused a visa on the basis of his age and that he remained in Sri Lanka living alone in the family home.
19. I have accepted that country information reports extortion demands from various groups in Sri Lanka around this time and in his statement of claims the applicant refers to other people in the village being subject to such demands; however I have some concerns about the applicant's account that he was subject to such a demand. It is the applicant's account that he was told to place the money in the bag "in a tree [at specified location]" and that he was told to place his National Identity Card in the same bag. At his SHEV interview the applicant stated he was instructed to leave the money in a bag in a tree [at different location], and when asked if he could see the tree from his house he said no and described it as being a little far away from his house. There is some variation in the account of the tree where the applicant was told to leave the money and I am also surprised by his claim he was told to leave the money in such an open or publicly accessible area. Furthermore country information indicates that paramilitary groups, who are those mostly associated with extortion demands, operated with impunity and often openly, as evidenced by the following comments from the British High Commission, Colombo in 2010: "This paramilitary party,

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<sup>8</sup> UK Home Office, "Sri Lanka", 18 February 2010, 1595

<sup>9</sup> *ibid*

aligned with the government, operated with impunity and often with the military, openly carrying weapons. They were known to stand in the roads forcing people to buy their newsletters.”<sup>10</sup> However, despite my concerns in this regard I am willing to accept that the applicant was subject to an extortion demand which he paid. I accept that associated with such an extortion demand the applicant was threatened with abduction, arrest and told by the extortionists that they had information that would implicate his father, but I am not satisfied that such threats substantiate a finding that the authorities did have such information. As I have already noted the authorities had access to powers to detain the applicant’s father if they had concerns about his activities beyond the curfew breach in 2008. Nor am I persuaded that because the extortionists knew information about the applicant’s personnel circumstances, including the whereabouts of his father and that he had a passport and had applied for an Australian visa, that this indicates they were from the government; at this time the applicant was living alone in the family home after his parents and brothers had left Sri Lanka and noting his statements that it was ‘known’ to the extortionists and others his family was wealthy I consider it equally possible other aspects of the family’s and his personnel circumstances were generally known.

20. However, I am not satisfied that there is real chance the applicant would be subject to extortion demands should he return to Sri Lanka. Extortion as a feature of the civil war and post-war environment was largely conducted by paramilitary groups and the country information indicates the influence of paramilitary groups has subsided. In its 2015 report, covering the 2014 year, the US Department of State referred to the EPDP and paramilitary activities in the north and noted “there were persistent reports of close ties between pro-government paramilitary groups such as the Eelam People’s Democratic Party (EPDP) and government security forces. Whereas during the war these groups served more of a military function, often working in coordination with security forces, in the post-war environment they increasingly took on the characteristics of criminal gangs as they sought to solidify their territory and revenue sources.”<sup>11</sup> The US Department of State report published in 2018 and commenting on the 2017 year, does not make reference to the EPDP or paramilitary groups and it does not indicate that paramilitary groups are working with the current government.<sup>12</sup> The 2018 DFAT report,<sup>13</sup> similar to the US Department of State report, does not indicate that paramilitary groups are working with the current government. I note the International Truth and Justice Project report and while this report noted the involvement of the EPDP in brokering a number of ransom for release cases in 2015, these are few in number and involved people with suspected LTTE links.<sup>14</sup>
21. I have had regard to the comments in the submission to the IAA about “limited occurrences” and that “limited instances do not abrogate a real chance” and the contention that the police may be those responsible for the past extortion and that this considered together with his wealthy background renders the applicant vulnerable to the whim of the police. The country information supports a finding that during the civil war and in the immediate aftermath the authorities allowed extortionists to act with impunity but I am not persuaded it supports a finding that the police would extort the applicant should he return to Sri Lanka. Overall the country information, considered together with the general improvement in the security situation as discussed below, does not indicate the applicant faces a real chance of harm

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<sup>10</sup> UK Home Office, "Sri Lanka", 18 February 2010, 1595

<sup>11</sup> Austrian Centre for Country of Origin & Asylum Research and Documentation, "Sri Lanka: COI Compilation", 31 December 2016, CIS38A80123251

<sup>12</sup> US Department of State, "Sri Lanka 2017 Human Rights Report", 20 April 2018, OGD95BE927333

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

<sup>14</sup> International Truth and Justice Project, "Silenced: survivors of torture and sexual violence in 2015", 7 January 2016, CIS38A801275

from extortionists, either from the police or paramilitary groups, in the foreseeable future. Nor am I satisfied that because of his extended residence in Australia the applicant would be viewed as having a lot of money and thereby be vulnerable to extortion demands. DFAT addressed the practical challenges faced by returning asylum seekers and did not report such extortion demands of asylum seekers returned from Australia, although it noted that from 2008 to 2017 over 2,400 Sri Lankan nationals departed Australia for Sri Lanka.<sup>15</sup> I take into account that in its fact finding mission conducted in 2016 the UK Home Office spoke to a wide range of agencies about conditions for Tamils returning to Sri Lanka and discussed a range of reintegration issues but their informants did not report extortion as a concern.<sup>16</sup>

22. The applicant was able to leave Sri Lanka in 2012 legally using his own passport, indicating that the authorities had no concerns about him leaving the country. I note his comment that he paid someone to assist him with the travel arrangements and to leave via the airport but the indications are that he went through standard exit procedures at the airport and was not hampered in his attempts to leave. I do not accept that the applicant was of interest to the authorities or imputed as an LTTE supporter at the time he departed Sri Lanka.
23. In its fact finding mission in 2016 the UK Home Office spoke with a range of agencies about conditions and the security situation in Sri Lanka, particularly for Tamils. Overall agencies reported an improvement, although many referred to slow progress with many reforms and the continued arrest, detention and mistreatment of Tamils. The Tamil Civil Society in Sri Lanka reported there have been changes since 2015 and that “between 2009 and 2015, the north had been in the tight clutches of the military – there had been abductions but now things had settled down. Some sentry points and military camps had closed. Also during this time, when the organisation held meetings and social gatherings, the military had attended in full uniform and with guns, but now they attend in civilian clothes.” A peacebuilding and human rights organisation responded to questions about the use of the Prevention of Terrorism Act (PTA) and noted “it has happened but not much. There was a spate of about 20 arrests, but it appears that those 20 who were arrested under the PTA were Tamils who were suspected of working with the military. They were Tamils who had become informers, working with a section of the military.” The Centre for Policy Alternatives reported their perception of security and safety in Sri Lanka and stated “It is relatively safe but surveillance continues in the North and East against those perceived to have had LTTE links”. The International Organization for Migration stated “in terms of the current situation in Sri Lanka, there has been a visible and general improvement in the country – with human rights, economics and reintegration”.<sup>17</sup>
24. Reports from a number of non-governmental organisations and agencies report ongoing harassment and mistreatment of Tamils, particularly those involved with the LTTE.<sup>18</sup> However the indications are that the Sri Lankan government has moved away from the systematic program which operated after the civil war of identification and detention and rehabilitation of LTTE members and DFAT assesses that the risk of torture perpetrated by either military, intelligence or police forces has decreased since the end of the civil conflict and is no longer

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

<sup>16</sup> UK Home Office, “Report of a Home Office Fact-Finding Mission Sri Lanka: treatment of Tamils and people who have a real or perceived association with the former Liberation Tigers of Tamil Eelam (LTTE)”, March 2017, CISED50AD3780

<sup>17</sup> *ibid*

<sup>18</sup> International Truth and Justice Project, “Sri Lanka’s Special Task Force” 23 April 2018, CIS7B83941895; Freedom From Torture, “Sri Lanka – Update on torture since 2009”, 6 May 2016, CIS38A8012881; Freedom From Torture, “Tainted Peace: Torture in Sri Lanka since May 2009”, August 2015, CISEC96CF13070; International Truth & Justice Project, “Unstopped: 2016/17 Torture in Sri Lanka”, 14 July 2017, CISED50AD4849



state-sponsored.<sup>19</sup> I note the applicant's concern about the extent of the military presence in the north, but from 2015 the government has publicly committed to reducing military involvement in civilian activities and removed military checkpoints on major roads. Most of the remaining military presence in the north is confined to the High Security Zones or smaller surrounding military camps and overall military involvement in civilian life has diminished, although military involvement in some commercial activities continues in the north.<sup>20</sup>

25. The Emergency Powers used to detain people arbitrarily have been allowed to lapse and application of the PTA has been suspended and the number of people detained under the PTA has reduced significantly.<sup>21</sup> The government has closed most rehabilitation sites and the UNHCR Special Rapporteur reported in July 2016 that the numbers remaining under rehabilitation amounted to only 40.<sup>22</sup> The Special Rapporteur noted a "culture of torture" persists in Sri Lanka, although it is less prevalent and severe than during the war. The Special Rapporteur received credible reports of suspects, particularly detainees under the PTA, being detained for interrogation without being registered or brought before a judge.<sup>23</sup>
26. I accept that the applicant is concerned about reports of mistreatment of Tamils and returning asylum seekers and at the SHEV interview his representative expressed concern about Sri Lanka returning to chaos if former President Rajapaksa resumes power. Mr Rajapaksa was defeated as President in the 2015 elections and replaced by current President Sirisena. Mr Rajapaksa formed the Sri Lanka Podujana Peramuna (SLPP) party which contested the February 2018 local government elections, performing strongly and emerging as the single largest party. The SLPP governs most of Sri Lanka's over 300 local councils and exercises significant influence at provincial council level.<sup>24</sup> The IAA submission refers to the brutality towards Tamils of the previous Rajapaksa's presidency and concern there could be a resurgence of harsh laws and practices. However it is important to note the context of the repressive actions of the former Rajapaksa government being at the end of the civil war and in the aftermath of the war and there is no information before me to indicate that Mr Rajapaksa or his political supporters intend to introduce repressive policies that would impinge on the Tamil population in general or Tamils with a profile similar to that of the applicant, or that such has been the result since the SLPP's success at the February 2018 local elections and ongoing political influence, or would be in the foreseeable future.
27. I am not satisfied that the applicant was of adverse concern when he departed Sri Lanka. I accept that he is a young Tamil male from a former LTTE controlled area and I have accepted that his father was a fisherman who transported goods for the LTTE. I have considered the claim that should he return the applicant would not be safe in Sri Lanka from repercussion because of his familial links to his father but, as noted, he did not come to harm on this basis prior to leaving Sri Lanka and I take into account the passage of time since his departure and that the current focus of the Sri Lankan authorities is those involved with Tamil separatism. The UK Home Office commented that being of Tamil ethnicity in itself would not warrant

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

<sup>20</sup> *ibid*

<sup>21</sup> UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism (version 5.0)", 15 June 2017, OG6E7028826; UK Home Office, "Report of a Home Office Fact-Finding Mission Sri Lanka: treatment of Tamils and people who have a real or perceived association with the former Liberation Tigers of Tamil Eelam (LTTE)", March 2017, CISED50AD3780; UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka", 21 December 2012, UNB0183EA8

<sup>22</sup> Office of the United Nations High Commissioner for Human Rights, "Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Sri Lanka A/HRC/34/54/Add.2", 22 December 2016, CIS38A80123313

<sup>23</sup> *ibid*

<sup>24</sup> DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064

international protection and that generally a person with past connection to the LTTE would not be regarded as a concern unless they have or are perceived to have had a significant role in the LTTE or to have been active in post-conflict Tamil separatism.<sup>25</sup> The applicant's father was never detained or charged and was not prevented from continuing to fish after being arrested for a curfew breach in 2008. The applicant himself was never arrested or detained, nor is there any indication he was asked about the activities of his father and brother. Nor am I satisfied that he would be of concern should he return to Sri Lanka or that because his family members have been granted protection and he has claimed asylum and lived for an extended period in Australia he would be perceived as being of adverse concern or imputed as an LTTE supporter. The information before me does not support that Tamils with family members granted protection in Australia have come to adverse attention on that basis or that they have been imputed as being LTTE supporters. Nor am I satisfied that simply living overseas, even in proximity of other Tamil people, would give rise to suspicion by the authorities that the applicant was active in post-conflict Tamil separatism.

28. I have taken into account the country information about the situation for Tamils in Sri Lanka and I accept there are reports of mistreatment of those of concern to the authorities. However I have not accepted that the applicant has or would be perceived to have a profile of concern to the authorities I find that there is not a real chance he would be tortured or otherwise harmed. I note his concern about not having family to assist with bail or otherwise should he be arrested, but I do accept that there is a real chance he would be arrested in Sri Lanka.
29. There is no indication on the evidence before me that the applicant's status as a failed asylum seeker would bring him to adverse attention on return to Sri Lanka or that this considered individually or together with his profile and his extended residence in Australia and the grant of protection to his family members would give rise to a real chance he would be imputed as a supporter of the LTTE or other profile of concern. I accept that there are reports of mistreatment of returned asylum seekers who have an actual or imputed profile of concern to the authorities<sup>26</sup>, but I have not accepted that the applicant was so imputed or that he would be now or in the foreseeable future.
30. DFAT reports anecdotal evidence of regular visits and phone calls by the CID to failed asylum seekers in the north as recently as 2017 and a UNHCR survey in 2015 reported that 49 per cent of refugee returnees in the north had received a visit at their homes for a purpose other than registration, with almost half of those visits from the police.<sup>27</sup> I accept that the applicant may possibly be visited or contacted in this manner but I am not satisfied that such visits or contact are of themselves, or would lead to, any harm, let alone serious harm. I am not satisfied that the applicant would face any harm as a returning failed Tamil asylum seeker and from a wealthy family.
31. I accept that the applicant no longer has his National Identity Card, which is an important identity document in Sri Lanka, but there is no indication that he could not apply for a

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<sup>25</sup> UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism (version 5.0)", 15 June 2017, OG6E7028826

<sup>26</sup> Freedom from Torture, "Sri Lankan Tamils tortured on return from the UK", 13 September 2012, CIS24086; Sri Lanka Mirror, "Another Tamil returnee arrested", 1 July 2011, CXBD6A0DE16698; Tamil net, "SL military continues to arrest Tamils from East returning from Middle-East", 31 May 2015, CXBD6A0DE7540; Tamil net, "16 Batticaloa Tamils arrested within last 100 days at Colombo airport", 3 May 2015, CXBD6A0DE6027; Sri Lanka Mirror, "10 Tamils arriving in Lanka arrested", 4 March 2015, CXBD6A0DE6065; International Truth & Justice Project, "Unstopped: 2016/17 Torture in Sri Lanka", 14 July 2017, CISED50AD4849

<sup>27</sup> DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064

replacement card should he return to Sri Lanka, or in Australia as Sri Lankans residing overseas can apply for identity documents from any Sri Lankan overseas mission.<sup>28</sup>

32. In addition to no longer having his National Identity Card the applicant no longer has his passport. Returnees travelling on temporary travel documents, such as the applicant would, are subject to an investigative process to confirm identity on arrival. Various agencies, including the CID, check travel documents and identity information against the immigration databases, intelligence databases and records of outstanding criminal matters. This process may take several hours to complete and as involuntary returnees are processed in a group further delays may occur until all returnees are processed. Returnees are treated according to these standard procedures, regardless of their ethnicity, and are not subjected to mistreatment during their processing at the airport.<sup>29</sup> I do not accept that the applicant has a profile of concern to the authorities and I do not accept that there is a real chance he would be arrested or detained at the airport or in the return process. I do not consider that this checking and questioning would constitute serious harm or result in any harm to the applicant. There is no threat to the applicant's life or liberty, or physical harassment or ill treatment, or significant economic hardship, denial of access to basic services to capacity to earn a livelihood that threatens the applicant's capacity to subsist, or other form of harm that may be considered serious harm. I find that the applicant does not have a well-founded fear of serious harm on this basis.
33. The applicant fears that he will have difficulty obtaining employment. I note his claim that he did not complete his education and has no family support, yet the information before me is that he completed his O Levels and a vocational [course] and has extended family in Sri Lanka. His extended family live in the same area of [Town 1] as the applicant's family and were looking after the family property in the absence of the family. In considering the applicant's claim that he would have difficulty obtaining employment should he return to Sri Lanka I take into account that he worked as a [Occupation 1] for a period after completing his [course] and then managed his own small business. While the applicant may experience some difficulty obtaining employment, and I accept that he was assisted in finding the [Occupation 1] position through a family connection, I am not satisfied that he would be denied employment. I do not accept he would experience significant economic hardship that would threaten his capacity to subsist or that he would experience other serious harm on this basis.
34. I have not accepted that the applicant would be subject to extortion or denied employment in Sri Lanka. The applicant is a young Tamil male from a wealthy family and from a former LTTE controlled area whose father fisherman transported goods for the LTTE and came to the attention of the authorities for a curfew breach in 2008, but I have not accepted that he would face harm on this basis should he return to Sri Lanka or that he would be imputed as an LTTE supporter on this basis, either individually or cumulatively. Nor am I satisfied that this considered together with his asylum claim and residence in Australia and the protection grants to his family members, would give rise to a well-founded fear of persecution.

#### **Refugee: conclusion**

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

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<sup>28</sup> DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064

<sup>29</sup> *ibid*

## Complementary protection assessment

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

### Real risk of significant harm

37. Under s.36(2A), a person will suffer 'significant harm' if:
- the person will be arbitrarily deprived of his or her life
  - the death penalty will be carried out on the person
  - the person will be subjected to torture
  - the person will be subjected to cruel or inhuman treatment or punishment, or
  - the person will be subjected to degrading treatment or punishment.
38. I have accepted that the applicant would be subject to checking and questioning at the airport on return to Sri Lanka but I have found that this would not amount to serious harm. I also find this does not amount to significant harm as defined. Similarly I am not satisfied any visits to the applicant as a failed asylum seeker on return would amount to or lead to significant harm.
39. The applicant has expressed his concern about his future employment prospects. However I do not accept that he would be denied employment and I am not satisfied that he faces a real risk of significant harm on this basis on return.
40. I have found that there is not a real chance that the applicant faces harm on the basis of being a young Tamil male from a wealthy family and from a former LTTE controlled area whose father transported goods for the LTTE and came to the attention of the authorities for a curfew breach in 2008 along with the applicant's brother, or for his asylum claim and residence in Australia and the protection grants to his family member. Noting that the "real risk" test for complementary protection is the same standard as the "real chance" test,<sup>30</sup> and based on the same information, and for the reasons set out above, I am also satisfied that there is not a real risk that he would face significant harm for these reasons.

### Complementary protection: conclusion

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

## Decision

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

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<sup>30</sup> *MIAC v SZQRB* (2013) 210 FCR 505

## Applicable law

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### ***Migration Act 1958***

#### **5 (1) Interpretation**

In this Act, unless the contrary intention appears:

...

***bogus document***, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly

...

***cruel or inhuman treatment or punishment*** means an act or omission by which:

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature; but does not include an act or omission:
  - (c) that is not inconsistent with Article 7 of the Covenant; or
  - (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

***degrading treatment or punishment*** means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:

- (a) that is not inconsistent with Article 7 of the Covenant; or
- (b) that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

***receiving country***, in relation to a non-citizen, means:

- (a) a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or
- (b) if the non-citizen has no country of nationality—a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.

...

***torture*** means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant; but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

#### **5H Meaning of refugee**

(1) For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a refugee if the person:

- (a) in a case where the person has a nationality—is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or
- (b) in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Note: For the meaning of ***well-founded fear of persecution***, see section 5J.

...

### 5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
  - (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
  - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
  - (c) the real chance of persecution relates to all areas of a receiving country.

Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.

Note: For effective protection measures, see section 5LA.
- (3) A person does not have a well-founded fear of persecution if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country, other than a modification that would:
  - (a) conflict with a characteristic that is fundamental to the person's identity or conscience; or
  - (b) conceal an innate or immutable characteristic of the person; or
  - (c) without limiting paragraph (a) or (b), require the person to do any of the following:
    - (i) alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith;
    - (ii) conceal his or her true race, ethnicity, nationality or country of origin;
    - (iii) alter his or her political beliefs or conceal his or her true political beliefs;
    - (iv) conceal a physical, psychological or intellectual disability;
    - (v) enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
    - (vi) alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.
- (4) If a person fears persecution for one or more of the reasons mentioned in paragraph (1)(a):
  - (a) that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and
  - (b) the persecution must involve serious harm to the person; and
  - (c) the persecution must involve systematic and discriminatory conduct.
- (5) Without limiting what is serious harm for the purposes of paragraph (4)(b), the following are instances of **serious harm** for the purposes of that paragraph:
  - (a) a threat to the person's life or liberty;
  - (b) significant physical harassment of the person;
  - (c) significant physical ill-treatment of the person;
  - (d) significant economic hardship that threatens the person's capacity to subsist;
  - (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
  - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.
- (6) In determining whether the person has a **well-founded fear of persecution** for one or more of the reasons mentioned in paragraph (1)(a), any conduct engaged in by the person in Australia is to be disregarded unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.

### 5K Membership of a particular social group consisting of family

For the purposes of the application of this Act and the regulations to a particular person (the **first person**), in determining whether the first person has a well-founded fear of persecution for the reason of membership of a particular social group that consists of the first person's family:

- (a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in paragraph 5J(1)(a); and
- (b) disregard any fear of persecution, or any persecution, that:
  - (i) the first person has ever experienced; or

- (ii) any other member or former member (whether alive or dead) of the family has ever experienced;

where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.

Note: Section 5G may be relevant for determining family relationships for the purposes of this section.

#### **5L Membership of a particular social group other than family**

For the purposes of the application of this Act and the regulations to a particular person, the person is to be treated as a member of a particular social group (other than the person's family) if:

- (a) a characteristic is shared by each member of the group; and
- (b) the person shares, or is perceived as sharing, the characteristic; and
- (c) any of the following apply:
  - (i) the characteristic is an innate or immutable characteristic;
  - (ii) the characteristic is so fundamental to a member's identity or conscience, the member should not be forced to renounce it;
  - (iii) the characteristic distinguishes the group from society; and
- (d) the characteristic is not a fear of persecution.

#### **5LA Effective protection measures**

- (1) For the purposes of the application of this Act and the regulations to a particular person, effective protection measures are available to the person in a receiving country if:
  - (a) protection against persecution could be provided to the person by:
    - (i) the relevant State; or
    - (ii) a party or organisation, including an international organisation, that controls the relevant State or a substantial part of the territory of the relevant State; and
  - (b) the relevant State, party or organisation mentioned in paragraph (a) is willing and able to offer such protection.
- (2) A relevant State, party or organisation mentioned in paragraph (1)(a) is taken to be able to offer protection against persecution to a person if:
  - (a) the person can access the protection; and
  - (b) the protection is durable; and
  - (c) in the case of protection provided by the relevant State—the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system.

...

#### **36 Protection visas – criteria provided for by this Act**

...

- (2) A criterion for a protection visa is that the applicant for the visa is:
  - (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee; or
  - (aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or
  - (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
    - (i) is mentioned in paragraph (a); and
    - (ii) holds a protection visa of the same class as that applied for by the applicant; or
  - (c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
    - (i) is mentioned in paragraph (aa); and
    - (ii) holds a protection visa of the same class as that applied for by the applicant.
- (2A) A non-citizen will suffer **significant harm** if:
  - (a) the non-citizen will be arbitrarily deprived of his or her life; or
  - (b) the death penalty will be carried out on the non-citizen; or
  - (c) the non-citizen will be subjected to torture; or
  - (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
  - (e) the non-citizen will be subjected to degrading treatment or punishment.

- (2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:
- (a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or
  - (b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or
  - (c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

...

*Protection obligations*

- (3) Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.
- (4) However, subsection (3) does not apply in relation to a country in respect of which:
- (a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or
  - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.
- (5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:
- (a) the country will return the non-citizen to another country; and
  - (b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.
- (5A) Also, subsection (3) does not apply in relation to a country if:
- (a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and
  - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country.

*Determining nationality*

- (6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.
- (7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.