



**Australian Government**  

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**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA19/06457

Date and time of decision: 11 April 2019 10:45:00  
J Maclean, Reviewer

**Decision**

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

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

## Background to the review

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### Visa application

1. The referred applicant (the applicant) lodged an application for a Safe Haven Enterprise visa (SHEV) in September 2017. He claimed to fear harm if returned to Sri Lanka because he is a Tamil from the north, as a result of actual or imputed connections with the Liberation Tigers of Tamil Eelam (LTTE), and as a failed asylum seeker who has been absent from Sri Lanka for a number of years.
2. On 7 March 2019 a delegate of the Minister for Immigration (the delegate) refused to grant the applicant a SHEV because the delegate found the applicant is not a person in respect of whom Australia has protection obligations.

### Information before the IAA

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

### Applicant's claims for protection

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5. The applicant's claims can be summarised as follows:
  - He is a Tamil male, who was born in the north of Sri Lanka, and with the exception of a one month period always lived in the north whilst in Sri Lanka.
  - His mother had problems in Sri Lanka because she was running a ladies club in Jaffna, and was declared to be an LTTE member. As a result the family left Sri Lanka in 2007 and went to [Country 1].
  - In [Country 1], when his family had spare rooms in their house they rented them out. They did not know they had rented rooms to people from the LTTE until people came searching for them, and started to harass him also. They visited two or three times and as a result he had to leave his home. However, they found out where he was living and started coming there. He does not know who they were, but they said they belonged to the Karuna group.
  - He left [Country 1] and travelled to [Country 2], however the Karuna group found out he was in [Country 2] and his mother told him they made threats to kill him if he returned to the country. He is not clear why the Karuna group is after him, and whether it is because his mother was once suspected of LTTE involvement. They also went to his [sibling's] house and detained his [Relative A] for 32 hours, during which he was harassed and beaten, and they were looking for his mother. His [Relative A] was released after giving them his mother's number in [Country 1].
  - If he is returned to Sri Lanka he fears he will be detained at Colombo airport, and the airport Criminal Investigation Department (CID) will find out about his problems with the Karuna group, and about his mother's suspected involvement with or support of the LTTE, and he will be detained and questioned for a longer period than other returnees, and subjected to ill-treatment amounting to serious harm.

- He also fears harm as a failed asylum seeker who has been absent from Sri Lanka for many years, and who left Sri Lanka by boat, and that his return will trigger an investigation process.

## **Refugee assessment**

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6. Section 5H(1) of the Act provides that a person is a refugee if, in a case where the person has a nationality, he or she is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

### **Well-founded fear of persecution**

7. Under s.5J of the Act ‘well-founded fear of persecution’ involves a number of components which include that:
  - the person fears persecution and there is a real chance that the person would be persecuted
  - the real chance of persecution relates to all areas of the receiving country
  - the persecution involves serious harm and systematic and discriminatory conduct
  - the essential and significant reason (or reasons) for the persecution is race, religion, nationality, membership of a particular social group or political opinion
  - the person does not have a well-founded fear of persecution if effective protection measures are available to the person, and
  - the person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour, other than certain types of modification.
8. The applicant has consistently claimed he is a Tamil who was born in the Jaffna District of the Northern Province of Sri Lanka in [year], and he has provided documents in support of his identity. There is no issue regarding the applicant’s identity. I accept he is of Tamil ethnicity, that he is a national of Sri Lanka from the Northern Province, and that Sri Lanka is the receiving country for the purposes of the Act.
9. The applicant has consistently claimed, and I accept, he is of Hindu faith. He did not claim to have suffered any harassment, discrimination or violence as a result of his religion or indicate he was unable to freely practise his religion whilst in Sri Lanka, or express any fear of harm on that basis if returned to Sri Lanka.
10. I accept the applicant’s consistent evidence regarding his early life in Sri Lanka. He resided with his parents in the Jaffna District of the Northern Province, and attended primary, middle and high school there between [specified years]. He was also consistent in describing leaving Sri Lanka, legally using a Sri Lankan passport, with his family in 2007, travelling initially to [Country 3] where they stayed for 25 to 30 days, and on to [Country 1]. During the SHEV interview he said he travelled to Colombo in 2007, when he was [age] years old, to get the passport, and that he lost the passport in [Country 1] at the end of 2007. He was able to obtain a copy of the passport from the UNHCR, as he had provided a copy of the document to them when he was in

[Country 1]. The biodata page from the passport indicates the passport was issued by the relevant authority in Colombo [in] July 2007. A copy of two further pages from the passport have also been provided. The first page is a [Country 1] single entry Visa in the applicant's name, issued [in] August 2007 at the High Commission of [Country 1] – [Country 3], and valid for 14 days, and which has been stamped "Journey performed". The second page shows a stamp from [Country 1] Immigration dated [later in] August 2007 and noting permission to remain in [Country 1] until [September] 2007. The applicant's statement of claims states he left Sri Lanka by boat, and I accept that evidence. At the Arrival interview the applicant said he travelled from Sri Lanka to [Country 3], where he stayed for 20 to 25 days before travelling to [Country 1]. I accept the applicant obtained a Sri Lankan passport in 2007, that he no longer has the passport in his possession, that he travelled from Sri Lanka to [Country 3] with his family in 2007, legally using his passport, and about one month later they travelled to [Country 1].

11. I accept the applicant's consistent evidence that he married in [Country 1] in 2011, and that they have one child together. In his SHEV application the applicant describes his wife as his ex-wife, and notes they separated [in] May 2015, and I accept that to be the case.
12. The applicant claims his father was an LTTE member. During the SHEV interview the delegate asked the applicant if he or any of his family members were ever members of the LTTE, and the applicant said before 1995 his father was. He said his father was part of a team for the LTTE, providing food, supplies and some information, and that his father told him this story when he was [age] years old. The applicant's representative submitted if the applicant returns to Sri Lanka there is a possibility Sri Lankan authorities might become aware of his father's involvement with the LTTE and as a result the applicant might be harmed. I consider it significant that the applicant made no mention of his father being involved with the LTTE prior to the SHEV interview. I consider if the applicant's father had been an LTTE member, or had provided a significant level of support to the LTTE, the applicant would have mentioned that, just as he mentioned his mother being suspected of having an association with the LTTE. Taking into account the country information, which supports that the majority-Tamil civilian populations of the areas controlled by the LTTE were required to interact with the LTTE as a matter of course,<sup>1</sup> I accept the applicant's family lived in the Northern Province of Sri Lanka, an area that was at times controlled by the LTTE, and it is plausible his father may have provided some support to the LTTE, such as obtaining supplies and providing information. However, I reject the applicant's contention that the LTTE would only have taken information from LTTE members, and taking into account the applicant's evidence overall, I consider the claim that his father was an LTTE member is a recent invention to bolster his claim for protection. I do not accept the applicant's father was an LTTE member.
13. The applicant claims he left Sri Lanka with his family in 2007 because his mother had problems as a result of running a ladies' club at Jaffna, and as a result she was declared to be an LTTE member. At the Arrival interview the applicant said his mother was accused of being involved with the LTTE, but she was not involved with them on a personal level, nor was he involved with the LTTE. When asked if he had ever been detained by the police or security organisations the applicant said in 2006 in Sri Lanka they came looking for his mother and they arrested him for one day. When asked how he got out he said his mother came and took him out. In relation to the day-to-day impact the police or security organisations had on him in Sri Lanka the applicant said because of his mother's problem he and his family had problems with the Sri Lankan Army (SLA), who would come frequently to caution them, maybe every two to three

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<sup>1</sup> Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064

days, and because of this problem he stopped school one month before leaving Sri Lanka. During the SHEV interview the applicant indicated the activities his mother's club engaged in were to help women and the community. When the delegate asked the applicant whether he or his family were supporting the LTTE, the applicant said after 2000 his mother was the leader of the club, and he referred to the club as "the movement's club", presumably referring to the club being an LTTE club. At that time there was a peacetime, when Jaffna was under the control of the LTTE and the Sri Lankan government, and LTTE members would also come to the club. When asked about whether he had ever been harmed or mistreated in Sri Lanka he said authorities came in search of his mother because she was running the women's club, and they were in hiding, presumably referring to himself and his family. The delegate questioned the applicant about the continuing operation of the club, and the applicant said he thinks the club is still running, and that his mother's friends from the area may still be in the club, but his mother does not attend because he does not want her to have any more problems. When asked if he ever had any contact with the LTTE the applicant said he was not an LTTE member, and was not doing anything with the LTTE, but they used to come to his house.

14. The applicant provided a number of photographs in support of his application. Some of the photographs are of people who appear to be attending various events, and relate to the applicant's claim that his mother was involved with a women's club. No descriptions have been provided about the photographs, including exactly when and where they were taken, to identify exactly who the people are in the photographs, or to explain the significance of some of the photographs. During the SHEV interview the delegate asked the interpreter to interpret some text contained within one of the photographs, which was interpreted as "[women's group name] – October 2004". When asked whether his mother appeared in the photographs the applicant said his mother was the one speaking. Some other photographs apparently show dates in Tamil, including 2005 and 2006.
15. I am prepared to accept the applicant's mother was involved with a women's club, and that she may have had a leadership role in the club. Noting the country information referred to above regarding Tamil civilians interacting with the LTTE, I also accept that LTTE members, or people having connections to the LTTE may have attended the club. However, given the applicant's evidence that the club continues to operate in Jaffna, and my opinion that the applicant embellished his evidence during the SHEV interview to include that the club was an LTTE club, I consider he did so to bolster his Visa application, and I do not accept the club was an LTTE club. Country information reports that many Tamils, including civilians, and particularly in the north and east, reporting being monitored, harassed, arrested or detained by security forces during the conflict and under the Rajapaksa government.<sup>2</sup> Taking that into account, it is plausible, and I accept, the applicant and his family were subjected to some monitoring and harassment by Sri Lankan authorities, and that the applicant was detained as claimed on one occasion. However, I consider it implausible if the applicant's mother was being searched for by Sri Lankan authorities she would have attended as described to secure the applicant's release from detention, and that she would not have been detained herself at that time. I consider a more plausible explanation is that the treatment they encountered resulted from the routine but troubling treatment of Tamils at the time, rather than relating to any specific security concerns regarding the applicant or his family members. I accept the applicant and his family may have held some subjective fears for their safety as a result of this treatment, and this informed their decision to leave Sri Lanka. Of note, the applicant indicated he and his family were able to travel to Colombo and obtain passports in 2007, and did not refer to experiencing problems obtaining passports, travelling to Colombo, or when departing Sri Lanka, which I consider is also indicative that the applicant and his family members were not

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

considered security risks at that time. I do not accept the applicant or his family were in hiding prior to their departure from Sri Lanka, that his mother was declared to be an LTTE member, or that they were of adverse interest to Sri Lankan authorities at that time.

16. The applicant claims the Karuna group attended his [sibling's] house looking for the applicant's mother. They took his [Relative A] and detained him for about 32 hours, during which he was harassed and beaten, and only released him after he provided the applicant's mother's number in [Country 1]. During the SHEV interview the applicant said this incident happened in 2007. Country information describes the Karuna group as a paramilitary group formed in 2004, when the commander of the LTTE in the Eastern Province, Colonel Karuna, broke away from the LTTE,<sup>3</sup> and indicates that in 2006 and 2007 they fought together with the SLA in the Eastern Province<sup>4</sup>. Taking into account my finding above that neither the applicant or his mother were of adverse interest to Sri Lankan authorities at the time they departed Sri Lanka, the country information supporting the Karuna group operated primarily in the Eastern Province at that time, and the scant information provided about this claim, which I do not find convincing, I do not accept this incident occurred, or that the applicant or his family were of interest to the Karuna group at that time.
17. The applicant claims he was of interest to the Karuna group whilst in [Country 1], and this was the reason he left [Country 1] and travelled to Australia. He said his problems started in 2011. His family were renting a house in [Country 1], and one of the rooms was rented out to people who were members of the LTTE. At the beginning he did not know they were related to the LTTE, and it was only after the problem with the Karuna group that he became aware. He was living with these people for three years, they were his friends and he was "going around" with them, that he was also targeted by the Karuna group, and that they came three times to his home, but he only saw them once, as twice he was not at home at the time. He said he does not know what position within the LTTE they had, but the people renting the room were from the in Sri Lanka (an area in the Northern Province). In his statement of claims the applicant said the problems started happening in 2012 when "authorities" came a few times to search for the people, and they started harassing/pushing the applicant as well. They also visited a few times when the applicant was at work, and because of this he left his home to live in another place with his wife. However, they found the address and started coming there. Of note, during the Arrival interview, the applicant reported living at the same address in [Country 1] from 2009 until [February] 2013, and to working with [Business 1] until February 2013, and in his SHEV application he refers to living at that same address until 2013. Despite the alleged harassment, which the applicant claims was the reason he left [Country 1], the applicant was able to remain at his family home and continue working for a number of months after the harassment started, and up to 14 months after it started if the problem started in 2011. Although the applicant's statement of claims refers to him being of interest to "authorities" in [Country 1], during the SHEV interview the applicant clearly identified it was the Karuna group who came after him, and denied the [Country 1] Police came after him. In his statement of claims the applicant stated that after he left [Country 1] the Karuna group somehow found out he had gone to [Country 2]. His mother told him they came and threatened that if the applicant returned 'to the country' he would be killed. He does not know the reason the Karuna group is after him, and whether it is because his mother was once suspected.
18. The applicant's evidence on this issue was vague and unconvincing, containing no details about the names of the people who rented the room from his family, or their role with the LTTE. In

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<sup>3</sup> Austrian Centre for Country of Origin & Asylum Research and Documentation (ACCORD), "Sri Lanka: COI Compilation", 31 December 2016, CIS38A80123251

<sup>4</sup> UK Home Office, "Sri Lanka February 2009", 18 February 2009, 649

addition, the evidence was inconsistent between the Arrival and SHEV interviews about when the problem in [Country 1] started. Given the significance of the claim, I consider the applicant would have been able to provide a consistent account regarding the timeframe. Moreover, I find it implausible that if the people were genuinely searching for the applicant with the intention to harm or kill him that they did not do so during the months he remained living in the family home in [Country 1]. I also find the applicant's speculation that he may have been threatened because of his mother's prior involvement with the LTTE is entirely implausible. If the applicant's mother was of interest I consider they would have threatened her directly during the years she had been in [Country 1], rather than making vague and indirect threats against the applicant. Overall, I am not persuaded the purported visits occurred, or that the people rooms were rented to were LTTE members. I consider the applicant has fabricated the evidence, regarding the Karuna group being interested in him or the people who rented the room, to support his Visa application. I do not accept the applicant was of interest to the Karuna group or any authorities in [Country 1], that he was being searched for, harassed or threatened, or that such treatment was the reason he left [Country 1]. Accordingly, I also do not accept that they discovered the applicant was in [Country 2], and that they visited his mother in [Country 1] and made threats.

19. The applicant consistently referred to the UNHCR issuing him with a card in [Country 1], and he has provided a photocopy of a UNHCR card in his name, and showing his date of birth and his assigned UNHCR number. During the Arrival interview, when asked about his identity documents, he referred to a UNHCR card issued in 2008. During the SHEV interview he said the card is given by the UNHCR when a person is accepted to be a refugee. He said he first obtained a card in 2007, along with other family members, and at that time he was only his parents were interviewed, but that he went for interviews in 2009 and 2010, and also after he married in 2011, and again in 2012. In regard to the 2010 interview he said it was a lengthy interview, and he told them about the problems his parents had. No documentation has been provided to support the grant of refugee status, nor regarding the basis on which the assessment was made. The copy of the UNHCR card the applicant has provided is not in English and no translation has been provided, however it appears the card was issued [in] November 2010 and was valid until [November] 2013. During the SHEV interview the applicant said he was issued with the card in [Country 1] in 2010, and he brought a copy of the card, which he laminated, with him to Australia, and left the original with his parents in [Country 1]. I am prepared to accept the applicant's evidence that he was granted status as a refugee by the UNHCR in [Country 1], however I consider that has no material bearing on the current decision, which must be made taking into account the material before me.
20. During the SHEV interview the applicant said his father passed away in November 2017. And that his mother and two of his [siblings] returned to Sri Lanka in November 2017, and they currently live in Jaffna. He has another [sibling] who married an Indian citizen and lives in India. I accept that evidence. The applicant said when his mother and [siblings] returned to Sri Lanka, for their security and safety, money was paid to ensure they did not have any trouble getting home to Jaffna. He referred to setting up someone in immigration to take care of them and take them in a van straightaway to Jaffna, and money or bribes being paid for them to leave the airport. I am prepared to accept the applicant's mother and [siblings] might have had some concerns for their safety, [when] travelling together, and that some money was paid to facilitate their travel to Jaffna. However, noting I have not accepted the applicant's mother was of interest to authorities in 2007 when she left Sri Lanka, and there is no information before me that the applicant's mother or [siblings] have been of interest to Sri Lankan authorities during the 16 months they have now been back in Sri Lanka, I do not accept the applicant's mother was of interest to authorities when she returned to Sri Lanka in 2017, or that bribes were paid to enable her to exit the airport.

21. It is now almost ten years since the long internal armed conflict between the Sri Lankan government and the LTTE ended in May 2009, and the LTTE was defeated. During the civil conflict more Tamils were detained under emergency regulations and the *Prevention of Terrorism Act* (PTA) than any other ethnic group. Many Tamils, particularly in the north and east, reported being monitored, harassed, arrested and/or detained by security forces during the conflict and the Rajapaksa Government, which ended in 2015. While this was primarily due to LTTE members and supporters being almost entirely Tamil, there were also likely instances of discrimination in the application of these laws, with LTTE support at times imputed on the basis of ethnicity.<sup>5</sup>
  
22. Country information reports that the situation for Tamils in Sri Lanka has changed significantly since the applicant left in 2007. Since Sirisena became President in 2015 there have been positive developments, and the overall situation for Tamils in Sri Lanka has improved. DFAT assesses the security situation in Sri Lanka is greatly improved since the conflict ended in May 2009, in particular in the north and east, and the Sri Lankan government exercises effective control over the entire country. Military involvement in civilian life has diminished, although military involvement in some civilian activities continues in the north. Monitoring and harassment of Tamils in day-to-day life has decreased significantly under the current government, however surveillance of Tamils in the north and east continues, particularly those associated with politically sensitive issues. Although the Sri Lankan Constitution provides that 'no citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any such grounds', ethnicity is a sensitive issue in Sri Lanka, and is a fundamental consideration in the reconciliation process to which the Sri Lankan government has committed to. Tamils now have a substantial level of political influence, and their inclusion in political dialogue has increased since the change of government in 2015. Tamil political parties are numerous, with the largest coalition of parties operation under the umbrella of the Tamil National Alliance.<sup>6</sup> Symbolic changes have also contributed to a more positive outlook for reconciliation, such as the singing of the national anthem in Tamil as well as Sinhala at the 2016 Independence Day ceremony.
  
23. In June 2017 the UK Home Office was of the opinion that a person being of Tamil ethnicity would not in itself warrant international protection and neither, in general, would a person who evidences past membership or connection to the LTTE, unless they have or are perceived to have had a significant role in it, or if they are perceived to be active in post-conflict Tamil separatism and thus a threat to the state.<sup>7</sup> The LTTE no longer exists as an organised force in Sri Lanka, however DFAT confirms Sri Lankan authorities remain sensitive to the potential re-emergence of the LTTE throughout the country, and are likely to maintain intelligence on former LTTE members and supporters, and high-profile former LTTE members would continue to be of interest to the authorities and subject to monitoring.<sup>8</sup> Of note, the applicant does not claim to have had any involvement with the LTTE, nor does he claim to have been involved in any political activity, either in Sri Lanka or in the diaspora. The country information does not indicate that Tamils are currently at risk of persecution in Sri Lanka purely on account of their race, or that Tamil ethnicity of itself imputes LTTE membership or a pro-LTTE opinion, even when combined with other factors such as gender, age or place of origin.

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<sup>5</sup> DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064

<sup>6</sup> DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064

<sup>7</sup> UK Home Office, "Country Policy and Information Note. Sri Lanka: Tamil separatism. Version 5.0", 15 June 2017, OG6E7028826

<sup>8</sup> DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064



24. Although virtually everyone agrees there has been progress towards alleviating the climate of fear in Sri Lanka, opinions differ markedly about the extent of that progress.<sup>9</sup> The UN Special Rapporteur on torture, in his December 2016 report on Sri Lanka, noted the fragility of the reform process and that the country is at a critical moment in its history in terms of setting up the necessary mechanisms to remedy its past large-scale human rights violations and prevent their recurrence. He observed that while the practice of torture is less prevalent today than during the conflict and the methods used less severe, a “culture of torture” persists against suspects being interviewed and a causal link seems to exist between the level of real or perceived threat to national security and the severity of the physical suffering inflicted during detention and interrogation.<sup>10</sup> In July 2017, following an in-country visit to Sri Lanka, the UN Special Rapporteur on human rights and terrorism expressed concern that ‘entire communities have been stigmatised and targeted for harassment and arbitrary arrest and detention, and any person suspected of association, however indirect, with the LTTE remains at immediate risk of detention and torture’. However, the Special Rapporteur’s statement is inconsistent with DFAT’s assessment of the risk that a person of Tamil origin with a low level and/or indirect association with the LTTE would not likely be detained under the Prevention of Terrorism Act (PTA) on return to Sri Lanka.<sup>11</sup>
25. DFAT reports the PTA is currently suspended, but still in legal force. Under the PTA suspects can be held without charge for three-month periods, not exceeding a total of 18 months. Human Rights Watch reported in January 2018 that the PTA had not been used in 2017, and DFAT understands that fewer individuals are currently detained under the PTA than during the conflict. According to the Bureau of the Commissioner General of Rehabilitation, by November 2017, 12,882 people, primarily former LTTE, had completed rehabilitation, however only one centre with eight inmates remained open in December 2017. Of note, DFAT reports the Sri Lankan government claims no returnee from Australia has been charged under the PTA, however DFAT cannot verify this claim.<sup>12</sup> I consider the small number of detainees, who are ex-LTTE combatants, reflects there is no longer a systemic practice of detaining those suspected of any involvement with the LTTE, and only those with significant links to the LTTE are now at risk of detention under the PTA. I do not accept the applicant has a profile such that he would be at a real risk of being imputed with an LTTE connection, or be at risk of detention under the PTA.
26. The 2018 DFAT report refers to allegations by several local and international organisations regarding torture by Sri Lankan military and intelligence forces, mostly from the period immediately following the conflict and involving people with imputed links to the LTTE. Reports have been made by credible sources such as Freedom from Torture and the International Truth and Justice Project, and other sources reported in the DFAT and UK Home Office reports, such as Amnesty International and Human Rights Watch, of ongoing arrests and mistreatment amounting to torture perpetrated by security forces and police in Sri Lanka, predominantly affecting Tamils.<sup>13</sup> In July 2017 the ITJP reported on victims of torture who had fled to Europe, and found that in 2016/17 both the military and police continued to abduct, unlawfully detain,

<sup>9</sup> UK Home Office, "Country Policy and Information Note. Sri Lanka: Tamil separatism. Version 5.0", 15 June 2017, OG6E7028826

<sup>10</sup> United Nations, "Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Sri Lanka A/HRC/34/54/Add.2", 22 December 2016, CIS38A80123313

<sup>11</sup> DFAT, "DFAT Cable response: UN Special Rapporteur (Ben Emmerson) on human rights and terrorism in Sri Lanka", 14 August 2017, CISED50AD5239

<sup>12</sup> DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064

<sup>13</sup> Freedom from Torture, "Sri Lanka – Update on torture since 2009", 6 May 2016, CIS38A8012881; International Truth & Justice Project Sri Lanka ("ITJP"), "Silenced: survivors of torture and sexual violence in 2015", 7 January 2016, CIS38A801275; 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

torture and rape Tamils. Of the victims interviewed, the main risk factor leading to interrogation and torture appeared to be an association with LTTE cadres and/or authorities' concerns that the suspects were involved in regrouping the LTTE.<sup>14</sup>

27. With regard to the applicant's claim to fear harm from the Karuna group if returned to Sri Lanka. The comprehensive December 2016 report from the ACCORD states that there are no longer any active paramilitary groups in Sri Lanka, and that with the exit of Rajapaksa from power, paramilitary wings have lost much of their influence and relevance to pressurise. Major paramilitary groups in Sri Lanka have been disarmed, including the Karuna group, and influential members in the group have moved into politics. The Karuna group formed an associated political party called Tamil Makkal Viduthalai Pulikal (TMVP) in 2007, and contested the Eastern Provincial Council elections in 2008, winning a majority.<sup>15</sup> In addition, the 2018 DFAT and 2017 UK Home Office and US Department of State reports do not mention paramilitary group activity. Taking into account the country information, and the dramatic improvements to the security situation in Sri Lanka since the end of the conflict in May 2009, I am not satisfied the applicant faces a real chance of harm from any paramilitary group on return to Sri Lanka, including the Karuna group, now or in the reasonably foreseeable future.
28. Considering the applicant's circumstances and profile, in the context of the country information, I am not satisfied the applicant was of adverse interest to Sri Lankan authorities, or any other group, at the time he left Sri Lanka, or that there is a real chance the applicant would be at risk of harm on return to Sri Lanka, now or in the reasonably foreseeable future, for the reasons claimed, including as a young Tamil male, who resided in an area formerly under LTTE control, and who had no direct involvement with the LTTE; for any imputed membership of or political opinion in support of the LTTE as a result of his father's support of the LTTE over 23 years ago, or as a result of his mother's incidental association with LTTE members through a womens' club, or as a result of his own association with LTTE members in Sri Lanka or [Country 1]; as a result of his previous interaction with Sri Lankan authorities, including being detained for a number of hours on one occasion in 2007, and harassed on a number of occasions; and as a person who has resided outside Sri Lanka for an extended period of time and gained refugee status overseas; who has not indicated he has participated in Tamil diaspora activities in Australia, or in any activities in Sri Lanka or elsewhere that would be considered to constitute post-conflict Tamil separatism on return to Sri Lanka, or indicated that he would do so on return to Sri Lanka.
29. In his statement of claims the applicant claims if he is returned to Sri Lanka, on arrival in Sri Lanka as a failed asylum seeker absent for many years, and having left Sri Lanka by boat, that an investigative process will be triggered, which will reveal his suspected involvement with the LTTE in [Country 1], and his mother's suspected involvement in supporting the LTTE. As a result he will be detained and questioned for a longer period than other returnees, and during such detention he will be subjected to physical ill-treatment by authorities, amounting to serious harm. During the SHEV interview the applicant's representative submitted that even though the applicant left Sri Lanka lawfully, that because he came to Australia by boat unlawfully on return to Sri Lanka he would be detained and questioned about illegal departure, and that he may be detained for one or two days, and up to four days if over a weekend. It is also submitted that he will be questioned about whether he or his family were involved with the LTTE, and it is possible his father's involvement with the LTTE long ago might come to the attention of the authorities and result in the applicant being harmed, harassed or tortured during detention.

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<sup>14</sup> ITJP, "Unstopped: 2016/17 Torture in Sri Lanka", 26 July 2017, CISED50AD4849

<sup>15</sup> ACCORD, "Sri Lanka: COI Compilation", 31 December 2016, CIS38A80123251

30. Entry and exit from Sri Lanka is governed by the Immigrants and Emigrants Act 1949 (the I&E Act). Under the I&E Act it is an offence to depart other than from an approved port of departure. As the applicant departed legally using his passport, I am not satisfied he would be imputed with having departed illegally, or that he is at risk of harm for that reason, including being prosecuted under the I&E Act. Information from DFAT indicates all involuntary returnees undergo checks on arrival in Sri Lanka, including by the Department of Immigration and Emigration, the State Intelligence Service and the CID. For those travelling on a temporary travel document, as would be the case for the applicant, investigation is undertaken to confirm identity, which often includes an interview, contacting authorities in their home area, and neighbours and family, and checking criminal or court records, a process that can take several hours. According to DFAT all returnees are treated according to standard procedures irrespective of ethnicity, and are not subject to mistreatment during processing at the airport. Most returnees are questioned upon return, usually at the airport, and the processing can take several hours. In addition, DFAT notes that some returnees from Australia have been charged with immigration offences and criminal offences allegedly committed before departure.<sup>16</sup> Although DFAT reports that those who departed illegally from Sri Lanka may be charged under the I&E Act, and detained in police custody at the airport for up to 24 hours after arrival, or for up to two days in an airport holding cell if a magistrate is not available, for example, because of a weekend or public holiday, I do not accept the applicant will be detained for more than a few hours. I note that there are some country information reports of returnees being mistreated, however they are predominantly people suspected of having substantial links to the LTTE, rather than relating to being a failed Tamil asylum seeker.<sup>17</sup> I accept the applicant may be questioned on return, about his or his family LTTE connections, however overall I am not satisfied the applicant's profile is such that he would be of interest to Sri Lankan authorities, and be at risk of harm for that reason.
31. I accept Sri Lankan authorities may infer the applicant sought asylum in Australia due to the manner of his return, and that he may be interviewed, which may take several hours. I accept some asylum seekers with substantial links to the LTTE, or who have engaged in Tamil separatist activities, may be at risk of harm during arrival processing. However, I have found the applicant would not be of adverse interest to authorities on return as a result of his LTTE profile, and I do not consider he faces a real chance of harm as a consequence of his re-entry. There is no information before me to support returnees are at risk of harm simply for having been overseas for an extended period, and I do not accept this would heighten the applicant's profile.
32. The applicant originates from the Northern Province of Sri Lanka and, with the exception of about one month in 2007, always lived there whilst in Sri Lanka. I consider it very likely he would return to the Northern Province where he indicated his mother and at least one of his [siblings] continue to reside. DFAT reports that despite positive government sentiment, refugees and failed asylum seekers face practical challenges to successful return to Sri Lanka, and many have difficulties finding suitable employment and accommodation. DFAT assesses that reintegration issues are not due to failure to obtain asylum, but rather due to the employment and accommodation difficulties they may face. I accept the applicant, having been absent from Sri Lanka for over eleven years may face a period of re-adjustment on return to Sri Lanka. The applicant noted during the SHEV interview that he had worked on a number of contracts whilst in [Country 1], and also that he undertook [occupational] training and worked at [Business 1]. In Australia he has been working as a labourer in the [specified]

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<sup>16</sup> DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064

<sup>17</sup> Freedom From Torture, "Sri Lanka – Update on torture since 2009", 6 May 2016, CIS38A8012881; International Truth and Justice Project, "Silenced: survivors of torture and sexual violence in 2015", 7 January 2016, CIS38A801275

industry since 2016. The applicant has shown himself to be resourceful in finding and maintaining employment in [Country 1] and Australia, and I consider that, along with the assistance and support of his immediate family, who have been re-established in Sri Lanka since late 2017, he will be able to re-establish himself in Sri Lanka. 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. The UNHCR also interviewed refugee returnees in 2016, and only 0.3 per cent indicated they had any security concerns following their return. While the government has reportedly decreased systematic surveillance of returnees, DFAT is aware of anecdotal evidence of regular visits and phone calls by the CID to failed asylum seekers in the north as recently as 2017. In addition, refugees and failed asylum seekers reported social stigma from their communities upon return.<sup>18</sup> It is possible the applicant, as a returning asylum seeker, may be monitored for a period of time on return to the Northern Province, and experience some social stigma, however, I am not satisfied this treatment would amount to serious harm.

33. Overall, I am not satisfied there is a real chance of persecution on account of the applicant returning to Sri Lanka from Australia as a failed asylum seeker, now or in the reasonably foreseeable future.
34. Considering all the applicant's claims, I am not satisfied the applicant has a well-founded fear of persecution.

#### **Refugee: conclusion**

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

#### **Complementary protection assessment**

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

#### **Real risk of significant harm**

37. Under s.36(2A), a person will suffer 'significant harm' if:
  - the person will be arbitrarily deprived of his or her life
  - the death penalty will be carried out on the person
  - the person will be subjected to torture
  - the person will be subjected to cruel or inhuman treatment or punishment, or
  - the person will be subjected to degrading treatment or punishment.

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<sup>18</sup> DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064

38. I have found the applicant does not face a real chance of any harm on the basis of his Tamil ethnicity, for any actual imputed connection to the LTTE, including as a result of his place of origin and residence in former LTTE-controlled areas, as a result of any prior interactions with Sri Lankan authorities, or for having spent an extended period of time outside Sri Lanka. For the same reasons, I am also not satisfied there is a real risk of any harm, including significant harm.
39. There is a possibility the applicant, as a returning asylum seeker, may face monitoring for a period and possibly social stigma, however I have found this would not amount to serious harm. I am also satisfied such treatment would not amount to significant harm. I am not satisfied it amounts to the death penalty, arbitrary deprivation of life or torture. I am also not satisfied any monitoring or social stigma the applicant may experience amounts to pain or suffering that is cruel or inhuman in nature, severe pain or suffering, or extreme humiliation for the purposes of the definition of cruel or inhuman treatment or punishment, or degrading treatment or punishment. I do not accept the applicant will face monitoring or social stigma in Sri Lanka that amounts to significant harm for the purposes of s.36(2A).

**Complementary protection: conclusion**

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

**Decision**

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

## Applicable law

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

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

In this Act, unless the contrary intention appears:

...

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

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

...

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

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

...

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

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

...

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

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

...

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

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

...

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

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

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

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

...

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

...

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

...

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



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

...

*Protection obligations*

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

*Determining nationality*

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