



**Australian Government**  

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**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA19/06479

Date and time of decision: 8 May 2019 13:43:00  
G Deal, Reviewer

**Decision**

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The IAA remits the decision for reconsideration with the direction that:

- the referred applicant is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*.

*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 applicant (the applicant) claims to be a Tamil from [District], Sri Lanka. [In] June 2013 she arrived by boat in Australia. On 17 March 2017 an application for a Safe Haven Enterprise Visa (SHEV application) was lodged on the applicant's behalf with the Department of Immigration, now part of the Department of Home Affairs.
2. On 21 August 2018 a delegate of the Minister for Immigration (the delegate) refused to grant the visa. The delegate accepted most of the applicant's claims, including that she was forcibly recruited by the Liberation Tigers of Tamil Eelam (LTTE) during the conflict, spent some time in an Internally Displaced Person's (IDP) camp and was subsequently harassed by the authorities on her release but did not accept she was high level within the LTTE or that she was genuinely of interest to the authorities when she left Sri Lanka. The delegate also accepted the applicant would be returning to Sri Lanka alone, as her Tamil husband in Australia had been granted a SHEV, prior to her lodging an application. Her husband claimed to be a former LTTE member, with serious scarring, who had undergone rehabilitation. The delegate did not accept he was high profile or that the applicant's more recent marriage to him in Australia would lead to the applicant having a profile of interest to the authorities. Overall, the delegate found the applicant was not a person in respect of whom Australia had 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. On 5 May 2019 the IAA received a submission and supporting documents from the applicant.
5. I have obtained the 2018 Special Rapporteur's report on the promotion and protection of human rights while countering terrorism.<sup>1</sup> I am satisfied there are exceptional circumstances to justify considering this recently published report which documents the changing conditions in Sri Lanka in relation to the treatment of Tamils, including those with suspected LTTE links. The delegate relied upon a much earlier version of a report by the Special Rapporteur. Only one other country information report before me was published as recently as the Special Rapporteur's 2018 report.
6. A United Nations May 2018 report<sup>2</sup> on conflict-related sexual violence in Sri Lanka was provided, which is new information. It provides more recent information specifically on the issue of sexual violence in Sri Lanka, including after the conflict, than that already before me and is relevant to the applicant's claimed fear of sexual violence. The report was published after the delegate's decision and I am satisfied could not have been provided to the delegate before the delegate's decision was made. I am satisfied exceptional circumstances exist to justify its consideration.
7. The applicant has provided a copy of an IAA decision dated 21 December 2018 in the context of the assertion that in similar cases the IAA has considered two years spent in rehabilitation as

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<sup>1</sup> Office of the High Commissioner for Human Rights' Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism - Mission to Sri Lanka', 23 July 2018, CIS7B839411830.

<sup>2</sup> United Nations, "Report of the Secretary-General on conflict-related sexual violence", 23 March 2018.

critical. This is new information. While I am satisfied the decision contains personal information it concerns another person's individual circumstances and apart from some very general similarities with the applicant's husband's profile that person appears to have no relationship to the applicant, her husband or family. I am not satisfied that there are exceptional circumstances to justify its consideration.

8. The applicant has provided a new claim and a number of articles in relation to the terrorist attacks in Sri Lanka in and around Easter Sunday 2019. This is new information. This information was published and/or relates to events after the delegate's decision was made and I am satisfied could not have been provided to the delegate before their decision was made. The reports indicate the attacks occurred in central and eastern Sri Lanka, targeted prominent hotels and Catholic churches and that responsibility for the attacks has been claimed by Muslim extremists. They also detail increased security measures following the attacks, including the declaration of a State of Emergency, the targeting of certain groups, including Muslims, and that former LTTE members are being pressured to act as informants. The applicant broadly claims she may be targeted because of a perception she is Muslim. The applicant has not claimed to be Catholic or Muslim or made any claims in relation to her faith and has claimed to be from the north and I do not consider the information adds anything material to her specific claims in relation to the LTTE, gender and her and her husband's profiles and experiences in Sri Lanka and Australia. In any event, as detailed below, I have accepted the applicant's claim she faces a real chance of serious harm on account of her profile and close familial links with a former LTTE member and rehabilitee of on-going interest to the authorities. I am not satisfied exceptional circumstances exist to justify consideration of the information.

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

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9. The applicant's claims can be summarised as follows:
  - She is a Tamil woman from the north of Sri Lanka and an area that was a former LTTE stronghold. Members of her extended family were involved with the LTTE and were sent to rehabilitation.
  - She completed up to year [number] schooling and other than helping her husband [in] Australia has not worked. Her father supported her in Sri Lanka. She only speaks Tamil.
  - Her father resides in the family home in the north and is old and unwell. Her younger brother has problems and so does not stay at the family home. She also has aunts and uncles living in the north.
  - She was forcibly recruited by the LTTE in 2008. She underwent weapons training and fought in two battles with them. She was injured while in battle in about May 2009 and has scars from these injuries.
  - At the end of the conflict, she was detained with her family at an IDP camp and interrogated on suspicion of LTTE involvement.
  - On her return to the family home in about December 2010 someone told the authorities about her past LTTE involvement and the Criminal Investigation Division (CID) told her she had to go to rehabilitation. Her parents were told by the authorities to surrender her to the nearby Sri Lankan Army (SLA) camp. She relocated to Jaffna District with her aunt where she hid until her departure from Sri Lanka, in May 2013, in fear of her life. While at her aunt's she heard the CID had continued to search for her

and her parents were beaten and severely mistreated by the authorities in connection with this.

- Since being in Australia the authorities have continued to search for her at her parents' home and mistreat her family. This was what led to her mother's death in 2014. They harassed her family looking for her as recently as about August 2018.
- [In] 2016 she married another Tamil asylum seeker. He claims to be former LTTE member with significant scarring who underwent rehabilitation and was further harassed and detained by authorities after release from rehabilitation before he fled to Australia in fear of his safety. He was granted a SHEV in [2016]. She lodged her application with the Department after this.
- She has no male protection in Sri Lanka. As a former female LTTE member from the north she fears being sent to rehabilitation, sexual assaults, difficulties with employment, stigmatisation in the community and that the police will turn a blind eye to her mistreatment. She also fears being detained by authorities in order to extract information about her husband and that she will be perceived as having the same profile as him. She and her husband have shared controversial images on their [social media] accounts which are linked. The authorities have her information because it was leaked in a 2014 Departmental data breach. She will be ostracised as a single married female whose husband is overseas. She departed illegally and will be a failed asylum seeker.

### **Factual findings**

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10. Based on the applicant's evidence, including her documentary evidence, I accept she is a Tamil female from the north of Sri Lanka and that she was born in [year] and that Sri Lanka is the receiving country.

### **LTTE links**

11. The applicant claims she was forcibly recruited by the LTTE when displaced in 2008. She undertook weapons training and fought with them in two battles and was injured in May 2009. In the arrival interview when asked about her role with the LTTE the applicant said they took her forcibly and she just served them. When asked what she did for them she explained that they had sent a letter requesting her family to allow her to join the LTTE but her mother had refused and so they were always in hiding. When they were displaced she was caught and forcibly recruited. When asked what she did for the LTTE she said they were given training for a short period and then they were asked to walk. When asked where they walked she named a number of areas including [Town 1]. When asked why she walked to these areas she said that was where the fighting was. When asked if she fought she initially said yes and then said she was only trained for a short period so she could not face that. When asked what she actually did she said she fired a gun but she was only trained for a short period and not properly so could only stand that for a little while. Eventually she escaped because they surrendered to the army.
12. In contrast, in her visa application the applicant stated she was forced to engage in combat in two battles while with the LTTE and was injured in about May 2009 in [Town 2]. In her SHEV interview when the delegate asked the applicant to tell her about the fighting the applicant said she was recruited by them, trained and was then asked to fight, was injured and that was it. When asked what happened after she was injured she said she had a bit of headache and

nausea, sought medical treatment and then moved into the IDP camp with her family. She also indicated she was not in a leadership role and said she was one of the civilians who followed the leaders.

13. The country information before me<sup>3</sup> indicates that the LTTE aggressively resumed forcible recruitment of adults and children after September 2008 in the lead up to the LTTE's military defeat. Following a series of strategic attacks forcing the LTTE to retreat toward the north, in January 2008, the SLA opened yet another front in an effort to capture the north-eastern coastline from [Town 3] to [Town 1] near where the applicant lived. Some 300,000 civilians were caught up in the conflict zone. While certain measures were taken to minimise civilian casualties, including helping them move into designated no conflict zones, the LTTE restricted the number allowed to leave their territory for a number of strategic reasons. There were reports they shot civilians who tried to escape. Civilians were used as human shields by the LTTE as the SLA continued to advance. Civilians provided a buffer for the LTTE to enable them to re-group in the face of the SLA's advancements. By February 2009 the LTTE stepped up its forced recruitment of civilians using them to build earth bunds among other things. As the SLA continued to gain ground, thousands of civilians unable to escape LTTE-held territory continued to be caught up in the fighting. The President formally announced military defeat of the LTTE on 19 May 2009.
14. I accept the applicant and her family were displaced at the end of the conflict and that they may have been caught in the conflict zone. However the applicant has provided very little detail about her role within the LTTE, despite being given an opportunity to do so. I conclude that she was one of the thousands of civilians caught up in LTTE-held territory in the last stages of the war and unable to leave and may have been forced to assist the LTTE as were many others in this position. But given the lack of detail and the significant inconsistencies in her evidence I do not accept she was forcibly recruited by the LTTE, underwent training with them or that she fought in two battles for the LTTE.
15. The applicant claims that she has scarring as a result of the injuries sustained in May 2009. The applicant has not provided any supporting information or further detail in relation to this claim, despite stating in her application that medical records would be provided and later confirming she sought medical treatment in Sri Lanka. I do not accept she has significant or noticeable scarring.
16. In the SHEV interview when asked if any other family members were former LTTE members the applicant said she had aunts and uncles who were involved with the LTTE and she indicated that some had been sent to rehabilitation. She also said that some had passed away and some were alive. I accept she may not have thought to mention this earlier given, based on her evidence, she does not appear to have been close or to know much about them or their fate and that the events appear to relate to some time ago. She has otherwise provided no further detail in relation to this matter. Her family is from the north and it is plausible that she may have extended family with LTTE links. However the evidence before me does not indicate they were prominent members, that she was close to them or that she came to the attention of the Sri Lankan authorities because of this.

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<sup>3</sup> Graduate Institute of International and Development Studies 'An Institutional History of the Liberation Tigers of Tamil Eelam (LTTE)', Joanne Richards, Centre on Conflict, Development and Peacebuilding (CCDP), Geneva, 1 November 2014, CISA447F082828.

## **IDP camp**

17. The applicant claims she was placed in an IDP camp with her family at the end of the conflict and that she and her family were questioned and severely mistreated on suspicion of LTTE involvement while in the camp. The country information before me indicates hundreds of thousands of Tamils were sent to IDP camps at the end of the conflict and some 12,000 were screened out as having suspected LTTE links and sent to rehabilitation centres.<sup>4</sup> I accept the applicant was sent to an IDP camp with her family at the end of the conflict and that they were interrogated and may have been severely mistreated on suspicion of LTTE links, as were many others in IDP camps at that time on account of their ethnicity. However, the applicant has said she was released from the camp with her family in December 2010. When asked why she was released she mentioned looking after her aunt's children and having long hair and that most LTTE cadres had short hair. At the time of her release she was about [age]. On the evidence I do not accept she was genuinely suspected of LTTE involvement at the time of her release.

## **After release**

18. The applicant claims that after her release from the IDP camp she lived with her family in [District] until about June 2011 when she relocated to her aunt's place in Jaffna and that she remained there until her departure for Australia in May 2013. She claims that while with her parents someone told the authorities about her LTTE links. The authorities searched for her on several occasions. She and her parents were told she had to go to rehabilitation as a former LTTE member but she fled to her aunt's in Jaffna where she hid. Her family were questioned and severely mistreated in connection with her after she fled.

19. After the applicant's release from the IDP camp she remained in Sri Lanka for some two and a half years (the first six months in her family home) and was not sent to rehabilitation, detained or mistreated despite claiming the authorities frequently searched for her during this period. The information before me indicates there was a heavy military presence in the north, particularly in Jaffna, at that time.<sup>5</sup> The applicant has also claimed in her application that there was a checkpoint out the front of her parent's house and a large army camp about 10 minutes' walk from her parent's house. Records provided indicate she attended school during some of this period. She was able to travel from [District] to Jaffna without apparent issue. She mentioned significant new details in the SHEV interview, such as that a jealous parent whose own child did not safely return from the conflict had told the authorities about the applicant's LTTE links and that the applicant was told directly by the authorities to go to rehabilitation. If she were of genuine interest, it is surprising that the authorities did not detain her and take her to rehabilitation on this claimed occasion. The delegate had to ask the applicant to repeat what she had said in response to questions relating to this period because, at times, her responses were unclear.

20. The country information before me<sup>6</sup> indicates IDPs from the north were all generally regarded as former LTTE members or sympathisers, given the extended period of time they were under the LTTE's control, and therefore closely monitored and checked by the authorities on their release.

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<sup>4</sup> Danish Immigration Service, "Human Rights and Security Issues concerning Tamils in Sri Lanka", 71, 1 October 2010, CIS19345.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

21. Based on the country information detailed above I accept the authorities frequently searched the applicant's village for suspects at that time and that she and her family may have been caught up in this generalised harassment of the Tamil community. However I do not accept she was an LTTE member, and the evidence indicates that she was released from the IDP camp not suspected of LTTE involvement and remained in her family home for an extended periods without being detained or mistreated. In light of this, and the lack of clarity and detail around the claimed events following her release, I do not accept the applicant was of genuine and on-going interest to the authorities on suspicion of LTTE involvement after her release from the IDP camp or when she left Sri Lanka in 2013. I do not accept the authorities told her or her family that she was a former LTTE member or that she had to go to the army camp or rehabilitation or that other people had told the authorities she was an LTTE member. I do not accept the authorities severely mistreated her family in connection with the applicant. I do not accept she was in hiding in Jaffna although I accept she may have relocated there at some point. I do not accept her family has been harassed or mistreated by the authorities in connection with the applicant since she left home for Jaffna or since she has been in Australia.
22. In support of the claim the applicant's mother's harassment by authorities led to her mother's death in 2014, the applicant has provided a copy of her mother's death certificate which states she passed away in hospital in June 2014 from a "blast of nerve in the brain and due to bleeding". I accept her mother passed away in 2014 due to bleeding in the brain.
23. In the SHEV interview the applicant also indicted lots of women were harassed by the military at that time and that the military tried to grab her, which the country information before me indicates commonly occurred at that time in the north and I accept that occurred.<sup>7</sup>

## Husband

24. The applicant claims she has married a Sri Lankan asylum seeker who has been granted a SHEV. Based on the applicant's evidence, including documentary evidence such as her marriage certificate and a notification of grant of the SHEV addressed to her husband, I accept the applicant married her husband in [2016] and that her husband was granted the SHEV in [2016], prior to her own protection visa application being lodged.<sup>8</sup> The applicant has also provided a "Certificate of Union" for her and her husband dated in [2016].
25. The applicant has also provided a copy of her husband's statement of claims. In it he claims his family supported the LTTE in many ways. He was conscripted by the LTTE in March 2007. After completing his initial training at the LTTE camp he was transferred to the administration section (distribution) in the LTTE. He initially worked as a driver transporting food and other items including weapons from a central location in the Vanni to various LTTE camps inside the LTTE controlled areas. He was seriously injured in December 2008 when transporting items in a truck. LTTE doctors at [Town 1] hospital performed surgery on him. He was told [he was operated on] and that there were four to five pieces of shrapnel still inside his body. Three of his ribs were also fractured. He has severe scarring as a result. At the end on the war he joined his family when the army took control of the area. [In] May 2009 he and his family were taken to [Town 4] where he was separated from his family. The authorities were suspicious of him due to his injuries. He was transferred to [Town 5] hospital and kept in a guarded area. Sometime in August 2009 he was transferred to [Location 1] army camp and then to another

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<sup>7</sup> Danish Immigration Service, "Human Rights and Security Issues concerning Tamils in Sri Lanka", 71, 1 October 2010, CIS19345.

<sup>8</sup> I note that in this case, s.91WB of the Act prevents the grant of the visa on the basis alone of her membership of her husband's family unit.

secret location near [Town 6] where he was held until about March 2010. He was interrogated and severely mistreated during this period. The CID continually asked him to confess he was an LTTE cadre and wanted him to identify LTTE cadres. They tried to force him to sign letters written in Sinhalese. He was told that they said he confessed to having carried out certain terrorist attacks. He was next transferred to a rehabilitation centre known as [Location 2] army camp where he was detained until September 2011 (more than a year). While at that camp he was taken to [Location 3] camp for questioning on several occasions and severely mistreated. He was released with monthly reporting obligations. Sometime in January 2012 he purchased a van and began working for himself. The CID started harassing him. They asked him where he got the money to purchase the van and asked him for some money. He refused to pay them and they held him in the [Town 5] army camp for a day only releasing him when he agreed to pay them the sum demanded. He subsequently fled and hid at a friend's house in Trincomalee for a number of months before departing for Australia in fear of his safety. He had more recently heard that the CID was offering to remunerate anyone who helped with his recapture.

26. The delegate accepted the applicant's husband was a former LTTE member and rehabilitee and I agree with the delegate and also accept these claims. The applicant indicated her husband had people under him while in the LTTE but she provided no further detail in this regard. Nothing to this effect is in her husband's statement and I agree with the delegate and do not accept he was a high profile member. I have some reservations about his claim that some four years after he left Sri Lanka the authorities would offer to remunerate anyone who helped to find him. However, there is nothing in the information before me that contradicts or discredits her husband's claims which are also quite detailed. The country information before me<sup>9</sup> is also consistent with many aspects of her husband's claims; the LTTE had a hospital in [Town 1]; those suspected of LTTE links were often separated from their families at camps at the end of the war; trucks had been used by the LTTE in past terrorist attacks; the LTTE transported legitimate goods as well as covertly transporting weapons and other similar items; in 2009 the authorities deemed scarring as evidence of LTTE membership and detained a number of people on these grounds; after the conflict suspected former LTTE members were typically sent for one year of rehabilitation which was extended to up to two years for those perceived to be highly radicalised. On the evidence before me I accept the applicant's husband transported items including weapons for the LTTE in trucks near the end of the conflict, was seriously injured and perceived by the authorities as having had a significant role in the LTTE because of this and continued to be viewed with suspicion after his release from rehabilitation. In these circumstances I accept he hid at a friend's house in the months prior to his departure from Sri Lanka for Australia and that he remained of adverse interest to the authorities.

### **Male protection**

27. The applicant claims she will have no male protection in Sri Lanka. In her application the applicant said that she would have to return to Sri Lanka alone because her husband has been granted a SHEV, which I accept. In her SHEV interview when asked why she could not live with her father and brother in the family home as she had previously done, she said that her brother was also now facing problems and was not staying at home. When asked where her brother was living she said at no certain place, sometimes in Jaffna, sometimes in [Town 5]. When asked where he was studying she said in her family village but that he was not staying there. According to her arrival interview and visa application the applicant's family home is

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<sup>9</sup> Joanne Richards, Centre on Conflict, Development and Peacebuilding (CCDP) - Graduate Institute of International and Development Studies, Geneva, 'An Institutional History of the Liberation Tigers of Tamil Eelam (LTTE)', 1 November 2014, CISA447F082828; DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064; Danish Immigration Service, "Human Rights and Security Issues concerning Tamils in Sri Lanka", 71, 1 October 2010, CIS19345.



located in [District], which is a considerable distance from both Jaffna and [Town 5].<sup>10</sup> When asked what trouble her brother was having the applicant said he was now [age] and at night someone would knock on the door and he was afraid he would be taken away. The applicant's evidence in relation to her claim her brother is facing problems was lacking in detail and her explanation for why he was being targeted and has to move around was unpersuasive. I do not accept he has the problems claimed or that he has to move around because of this. She also mentioned that her father was ill. When asked what was wrong with him she said he had chest pains and fainted sometimes. When asked if he were receiving medical treatment she said that he was. She also said that her father continued to farm (cultivate rice) and that he paid for her brother's studies. When the delegate indicated she was of the view that the applicant still had family to return to in Sri Lanka the applicant said her father was getting old and was sick. I note based on her application her father would be about [age]. While I am willing to accept her father may have experienced chest pains and fainted in the past based on her evidence he appears to be managing his condition and I do not accept his medical condition is debilitating or that he is infirm.

### **[Social media]**

28. At the commencement of the SHEV interview the delegate asked the applicant if she had any social media accounts like [social media] and the applicant said that she did. When asked what her [social media] account name was she appeared to state it was her first name. After returning from a break the applicant's migration agent said that he had been told by the applicant that after marrying in 2016 at least one image contained an image of her husband in an LTTE uniform which could be problematic. The husband's post had since disappeared and she had a separate account. The post she had shared on her [social media] account was controversial. He also said that things that her husband had posted were also probably controversial. Her profile was linked to her husband's. He also said that country information suggested that [social media] accounts were closely scrutinised by the authorities (although no source was cited in support of this). He also said that the Committee against Torture's 2016 report said that a mere link to the LTTE was enough to cause people problems. Her migration agent said that the applicant would provide a copy of these [social media] posts in support of this submission. However copies of these claimed [social media] posts or of their profiles were not provided. I am surprised this claim was not included in her application (lodged some nine months after her marriage) or mentioned earlier in the SHEV interview when she was specifically questioned about her [social media] profile. I note the applicant was represented when she lodged her SHEV application. I also note her husband made no claims regarding his [social media] account in his statement of claims (although I note this was lodged some months prior to their marriage). On the evidence before me I do not consider this belated claim supported, despite assurances to provide supporting information. While it is plausible the applicant may have a [social media] profile and her husband may be among her "friends" on [social media] I do not accept her and her husband have shared controversial images on their [social media] profiles, that they are otherwise linked or have attracted any adverse attention because of this.

### **Data breach**

29. The delegate accepted the applicant's name, date of birth, nationality, irregular maritime arrival and detention status may have been inadvertently released in a Departmental data

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<sup>10</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", March 2017, CISED50AD3780.

breach in 2014 and I also accept this. I note this was some two years prior to her marriage to her husband.

30. I also accept the applicant left Sri Lanka illegally and may be identifiable as someone who has attempted to seek asylum in another country.

### **Refugee assessment**

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31. 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**

32. 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.

33. I accept the applicant is a Tamil female from the north of Sri Lanka of about [age]. I do not accept she is a former LTTE member or that she has no male protection in Sri Lanka. I accept she married a Tamil asylum seeker, a former LTTE member and driver who transported weapons, was severely mistreated, rehabilitated and detained, harassed and mistreated by authorities before fleeing for Australia and who has been granted protection in Australia.

34. The applicant claims she fears being detained by the authorities in order to extract information about her husband stating that she cannot be expected not to tell the truth if asked about him. She also claims she will be perceived as holding a similar profile to her husband. She fears being interrogated and seriously harmed if she returns home because of this. The delegate did not accept the applicant would be harmed because of her husband’s links to the LTTE. While the delegate accepted the applicant’s husband was a former LTTE member and driver who was seriously injured and subsequently sent to rehabilitation the delegate did not accept he was a high profile member. I agree with the delegate and have not accepted he was high level within the LTTE. However I have come to a different conclusion in relation to the authorities’ perception of his level of involvement with the LTTE and interest in him. The country

information before me<sup>11</sup> notes that those of on-going interest include 'high profile' former LTTE members or those perceived to have a significant role in post conflict Tamil separatism, which includes former LTTE leaders, former LTTE members suspected of having committed terrorist or serious criminal acts or to have provided weapons or explosives to the LTTE and that the authorities maintain sophisticated intelligence on these people. I am satisfied that based on the country information before me detailed above and her husband's profile there is a real chance her husband is of on-going interest to the authorities.

35. I accept the applicant has never been issued with a passport. The country information before me<sup>12</sup> indicates that following arrival at the airport returnees are processed in a group by a number of government agencies including the State Intelligence Service, the CID and the Terrorism Investigation Department. These departments relevantly check a returnee's identity information against immigration and intelligence databases which can take several hours. The police undertake further investigations to confirm the identity of those entering on temporary travel documents. This often involves interviewing the returning passenger, contacting hometown police, neighbours and family and checking criminal and court records. In these circumstances I am satisfied the applicant will be asked questions by the authorities at the airport about her identity including her marital status. I am satisfied she would answer these questions honestly. To do otherwise would be to provide fraudulent information to the Sri Lankan authorities which she has clearly stated she would not do. The country information also indicates that police, neighbours and relatives in her family village may also be asked these same questions to assist in confirming her identity.
36. The Special Rapporteur notes of the imposing military presence in the north.<sup>13</sup> DFAT reports of anecdotal evidence of regular visits and phone calls by the CID to failed asylum seekers in the north (the applicant has not indicated she would not return there). Although unable to verify DFAT notes of claims of arrest and detention of family members of former LTTE members and states it understands that close relatives of high profile former LTTE members wanted by the Sri Lankan authorities may be subject to monitoring. While indicating the incidence of severe mistreatment of suspects by authorities had significantly decreased in 2017 the International Truth and Justice Project<sup>14</sup> noted of monitoring of victims' families. Also noted was the reported attempted abduction of a wife of a victim and reprisals against families when victims left the country, for a number of reasons, including in order to keep families quiet about past mistreatment.<sup>15</sup> DFAT refers to 2017 reports of the continued sexual exploitation of Tamil women by the military and Tamil officials and notes that the higher prevalence of, relevantly, sexual violence in the north has been said to be attributable to the conflict and militarisation of the region. Recent country information before me notes that few cases of gender-based crimes involving the security forces result in convictions and that reports continue to surface of the rape, gang rape and sexual torture perpetrated by police and military intelligence operatives.<sup>16</sup>
37. The applicant's husband is a former LTTE member, and rehabilitee who was severely mistreated by the authorities and is of on-going interest and has been granted protection in Australia. The applicant married him some three years ago and has lived with him in Australia.

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<sup>11</sup> UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826; DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064.

<sup>12</sup> DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826.

<sup>13</sup> Office of the High Commissioner for Human Rights' Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism - Mission to Sri Lanka', 23 July 2018, CIS7B839411830.

<sup>14</sup> International Truth and Justice Project, 'UNSTOPPED: 2016/17 TORTURE IN SRI LANKA', 14 July 2017, CISED50AD4849.

<sup>15</sup> Ibid.

<sup>16</sup> DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064; United Nations, "Report of the Secretary-General on conflict-related sexual violence", 23 March 2018.

While I consider this a borderline case, given her husband's profile, the applicant's relationship with him and based on the country information before me I am satisfied that there is a real chance this would trigger further investigation processes entailing her detention and further questioning at the airport or on her return to her family village in the north and that there is a real chance of ill harm or treatment requiring international protection in these circumstances, particularly given her gender and young age.<sup>17</sup> I am satisfied there is a real chance of significant physical harassment and physical ill-treatment of the applicant and that such conduct would be systemic and discriminatory and for the essential and significant reason of her imputed political opinion arising from the factors detailed above.

38. I am satisfied the real chance of serious harm relates to all areas of Sri Lanka. The harm feared by the applicant would be inflicted by the authorities and DFAT and the UK Home Office indicate that the security forces maintain effective control throughout Sri Lanka and therefore, relocation to escape such harm is not possible. I am also not satisfied that effective protection measures are available to the applicant.
39. Under s. 5J(3) of the Act a person does not have a well-founded fear of persecution if that 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, *inter alia*, a modification that would conceal an immutable characteristic of the person. I consider the applicant's marriage to her husband an immutable characteristic. I also consider it would be unreasonable to require her to conceal her marriage. As detailed above, the applicant will be required by the authorities to answer a number of questions in order to establish her identity on her return. The applicant has said she cannot be expected to lie about her marriage to the authorities. I consider it would be unreasonable to expect her to conceal her marriage and the identity of her husband as this would require her to provide fraudulent information to the Sri Lankan authorities. I am not satisfied the applicant could take reasonable steps to modify her behaviour so as to avoid a real chance of persecution in Sri Lanka.
40. I am satisfied the applicant has a well-founded fear of persecution by reason of her imputed political opinion.

### **Refugee: conclusion**

41. The applicant meets the requirements of the definition of refugee in s.5H(1).

### **Decision**

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The IAA remits the decision for reconsideration with the direction that:

- the referred applicant is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*.

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<sup>17</sup> UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826; Office of the High Commissioner for Human Rights' Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism - Mission to Sri Lanka', 23 July 2018, CIS7B839411830.

## 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.