



**Australian Government**  

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**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA19/06661

Date and time of decision: 21 June 2019 14:52:00  
M Wei, Reviewer

**Decision**

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

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

## Background to the review

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### Visa application

1. The referred applicant (the applicant) claims to be a national of Sri Lanka. He lodged an application for a Safe Haven Enterprise Visa (SHEV), Subclass 790 in June 2017. A delegate of the Minister for Immigration (the delegate) refused to grant the visa on 24 May 2019. The delegate found that the applicant did not have a well-founded fear of persecution and that there was not a real risk of significant harm upon his return to Sri Lanka.

### Information before the IAA

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

### Applicant's claims for protection

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3. The applicant's claims can be summarised as follows:
  - He is a Tamil and Hindu, born in [date], from [City 1/City 2], northern Sri Lanka.
  - He lived in an LTTE (the Liberation Tigers of Tamil Eelam) controlled area and worked for [Workplace 1] run by the LTTE during the conflict period.
  - He and his family were displaced towards the end of the war. After the war, they were placed in a detention camp. He was beaten while he was in the detention camp.
  - After the war, Tamils generally were regularly verbally abused by the army and Sinhalese people. This happened to him often.
  - Sometime after he and his family moved back to his family home in [City 2], the authorities visited his house searching for him. They spoke to his wife asking for his whereabouts. He went into hiding and then left Sri Lanka by boat in October 2012.
  - The authorities came to his house again searching for him after he left Sri Lanka.
  - He fears harm for reasons of his Tamil ethnicity, that he had provided assistance to the LTTE and he departed Sri Lanka illegally.

### Refugee assessment

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4. 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

5. 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.
6. Based on the applicant's consistent evidence and the personal identification documents provided, I accept that the applicant is a Tamil and Hindu, born in [date], in [City 1]. The applicant has also consistently claimed that he mostly lived in [City 2], also in Northern Province, from 1995 to 2012. I accept that the applicant lived in an LTTE controlled area in the Northern Province during the conflict period. I accept that the applicant's wife, [adult] children and his parents are living in Sri Lanka. I also accept that he has [number] siblings in Sri Lanka and [number] in [another country]. I am satisfied the applicant is a national of Sri Lanka and that Sri Lanka is the receiving country for the purposes of the Act.
7. The applicant claimed that he worked in [Workplace 1] run by the LTTE and for this reason he came to the adverse interest of the authorities after the war. His evidence about when he worked for [Workplace 1] has varied quite significantly over time. He stated in the visa application that he worked in [Workplace 1] in 1994 and in 1995. At the SHEV interview, he claimed he worked for [Workplace 1] for a much longer period - initially he stated it was from 1997 to 2008, then stated from 1990/1992 to 2008. When the delegate put to him that he had stated in his written statement he worked from 1994 to 1995, the applicant responded that he was not clear about that and had difficulty in recollecting his memory as the written statement was prepared 'two years ago'. He asserted that he was sure he finished work in [Workplace 1] in 2008 but unsure when he started. While the applicant was not represented at the primary level, he was assisted by a refugee advocacy services with his visa application including in the preparation of his written statement of claims. An interpreter also declared that he/she had interpreted all the contents of the written statement of claims to the applicant. I consider the discrepancy as to the length of time he worked for [Workplace 1] is quite significant, given this forms part of his core claims for protection. In his visa application, when giving details of his employment history, the applicant also stated that he worked [in his family business] for the period approximately from 1979 to 2008.
8. The applicant was able to provide some details of his role in [Workplace 1] at the SHEV interview. He stated that he was [an occupation] in [Workplace 1]. [Workplace 1] was run by the LTTE and a person from the LTTE organised and assigned work. There was no suggestion that the applicant was ever a member of the LTTE. He was involved in selling [goods] and processing [these goods] and supplying [goods] for [an industry]. He also told the delegate that the LTTE had many restrictions for [working] and his role was to [complete various tasks]. He would catch them and inform the LTTE who would punish these people by forcing them to [complete tasks]. Most of them were from Kandy region. He advised the delegate that [Workplace 1] did not have a name but was located in [a city]. While I have some concerns that the applicant has exaggerated the length of the period he worked for the LTTE run [Workplace

1], I am prepared to accept he had worked for [Workplace 1] for a period during the conflict as [an occupation].

9. The applicant claimed that he and his family were displaced to several places towards the end of the war. After the war, he and his family were placed in a detention camp run by the army. Anyone who had lived in an LTTE controlled area during the war was put into a detention camp, which was why they were put there. He was not sure where the camp was located, but it was in [an] area in the Northern Province. He and his family were detained for approximately six months. The army and the Criminal Investigation Department (CID) had asked people who had assisted the LTTE to surrender to them. The applicant did not surrender as he did not consider he assisted the LTTE. After they were released from the detention centre, his family then moved back into his family home in [City 2]. The UNHCR provided them with financial assistance and some basic supplies.
10. The applicant indicated in his written statement the detention occurred in 2009. At the SHEV interview however, he stated that this occurred in 2011 and asserted that the war ended in 2011, not 2009. The applicant claimed in the visa application that he was beaten while in the detention and also saw many other Tamils beaten in detention. When he was asked at the SHEV interview that whether anything happened to him in the detention camp, he stated that the army (personnel) beat him, who came in a motorbike coming towards him, kicked his chest with boots. He stated that he thought it was because someone had identified him to the authorities that he worked for the LTTE in [Workplace 1]. He made no reference to that he was beaten on another occasion or there was anything to do with his visiting the neighbouring camp without permission or a water issue as he stated in the visa application.
11. Country information indicates that the Sri Lanka civil war ended in 2009 and it had displaced many families and individuals, mostly Tamils. Country information also indicates that camps intended for displaced persons were known as 'welfare camps' and those intended for former LTTE members or suspected LTTE members were known as 'rehabilitation camps'. Towards the end of the conflict, government security forces also arrested and detained a large number of LTTE members. Most were sent to government-run rehabilitation centres. A smaller number were prosecuted through Sri Lanka's court system.<sup>1</sup> It is plausible, and I accept, that the applicant and his family were displaced to several places towards the end of the war and were placed in a detention camp, for about six months. I accept the applicant did not voluntarily surrender to the army as he did not consider he had assisted the LTTE. I am also willing to accept that he might have been mistreated on occasions and witnessed other Tamils were mistreated while in the camp. DFAT also reported that the government has used the rehabilitation process to screen and profile LTTE members through interviews, informants and other relevant information to assess individuals' depth of involvement, period of involvement and activities. Security forces can use such information to categorise individuals and potentially to determine whom to prosecute for terrorism or other offences. DFAT is not aware of specific cases where this has occurred. Country information also indicates that towards the end of the war, security forces questioned or monitored many civilians for possible LTTE activity, and for civil resistance or anti-government sentiment.<sup>2</sup> Regardless the type of detention camp the applicant and his family were held, I consider it is plausible and I am prepared to accept that the applicant's claim that people might have informed on him to the CID or the army that he worked for the LTTE in [Workplace 1]. However, the applicant's evidence does not suggest that he was questioned about his LTTE involvement while he was in the camp. He was released

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

<sup>2</sup> Ibid.

from the camp after approximately six months and he was not required to report following the release from the camp and he was not charged or detained on suspicion of LTTE involvement. On the evidence before me, I am not satisfied that the authorities considered the applicant to be a person of interest at the time when he was released from the camp shortly after the war ended, even though the authorities was likely to be aware of his low level connection to the LTTE because of his work in [Workplace 1].

12. Whether or not the authorities were aware of his work in [Workplace 1] before he was released from the camp, for the following reasons, I am not satisfied that the applicant came to the adverse interest of the authorities after he was released from the detention camp.
13. In the visa application, the applicant stated the army came to his house twice asking for him between 2010 and around late 2011 after he moved back to his family home in [City 2]. He believed that 'someone' who had seen him work for the LTTE informed the army about him. He was not home when they visited. They spoke to his wife. His wife told him that they asked where he was and she told them the applicant was out. His wife was told to tell the applicant that the army people wanted to talk to him and he had to report to the military camp. The applicant stated that after the second visit, he was scared and went into hiding. He went to Colombo to wait to get on a boat to Australia, which took approximately three months. He also stated that the army came to his house again twice between October 2012 and March 2013 when he was in Australia.
14. At the SHEV interview, the applicant said that he did not face any problems for about a year after he was released from the camp but that he had problems in late 2012. He said that CID came to his house searching for him and asking his wife about his whereabouts. He said that the next time the CID visited was after he came to Australia. He told the delegate when the CID visited his house the first time, he was at home but hid himself and then moved to [City 3] for his safety. When he was asked what the CID did to him, he said the CID asked his wife about his whereabouts and his wife said that he had gone to [a location] and that 'he heard about that'. When asked what questions the CID asked, he stated they tried to find his whereabouts. They asked the same questions on both occasions. When asked who reported him to the CID, he stated that 'they' were taking revenge against him. When the delegate asked the applicant to clarify who were 'they', he referred to those people who were involved in [illegal activities], because in his role in [Workplace 1] that he caught them and the LTTE made them [complete tasks]. When asked what happened to his family and when it was the last time his family were visited, the applicant stated once in 2012 and once in 2013.
15. Regardless of whether it was the army or the CID visited the applicant's home, I note that the applicant has given differing accounts of the number of times that authorities visited his house while he was in Sri Lanka. He stated in the visa application he left home after the second visit whereas his evidence at the SHEV interview indicates that authorities visited his home once when he was in Sri Lanka. The applicant's evidence in the visa application that he was not home when authorities visited is also directly in contrast with his later evidence that he was home and heard what happened when they visited. Given the applicant claimed that the authorities' visit was the very reason that caused him to be fearful and leave Sri Lanka in October 2012, I do not consider these inconsistencies are insignificant, or easily reconciled. While he stated in the visa application that the army people told his wife that he had to report to the military camp, he made no reference to this at the SHEV interview despite the delegate specifically asked him what the CID did and what questions they asked when they visited his home. Apart from stating they asked the same questions trying to find his whereabouts, the applicant's evidence gave no real insight why the authorities searched for him. The applicant's evidence as to who reported him to the authorities about a year after he returned to his family

home was also vague. He stated in the visa application it was someone who had seen him work for the LTTE. He stated at the SHEV interview it were people who were punished previously by the LTTE for [illegal activities] and referred to the people variously as 'from Kandy area', from the 'same village' and 'from the neighbouring village about 12 kilometres from his area'. The applicant's evidence does not suggest that the LTTE's punishment to people who were caught by him (in forcing them to [complete tasks]) to be particularly harsh or severe, which also raises doubt that those people would be motivated to report the applicant in seeking revenge. The applicant was also asked how he was able to avoid the CID or army when he travelled to Colombo from [City 2] going through checkpoints and he replied that the CID that was operating in his areas knew about him but not the other CID people. The applicant's evidence was also that he lived [in a location] in Colombo for three months from August 2012 to October 2012 before he was able to finally get onto a boat for Australia, though he also stated that he moved around that area to avoid the police. On the applicant's evidence in the written statement, the authorities visited his house twice before he left Sri Lanka between 2010 and around late 2011 (he could not remember the dates) and then twice while he was in Australia between October 2012 and March 2013. On his evidence at the SHEV interview, his house was visited once in 2012 shortly before he left in Sri Lanka in October 2012 and once in 2013 when he was in Australia. I do not consider it is plausible that the authorities would have waited for some time between the claimed visits or have not otherwise sought to pursue the applicant if they considered the applicant to be a person of interest. I am not satisfied that the authorities visited the applicant's house searching for him at any time or considered the applicant to be a person of interest, because of his work in the LTTE run [Workplace 1] or for any other reason. I am also not satisfied some people who were affected by the applicant's work in [Workplace 1] had sought revenge against the applicant.

16. The applicant stated in the visa application after the civil war, he was regularly verbally abused by the army and by Sinhalese people generally and Tamils generally were regularly verbally abused by the army and Sinhalese people. At the SHEV interview, when the applicant was asked if he experienced any harm in Sri Lanka, he referred to the incident that he was kicked with boots by a CID person in the camp. When he was asked if any of his family were harmed in Sri Lanka, he referred to the deaths of his nephew and the father of the nephew (see below). The applicant also told the delegate at the interview that he did not have any problem for about a year after resettled in his family home in [City 2] until the time the authorities visited his family home (which I have not accepted). I have had regard to the country information that many Tamils in the north reported being harassed by the security force during the conflict and under the Rajapaksa government. The country information also indicates that in the Northern Province where the applicant lived, Tamils comprise 93 percent of the population.<sup>3</sup> I consider that the applicant has largely exaggerated the level of verbal abuse, if any, that he was subject to. I accept above that the applicant was subject to some physical abuse when he was in the camp. I am also prepared to accept that the applicant, as a Tamil, may have also been subject to verbal abuses on occasions in the past, in particular during his time in the camp by CID or army personnel who were likely to be of Sinhalese background.
17. The applicant was asked at the SHEV interview if he had any family members involved in the LTTE. He initially stated 'no'. When he was later asked if any of his family had been harmed in Sri Lanka, he stated that his nephew was a member of the LTTE and died while in the LTTE in 2010 and that the father of his nephew was killed in air raid in 1999. He stated that his nephew did not have a high profile in the [LTTE]. I accept that the applicant may have had a nephew

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<sup>3</sup> DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

who was a member of the LTTE; however, the evidence before me does not suggest that the applicant was in anyway implicated in the past because of his connection to his LTTE nephew.

18. Overall, I am not satisfied that the applicant came to the adverse attention of the Sri Lankan authorities due to his previous work as [an occupation] at the LTTE run [Workplace 1] or due to any other perceived LTTE connections because of his nephew or his experience in the detention camp. I accept above that it was likely that the authority became to know his work in [Workplace 1] while he was in the detention camp but did not consider he was of a person of interest. It is now over ten years since the end of war and since the applicant stopped working in [Workplace 1]. I also consider the chance is remote that some people who were affected by his work in [Workplace 1] would seek revenge against him if he were to return to Sri Lanka.
19. In any event, country information before me does not support that this past employment in a LTTE run business and his connection to his nephew, whether was previously known to the authorities or not, would now be of concern to the authorities or would impute the applicant with an adverse profile.
20. While it is not an exhaust list, the applicant's link to the LTTE through his work in a business run by the LTTE, was not something identified as having a risk profile by the UNHCR even back in 2012.<sup>4</sup> DFAT reported 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. The 2017 UK Home Office report states that the Sri Lankan government's concern has changed since the war ended in 2009 and the government's present objective is to identify Tamil activists in the diaspora who are working for Tamil separatism and to destabilise the unitary Sri Lankan state. It opined that, a person simply being of Tamil ethnicity would not in itself warrant international protection, 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, or are perceived to be, active in post-conflict Tamil separatism and thus a threat to the state.<sup>5</sup> I do not regard the applicant a person as such due to his past work in a LTTE run [Workplace 1]. While DFAT states that low profile former LTTE members who came to the attention of the Sri Lankan authorities would be detained and may be sent to the remaining rehabilitation centre, the information on the other hand is that there was only one centre with eight inmates remained open in [City 3] in [2017]. The rehabilitation program is expected to conclude once the last intake has completed the one-year program. The government estimates 5,000 undisclosed ex-combatants remain in the community. A Sri Lankan official told DFAT that former LTTE members who are not already rehabilitated are unlikely to be rehabilitated now. DFAT is not aware of rehabilitation being imposed on any former LTTE members who have returned from Australia.<sup>6</sup> DFAT also considers that close relatives of high profile former members who are still wanted by the authorities may be subject to monitoring.<sup>7</sup> The applicant is not a former member of the LTTE. His nephew, who was a member of the LTTE, died in 2010 and was not of high profile in the LTTE. There is also lack of recent information to support that Tamils or Tamil males from the North/former LTTE controlled areas in general are still perceived to have links to the LTTE solely due to their ethnicity or their past residence, even though the imputation was made in the past.

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<sup>4</sup> UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183EA8

<sup>5</sup> UK Home Office, "Country Police and Information Note, Sri Lanka: Tamil separatism, version 5.0", June 2017, OG6E7028826; DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064; DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

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

<sup>7</sup> Ibid.

21. In respect of the concerns raised by various bodies as to the use of the Prevention of Terrorism Act (PTA) and other human rights concerns including the abuses and torture of detainees, more recent information is that the PTA has been suspended and was only used in very few cases and there are a very small number of persons currently held under the PTA. In June 2016, President Sirisena instructed the security forces to adhere to the directives of the Human Rights Commission of Sri Lanka to protect those arrested under the PTA. DFAT assesses that reports of torture carried out by Sri Lankan military and intelligence forces during the conflict and in its immediate aftermath are credible. However, DFAT was unable to verify allegations of torture in 2016 and 2017.<sup>8</sup>
22. I accept that the applicant was subject to some physical abuse when he was in the camp and may on occasions have also been subject to verbal abuse from army or CID persons who were likely to be from Sinhalese background. This is consistent with country information that indicates Tamils in general were subjected to disproportionate harassment during the conflict and in the period immediately after the conflict. However, the country situation has significantly improved since the end of the conflict, in particular, since the change of government in 2015 which occurred after the applicant had left Sri Lanka in 2012. Tamils now have a substantial level of political influence. The government has also publicly committed to reducing military involvement in civilian activities. In 2012, the Trilingual Policy gave Sri Lankans the right to communicate in Sinhala, Tamil or English throughout Sri Lanka. Under this policy, all civil servants employed after 1 July 2007 must be proficient in both official languages within five years of employment in order to receive annual salary increments. Ethnicity and language are fundamental considerations in the reconciliation process. DFAT assesses that Sri Lankans of all backgrounds face a low risk of official or societal discrimination based on ethnicity. It notes that members of the Tamil community report discrimination in employment, particularly in relation to government jobs, but assesses that limited Tamil appointments are a result of other factors including education level and language constraints not official discrimination.<sup>9</sup>
23. According to DFAT, members of the Tamil community in the north and east continue to claim that authorities monitor public gatherings and protests, and practise targeted surveillance and questioning of individuals and groups. In the north, security forces are more likely to monitor people associated with politically sensitive issues, including missing persons, land release and memorial events. The US Department of State also notes that Tamils reported security forces regularly monitored and harassed members of their community, especially activists and former or suspected former LTTE members.<sup>10</sup> The applicant is not a former or suspected former LTTE member. The evidence also does not support that the applicant is political active or otherwise likely to be involved in any activities of such nature. DFAT reported on the other hand that some members of the Tamil community reported they felt more empowered to question monitoring activities. US Department of States also reported that the government had a variety of ministries and presidentially appointed bodies designed to address the social and development needs of the Tamil minority. The government implemented a number of

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<sup>8</sup> International Truth & Justice Project (ITJP), "Silenced: survivors of torture and sexual violence in 2015", January 2016; CIS38A801275; ITJP, "Unstopped: 2016/17 Torture in Sri Lanka", 14 July 2017, CISED50AD4849; DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064; US Department of State, "Sri Lanka 2018 Human Rights Report", 13 March 2019, 2019031410324; Office of the United Nations High Commissioner for Human Rights, "Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Sri Lanka A/HRC/34/54/Add.2", 22 December 2016, CIS38A80123313; DFAT, "DFAT Cable response: UN Special Rapporteur (Ben Emmerson) on human rights and terrorism in Sri Lanka", 14 August 2017, CISED50AD5239; DFAT, "Country Information Request CI181005093018339 – Current status of PTA in Sri Lanka", 04 November 2018, CXBB8A1DA37923

<sup>9</sup> DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064

<sup>10</sup> DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064; US Department of State, "Sri Lanka 2018 Human Rights Report", 13 March 2019, 20190314103240



confidence-building measures to address grievances of the Tamil community. It also replaced military governors of the Northern and Eastern Provinces with civilians. The Office of National Unity and Reconciliation, established by the president in 2016, continued to coordinate the government's reconciliation efforts. The office focuses on promoting social integration to build an inclusive society, securing language rights for all citizens, supporting a healing process within war-affected communities via the government's proposed Commission for Truth, Justice, Reconciliation, and non-recurrence of the violence.<sup>11</sup>

24. The applicant stated in the visa application that he heard from news that the government was encroaching on Tamil land and gave an example that the government had built a camp which encroaches on Tamil land in his area. He stated this showed that Tamils were still being targeted and discriminated against by the government and authorities and that he feared going back for this reason too. The applicant gave evidence at the SHEV interview that his family has a [business]. The evidence before me does not suggest that his land was encroached by the government in any way. Like many, the applicant and his family were displaced in the past, but were nevertheless able to return to their former family home after the war. I am not satisfied that the applicant faced discrimination in respect of land ownership in the past. While the government is reportedly to have been slow on land return, DFAT reported in 2018 that the government had released 24,336 acres of private land in the north and east since the end of the conflict while the military continued to occupy 6,051 acres. The government has committed to pay compensation where security forces retain private land.<sup>12</sup>
25. The evidence before me does not suggest that Tamils in general are continuing subject to systematic harassment including physical or verbal abuse or discrimination, either official or societal. The applicant was asked at the SHEV interview whether anything happened to his family since he left Sri Lanka. Apart from referring to the visits from the authorities looking for him, there is no suggestion that his family members in Sri Lanka are subject to ongoing physical or verbal abuses in the hands of army, CID or governmental officials or Sinhalese people more generally. The applicant completed nine years of education. He worked [in his family business] while he was in Sri Lanka. There is no credible evidence to support that the applicant suffered discrimination in education, housing or employment, while living in the north, a Tamil majority area.
26. The applicant claimed to fear being abducted by white vans. He stated that the Sri Lankan army and the CID have paramilitary groups working for them, and directed them to conduct white van abductions. There is no suggestion that the applicant was the subject of white van abduction in the past. DFAT reported in May 2018 that systematic abductions using white vans, often leading to enforced disappearances, occurred during the conflict and post-conflict periods. However, forced disappearances are no longer common. DFAT assesses that reports of a small number of abductions involving white vans in 2016 and 2017 referred to incidents where police did not follow protocol during arrest.<sup>13</sup> In light of the applicant's profile, I consider it is remote that the applicant would be abducted by a white van.
27. At the SHEV interview, the applicant also raised concern in respect of the appointment of former president Rajapaksa as prime minister and general security concern following his appointment. However, more recent information indicates that Rajapaksa resigned and Wickremesinghe was reinstated as prime minister in December 2018 following a court ruling.<sup>14</sup>

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<sup>11</sup> Ibid.

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

<sup>13</sup> Ibid.

<sup>14</sup> US Department of State, "Sri Lanka 2018 Human Rights Report", 13 March 2019, 2019031410324

28. The applicant also stated in the visa application that he heard a Tamil teacher in his area went missing and was found dead some time in 2017. For this reason, he feared it was not safe for Tamils. The evidence does not say why the Tamil teacher was targeted and who targeted this teacher. I am not satisfied this evidence supports that his area is not safe for Tamils generally. I have found that the applicant faced no problems after he and his family resettled in [City 2] and before he came to Australia in 2012. His wife and [children] remain living in [City 2]. When the delegate asked the applicant at the SHEV interview whether anything happened to his family after he left Sri Lanka, he referred to the claimed visits to his home by the authorities. I am not satisfied that his area is not safe for him or for Tamils generally.
29. Having weighed the country information before me, I consider the chance is remote that the applicant would come to the adverse attention of the Sri Lanka authorities or would be considered as a person of interest to the authorities in his circumstances. I am not satisfied the applicant faces a real chance of harm from the authorities, paramilitary groups, Sinhalese people generally or anyone else, if he were to return to his home in Sri Lanka, for reasons of his Tamil ethnicity, LTTE links or perceived LTTE links and origins in a formerly LTTE controlled area or his other past history/experience.
30. For the reasons below, I am also not satisfied that the applicant, as a returning Tamil asylum seeker who has departed Sri Lanka illegally, in his circumstances, faces a real chance of persecution.
31. Entry and exit from Sri Lanka is governed by the Immigrants and Emigrants Act (I&E Act). All returnees to Sri Lanka are processed at the airport on arrival by various governmental agencies, including the Department of Immigration and Emigration and CID. For returnees travelling on temporary travel documents, police undertake an investigative process to confirm identity, which would identify someone trying to conceal a criminal or terrorist background, or trying to avoid court orders or arrest warrants. All returnees are subject to these standard procedures, regardless of ethnicity and religion. DFAT understands detainees are not subject to mistreatment during processing at the airport.<sup>15</sup>
32. The Sri Lankan government has, over recent years, consistently stated that refugees are welcome to return to Sri Lanka. Many Tamils have returned from Australia and European countries to the north in the past.<sup>16</sup> While DFAT also assesses the authorities may monitor members of the Tamil diaspora returning to Sri Lanka depending on their risk profile, and returning asylum seekers in the north,<sup>17</sup> there is lack of recent reports to support that, Tamil returnees in general, who sought asylum abroad and have lived abroad for some time are perceived to have anti-government or pro LTTE opinion or suspected of having involvement in LTTE or pro separatism activities or face a real chance of being of adverse interest to the authorities for this reason. According to DFAT, it 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. DAFT report refers to a UNHCR survey in 2015 which 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. This information is quite dated and also unclear as to the purposes of the visits. Also in 2016 only 0.3 per cent of refugee returnees interviewed by UNHCR (including UNHCR-facilitated and voluntary returns) indicated that they had security concerns following their return.<sup>18</sup> Even accepting that applicant may face some monitoring on return as a returning asylum seeker, with his profile I am not satisfied it will be for any

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

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

prolonged period or lead to a real chance of him coming to the adverse attention of the authorities or lead to any other harm.

33. DFAT notes that refugees and failed asylum seekers face practical challenges to successful return to Sri Lanka and refugees and failed asylum seekers reported social stigma from their communities. 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.<sup>19</sup> The applicant previously worked [in his family business] in Sri Lanka. He also told the delegate he was working in Australia. While returning to Sri Lanka after several years of absence can be challenging, I am not satisfied there is a real chance that his capacity to subsist will be threatened. The evidence before me overall does not support that any such treatment the applicant may possibly face, including monitoring, stigma and the practical challenges of re-integration, would amount to serious harm.
34. I accept the applicant left Sri Lanka in 2012 by boat, as such he may be considered as having departed Sri Lanka illegally and charged under the I&E Act. I accept he may be questioned and detained at the airport for processing by authorities for up to 24 hours with the possibility that he may be further held at an airport holding cell for up to two days, should a magistrate not available in time. However, as noted earlier, detainees are not subject to mistreatment during processing at the airport.
35. According to DFAT, Penalties for leaving Sri Lanka illegally can include imprisonment of up to five years and a fine. In practice, most cases result in a fine and not imprisonment. The Attorney-General's Department, which is responsible for the conduct of prosecutions, claims no mere passenger on a people smuggling venture has been given a custodial sentence for departing Sri Lanka illegally. However, fines are issued to deter people from departing illegally in the future. Fine amounts vary from LKR 3,000 (approximately AUD 25) for a first offence to LKR 200,000 (approximately AUD 1,670). A guilty plea will attract a fine, which can be paid by instalment, and the defendant is free to go. Where a passenger returnee pleads not guilty, the magistrate will usually grant bail on the basis of personal surety or guarantee by a family member. Where a guarantor is required, returnees may need to wait for the guarantor to come to court.<sup>20</sup> I am not satisfied there is a real chance that the applicant will be subject to a custodial sentence for departing Sri Lanka illegally, merely as a passenger. If the applicant pleads guilty, he would then free to go, subject to a fine, which can be paid by instalment. The information before me is that bail is usually granted if a returnee pleads not guilty on the basis of personal surety or guarantee by a family member. There is no probative evidence before me to support paying a fine as referred to above, which can be paid by instalment would cause the applicant significant hardship. Additionally, the country information does not support that the I&E Act is discriminatory on its face or that it is applied or enforced in a discriminatory manner. I am not satisfied that the questioning, temporary detention, imposition of a fine or any other costs associated with possible bail or the court appearances if they arise and any other treatment he may experience as a result of illegal departure would constitute serious harm or persecution to the applicant.
36. In light of my consideration of the above, I am not satisfied the applicant faces a real chance of persecution for any of the reasons claimed, if he were to return to Sri Lanka now or in the reasonably foreseeable future.

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<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

## Refugee: conclusion

37. 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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38. 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

39. 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.

40. I accept that the applicant may face some practical challenge upon resettling, social stigma or possibly be subject to some short term monitoring, as a returning asylum seeker. I am however not satisfied that such treatment reaches the relevant thresholds so as to amount to significant harm. I am not satisfied that it amounts to the death penalty, arbitrary deprivation of life or torture. I am also not satisfied that it amounts to pain or suffering that could be reasonably regarded as cruel or inhuman in nature, severe pain or suffering, or extreme humiliation for the purpose of the definition of cruel or inhuman treatment or punishment or degrading treatment or punishment. I am not satisfied there is a real risk of significant harm on these bases.

41. I accept the applicant is likely subject to questioning, various checks, possibly a fine and a brief period in detention at the airport and other administrative processes and costs as a returnee and as a result of his illegal departure. However, taking into account his past history and personal circumstances, I am not satisfied the treatment the applicant may face would amount to significant harm as defined. Nor am I satisfied that this treatment, when combined with that he may face as a returning asylum seeker amounts to significant harm. I am not satisfied the applicant faces a real risk of the death penalty, arbitrary deprivation of life or torture. I am not satisfied such treatment would involve an intention to inflict severe pain or suffering, pain or suffering that could be reasonably regarded as cruel or inhuman in nature, or an intention to cause extreme humiliation for the purposes of the definition of torture, cruel or inhuman treatment or punishment or degrading treatment or punishment.

42. I have otherwise concluded that there is a not real chance the applicant would face any harm. As real chance and real risk involve the same threshold, I am not satisfied there are substantial grounds for believing that, as a necessary and foreseeable consequence of being returned from

Australia to Sri Lanka, there is a real risk that the applicant will suffer harm, including significant harm.

**Complementary protection: conclusion**

43. 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.