



**Australian Government**  
**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA19/07130

Date and time of decision: 17 October 2019 14:43:00  
M Anderton, 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 applicant is a Tamil from Northern Province, Sri Lanka who arrived at Christmas Island by boat [in] November 2012.
2. On 12 April 2017 he applied for a Safe Haven Enterprise Visa. His claims revolved around his fear of harm from authorities due to his brother's Liberation Tigers of Tamil Eelam (LTTE) connections and because the applicant escaped from an army camp and authorities were looking for him, including showing his photo to persons returning to Sri Lanka.
3. On 3 September 2019 the delegate refused to grant the visa because he was not satisfied the applicant was a refugee or that there was a real risk of significant harm upon return to Sri Lanka.

### Information before the IAA

4. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).

#### *Ashmore Reef submission*

5. On 5 and 25 September 2019 the applicant provided submissions about the delegate's decision and referred to the decision of Judge Smith in *DBC16 v MIA 2018* and claimed he entered Australia by sea to Ashmore Reef and was therefore not an unauthorised maritime arrival within the meaning of s.5AA of the Migration Act and was not a fast track applicant.
6. I have considered these are submissions or legal argument as it goes to jurisdiction.
7. However, it was evident from the arrival interview and his application that he was directly taken to Christmas Island by sea (and thereby entered Australia), which is defined in s.5 as an exercised offshore place for the purposes of s.5AA. I do not accept the applicant is not an unauthorised maritime arrival. Given the time of his entry, he is therefore a fast track applicant within the meaning of s.5 of the Act.

#### *Other submissions*

8. It was submitted the delegate failed to adequately consider the applicant's evidence and the speed in which the decision was made raised questions of bad faith. The summary of claims failed to consider the applicant's brother's LTTE membership and reduced the applicant's profile without considering his brother's LTTE membership, from [City 1], who has an existing CID record and who has been questioned and tortured and therefore was a person of particular interest and ongoing profile. It was submitted the delegate's conclusions were illogical. It was submitted accepting the applicant had been questioned in August 2009, but finding he would have been charged if a person of interest is illogical because it is widely accepted that there is a climate of impunity and arbitrary arrests. It was illogical also to conclude he had departed Sri Lanka legally as he left with an agent and it is not usual practice for an agent to accompany a person through immigration. It was submitted that rejection of his evidence would result in a miscarriage of justice because of bias, illogical reasoning and fragmented country information that has been selectively applied.

9. The applicant submitted he should be afforded an opportunity to present his claims in person and the IAA would fall into error if it did not conduct a hearing, particularly if adverse credibility findings are made.
10. I have considered the applicant's request for an interview opportunity. However, I do not consider an interview is necessary. The applicant has been given two interview opportunities and provided his application claims. The applicant had a lengthy protection interview and his arrival interview claims were lengthy also and not just one or two sentences. Further, the delegate put credibility concerns to the applicant throughout the interview. The applicant also provided country information and country information package from Asylum Seeker Resource Centre. I do not accept that making a decision six days after the interview is evidence of bad faith. In any event I have considered the application afresh on the material before me.

*New information – country information*

11. While the applicant had provided footnote references to country information in his 24 September submission, on 10 October 2019 the IAA reminded the applicant of the practice direction and need to provide extracts of country information he wished to consider (rather than hyperlinks). On 11 October 2019 the applicant provided copies of the country information.
12. The new information was country information about crimes against humanity in the Northern Province (March 2014) and newspaper reports about people smuggling by boat from Sri Lanka (2013 and 2015). The reports predate the delegate's decision by a number of years and could in my view have been provided earlier. The applicant was informed of the importance of providing all his information prior the decision. I note the applicant also provided and referred to country information at the protection interview, which indicates he is capable of providing such information in support of his claims. He did not provide or refer to the article or newspaper reports now provided. At interview he confirmed that he had provided all his information and documents and did not intend to provide anything further. In his submission, he did not explain or give any reason why he could not have provided the information earlier. I note the information is general country information, not personal information, which is quite dated and I have more recent information before me. Further, I note the people smuggling articles refer to smuggling by boat and not at the airport or by plane. Given the applicant departed Sri Lanka by plane through the airport, I do not consider those articles particularly relevant to the applicant. In the circumstances I am not satisfied the material meets s473DD(b) or that there are exceptional circumstances to consider the information.
13. I have not considered the information.

**Applicant's claims for protection**

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14. The applicant's claims can be summarised as follows:
  - He is a Tamil Hindu from [City 1], Northern Province.
  - According to his arrival interview in April 2009 he lost all his family when a shell landed on the bunker they were hiding in.
  - He escaped from an army camp and went into hiding at his aunt's home in [City 2] for two and a half months. He went to work at [Company 1], but police came to enquire about him. They took him and questioned him and hit him and accused him of being

LTTE. They sexually abused him and put him in a cell. He was questioned again and told them the truth that his brother was LTTE but he had no contact with him. They beat him and hit him. His uncle contacted a Muslim person who assisted his release. After he was at home his aunt received phone calls about him and they gave her dates that the applicant had to return. They received calls frequently so he pulled the cords out. The aunt received more calls and was abused accused badly. His uncle arranged for his departure and kept him in the room till he left. The applicant rang his aunt after he went to [Country 1] and was told people went to his aunt's house and hit and tortured the uncle and warned he was to be produced in a few days.

- His brother is LTTE and missing.
- According to his application the applicant is afraid he will be arrested, tortured and killed because of his connections with the LTTE as his brother was a member and the applicant escaped an army camp. The police took him in the night from his aunty's house to the police station and tortured him, including sexual assault. They forced him to give addresses of people he knew, including his family. They wanted him to accept he was LTTE.
- He bribed police and got out of the police station cell and the army group wanted him to report back and they are looking for him. They tortured his uncle because they could not find the applicant. They have his photograph at the airport. It has been shown to people at the airport who re-enter from [Country 2] and CID wanted to know if people have seen the applicant. They have threatened to kill him and his family.
- He is fearful that the authorities want to find him so they can torture and kill him to punish him because they have tortured him terribly in the past and have threatened to kill him and his family.
- In his protection interview the applicant added that his LTTE brother was alive and in [Country 3], but he had not heard from him. He said his parents [and other siblings] all live together in [City 1]. His father's occupation is [Profession 1].
- He claimed during the last part of the war in 2009 they all surrendered to the army and escaped from the army camp and went to his aunty's house in [City 2]. He claimed he was taken to hospital as he had [deleted]. Serious cases were taken to the hospital in ambulance, as he was. One or two days later he left the army hospital without telling them, spoke to an auto driver, gave him his aunt's address, and was taken there. He stayed at his aunt's. Police arrested him at home and tortured him about three to four and a half months later and he was kept for one day and night. His uncle paid a Muslim person to arrange for his release. His aunt was called the next day to bring the applicant or the family would be killed. Calls came for a couple days and then he left.
- In his protection interview the applicant claimed he obtained his passport through an agent and departed the airport accompanied by an agent, who spoke to immigration and he had no problems departing.
- In his protection interview the applicant claimed there was a [interest] in [Country 2] about the refugees and their problems in their country, so they told all their problems. Some of them have returned to Sri Lanka and have been shown photos and asked if these people are still in [Country 2].

## Refugee assessment

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15. 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

16. 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.
17. I accept the applicant is a Tamil Hindu from Northern Province.
18. The applicant’s claims revolve around his 2009 questioning and torture, his escape from an army camp or hospital and his LTTE brother. I note the applicant has consistently claimed since his arrival interview that his brother was LTTE, and that the applicant was questioned and tortured in 2009 after he escaped and his uncle was tortured because they could not find him. He also claimed that his photograph was shown to people re-entering Sri Lanka from [Country 2] to find out if they had seen him.
19. However there are a number of inconsistencies and problems in the applicant’s account of these claims.
20. According to his application he lived in [Town 1] from August 2009 until January 2010, when he departed Sri Lanka for [Country 1]. In his arrival interview also the applicant said he was hiding in one room in [Town 1] until his departure. However, in his protection interview the applicant claimed he lived in Kandy for three to three and a half months before departing Sri Lanka. When the delegate noted the inconsistency in his account, the applicant said he was shifting from place to place and said he was in [Town 1] for three to three and a half months. The delegate put to the applicant that he had provided differing accounts, of Kandy, [Town 1], and then shifting between the two. The applicant said he was shifting agency houses, but they kept him in [Town 1]. However, the applicant was very clear in his arrival interview that he was in the same room in [Town 1] the entire period and made no mention of moving around or being in Kandy. Having listened to the protection interview, I consider the

applicant was changing and making up his account as he went and not recounting true events.

21. The applicant's claims about his family's circumstances also changed considerably. Initially the applicant claimed his parents and siblings (other than his LTTE brother) were all killed in April 2009 in bunker due to a shell explosion. At the arrival interview he confirmed they were deceased (confirmed number of times throughout the interview).
22. However, in his application and at the protection interview the applicant's family were listed as residing in Sri Lanka and he stated that he spoke to them weekly to fortnightly. In his protection interview the applicant said he was separated from his family when going for food and lost contact with them. He did not claim they had been killed.
23. In the protection interview the applicant's evidence about his family was also evasive and inconsistent when asked about his contact with them and whether they also surrendered to the army camp at the end of the war. Initially, he said his father lived in [City 1] but he did not talk to him. He did not know about his work. Then said it was [Profession 1]. He did not know what kind of [Profession 1] they did and indicated he did not know their circumstances as he did not contact them as they may get problems. Then eventually he said that the family lived together in [City 1] and his brothers were studying.
24. The delegate also spent some time asking the applicant if his parents also went to the army camp at the end of the war. The applicant was evasive and did not answer the question, saying they were lost after [Town 1] and lost contact, but he met relatives. Eventually the applicant said he did not know if his parents went to an army camp. The applicant did not know how long the parents had been living in [City 1] since the war. He claimed he only knew they were alive after he came to Australia and he did not want to talk to them as could get them into trouble, so only spoke to them once or twice.
25. However, this was inconsistent with his application where he specified that he was in contact with his parents weekly to fortnightly. When the inconsistency was put to him the applicant repeated he only spoke to them once or twice as they may get problems.
26. In his arrival interview and application the applicant said his LTTE brother was missing. At his protection interview the applicant said he lost contact with the brother in 2007 when he was forcibly recruited by the LTTE, as everyone had to have one person to join. The delegate asked if the brother was alive or not. The applicant said the brother was alive and in [Country 3] but he had not heard from him, and only found out after coming to Australia. He had not talked to his brother and he did not know if any of his family had talked to his brother and had no information at all.
27. At the protection interview, despite talking about the LTTE brother and his LTTE situation and being missing since 2007, the applicant was not forthcoming that he had been found. It was not until the delegate asked him if the brother were alive or not that the applicant said he was alive in [Country 3]. I consider this was new and an important piece of information, particularly given the applicant's claims his brother had been missing since 2007. I find it difficult to believe that he would not mention such an important fact when discussing what happened to his brother. Further, I note at the beginning of the protection interview the delegate had asked the applicant if there was any update to his claims or wanted to add or change anything and he replied no. He did not mention that his brother had been found alive in [Country 3]. Having listened to the interview, I consider he was making up claims about his brother as he went.

28. Further, I find it difficult to believe that the applicant would not know anything about his brother who he now claimed was alive in [Country 3]. It is not credible that he would know his brother was alive and in [Country 3] but not have contact with him. And even more so, I find it difficult to believe that the applicant would not know if his family had had contact with his claimed long lost brother or have any information about him at all or seek information.
29. I do not accept that he is not in contact with his family in Sri Lanka. He clearly stated he was in contact in his application with specificity. Further, I consider he has been evasive and making up his account about his contact with his family in the protection interview. Further, it is incredulous that the applicant would not have information or talk to his parents about their circumstances given his protection interview claims he was separated from them towards the end of the war. I do not accept the explanation that he did not want to get them into trouble.
30. Further, I note the applicant's arrival interview claims were very different and specific that his family were killed by shell in a bunker in April 2009. If he believed they were dead, it is even more incredulous that he would not have information about what happened to them, when they were found, how he found out they were alive, how long they lived in [City 1].
31. I consider the applicant's account of his family circumstances, including the claimed LTTE brother, lacked credibility and was particularly problematic with regard to his changing account of his family's demise, missing and lack of information about their re-emergence, such that I do not accept the applicant was telling the truth.
32. The applicant's account of the claimed escape from the army camp to his aunt's place after war is also problematic in a number of respects.
33. Firstly, the applicant's escape claims differed. While in his arrival interview and application he said he escaped from an army camp, in his protection interview he claimed he escaped from hospital by not telling the army he had left. The applicant had not mentioned anything about being in hospital, or escaping from hospital until the protection interview. I find it difficult to believe that he would not mention he was in and escaped from hospital, but rather say an army camp. I have considered the possibility that it may have meant he was in hospital in the army camp. However, there was no suggestion in his application or the arrival interview that he was in an army camp hospital or in any hospital at anytime. Rather, it was clear that he escaped from the army camp and this was stated a number of times. There was no mention of being in hospital or any army camp hospital at any time.
34. Secondly, his account of how he was taken by police differed. In his arrival interview he was taken while he was working at [Company 1]. In his application he was taken from his aunt's home in [City 2].
35. Thirdly, I consider the applicant's account of his escape lacked credibility as I do not accept that if he were seriously ill with [deleted], transported by ambulance as his case was serious (on his evidence), that he could have walked out of the hospital one or two days later, found an auto driver, and travelled more than an hour to the aunt's house. I find it difficult to believe if he were that unwell that he could have walked out of the hospital. Further, if the hospital was run by the army, I find it difficult to believe that he could have walked out undetected.
36. Fourthly, the timeline of his residence at the aunt's house, being questioned and in hiding varied and did not match up with his departure from Sri Lanka in January. The applicant

claimed to have escaped from the hospital and gone to his aunt's home and he was later taken, questioned and detained by police for a day and night in August 2009. His protection interview evidence varied. On one account he was taken three and a half months after the escape. On another account he was taken four and a half months after escape from the hospital. While I place little weight on minor differences, I consider the applicant's evidence at the protection interview was also uncertain, and chopped and changed to try to fit his departure timeline. Initially he claimed he was questioned and tortured in August 2009. In trying to work backwards to pinpoint when he was arrested or questioned, the applicant then said it was four to four and a half months after he was at the Aunt's, then he said it was three and a half months. He then said he escaped in April and was arrested three and half to four and a half months after that. The applicant's account has varied from being taken three and a half months to four and a half months after he arrived at his aunt's house, which means he was taken by police either in July or August.

37. Further, according to his application and at the protection interview, the applicant also claimed he went into hiding for three and a half months after his detention and departed Sri Lanka. However, this does not match up with his claimed departure date in January 2010 and claimed arrest event somewhere between July or August. If he had been arrested in July, hid for three and a half months that would have brought him to October/ November. If the timeline was based on an August arrest, that would have brought him to November/ December – still more than a month short of his departure from Sri Lanka in late January.
38. Fifthly, I find it difficult to believe that if he had escaped from an army camp or hospital just after the war had ended, that he would not have been easily found or that it would take so long to find him (3.5 – 4.5 months), given he was in [City 2] at his aunt's house and worked for part of the time.
39. Further, the country information indicates that thousands of LTTE or suspected LTTE were arrested and taken to rehabilitation camps or prosecuted. If the applicant had been suspected LTTE or of interest it is highly likely he would have been rounded up into rehabilitation camp at the end of the war. The DFAT report states security forces arrested and detained large number of LTTE members, most sent to rehabilitation centres and small number prosecuted through the courts. They also questioned or monitored many civilians for possible LTTE activity and in many areas the military took a visible active role in civilian life. Travel restrictions and military checkpoints on major roads were removed in 2015.
40. The applicant's claim that he was questioned and tortured, released and avoided detection for months after that is also difficult to reconcile with his claims that he was accused of being LTTE, his brother was LTTE and that he escaped from camp/hospital. If he had been known to have such links and escaped, I do not accept that even with a bribe that he would have been released. Further, I do not accept that he could have avoided detection for another five to six months after release as it is not credible given this was shortly after the war ended, the heightened security, round ups, road blocks and required registrations referred to in the country information.
41. Further, I note there is no medical evidence of any injuries or medical treatment from such [beatings].
42. Further, the applicant's account of constant phone calls after his release varied and lacked credibility. For instance, in his arrival interview he said he received the phone calls, and they abused his aunt on the phone, but in his application he made no mention of any phone calls. In the protection interview he said his aunt received the calls threatening to kill the family if



they did not produce the applicant and she pulled the phone cord out. In his arrival interview the applicant said he pulled the phone cord out. Further, his evidence at the protection interview changed and lacked details. For instance, there was little meaningful detail about the calls, what was said, where he was to be taken, who made the calls.

43. Further, initially he claimed he was at home for two or three days before he got out. Then changed it to one or two days, then changed it to only one day at the home before he left. Having listened to the interview, I consider the applicant was making it up as he went, changing his account in response to delegate concerns and not recounting lived experiences.
44. Further, that he continued to remain at the house for even one or two days if he was receiving constant phone call threats lacks credibility. That the response to such was to pull out the phone cord one day and put it in the next day also lacks credibility given the claimed threats and constant calls and severe beating he claimed to have just received.
45. The applicant claimed an agent obtained a passport for him and assisted his departure through immigration at the airport. However, the applicant provided little meaningful detail (despite a number of questions by the delegate) other than he was accompanied by an agent through immigration and had no difficulty. Further, I note the applicant left on a passport which was in his name and with his photograph. I do not accept the applicant was accompanied by an agent through the airport. On the evidence I am not satisfied the applicant departed Sri Lanka illegally.
46. The applicant also claimed that the authorities were showing his photograph at the airport to people who returned from [Country 2]. At the protection interview he claimed there was a [interest in] refugee applicants in [Country 2] where they told of all the problems and photos were taken. People who returned to Sri Lanka from [Country 2] were shown photos of them and asked if they were still in [Country 2]. He claimed he was told this by others who had been in [Country 2] at the end of 2011 or 2012. However, when asked about this the applicant's account was repetitive and he did not know what photos were being shown or where the photos were from or whom or who took them. Further, I note the applicant made no mention of any [photos] taken in [Country 2] in his application. I consider such a point is an important aspect of his claim and I find it difficult to believe that he would not have mentioned that in his application if it were true.
47. I consider this claim shifted from the authorities having a photo of him already due to authorities looking for him after his release from detention to having a photo which was provided as a result of [Country 2] [interest] about refugee problems in Sri Lanka.
48. While the bare bones of the applicant's account were consistent from his arrival interview, I find the details of the account varied, shifted, were vague and lacked credibility in a manner that I do not consider can be accounted for by the passage of time.
49. Further, I consider the applicant's account of his family circumstances is not credible and I consider he concocted the original orphan account and LTTE brother to enhance his claims. While he said he was displaced to three different places, this varied between 2007 and 2008 or 2009 in the north. He also said he returned to the family home in [in] 2006 to 2009. I find it difficult to believe that he left [City 2] for the North at the height of the conflict. Rather, I consider it was more likely that he continued to reside in [City 2] after his studies and during the conflict. I do not accept he surrendered for a month or that he escaped from an army camp or hospital to [City 2]. I do not accept that he was questioned, beaten, interrogated, tortured or sexually assaulted by authorities. I do not accept that his aunt or uncle were

harassed or tortured by authorities looking for him. I do not accept that he was wanted by authorities or has an adverse profile. I do not accept that his photo has been shown to persons returning from [Country 2] or anyone. I do not accept the authorities are looking for him. I do not accept paramilitary, the authorities, police, army or anyone are looking for him or have or will have any adverse interest in him. I do not accept the applicant's brother was LTTE, missing or found alive in [Country 3].

50. I accept the applicant is a Tamil. I accept that during the conflict Tamils, particularly in the North and East faced harassment and harm. I have considered the country information in the referred material. I do not accept that the information is fragmented. It is evident from the country information in the referred material that a large number of sources were considered, not just the DFAT report.
51. I have considered the applicant's country information and concerns raised at the protection interview about the appointment of Silva as the army commander given allegations of human rights law violations against him. However, I do not accept that the applicant faces any chance of harm as a result as I do not accept the applicant has an at risk profile as discussed below. I accept that there has been communal violence against Muslims in response to the 2019 Easter attacks. However, I do not accept the applicant faces any chance of harm in that regard as the applicant is not Muslim or Christian. Further, I do not accept he faces a real chance of harm from authorities either.
52. I reject the submissions in the ASRC country information document about the DFAT report. I do not accept that NGOs in Sri Lanka are not free to report on harm to DFAT. I consider the DFAT report is credible source which relies on and considers other independent credible sources such as Amnesty, Human Rights Watch, UK Home office etc. Further, I note the UK Home Office report on Tamil Separatism and those at risk is not dissimilar in assessment of the situation in Sri Lanka.
53. It is evident from the country information, including in the ASRC country information document, that the situation has improved considerably since 2009 and even more so since 2015. The credible country information before me is that the security situation has improved considerably (while not perfect) since the end of the conflict in 2009, particularly for the Tamil population. UNHCR eligibility guidelines confirmed (at around the time of applicant's departure) that due to the improved human rights and security situation there was no longer a need for group based protection mechanisms or for the presumption of eligibility for Sri Lankans of Tamil ethnicity. The more recent credible country information in the material before me (DFAT reports, UK Home Office) continues to confirm this is the case.
54. I accept there are continuing human rights abuses in Sri Lanka. While I accept that there are reports of continuing risk of harm for certain persons suspected of LTTE involvement (real or perceived) or persons involved in a Tamil unitary state, the applicant is not of such a profile or suspected as such. I have not accepted the applicant's brother was LTTE or that the applicant was of interest to authorities, interrogated or tortured or will be in the future. I do not accept, in light of the more recent country information, that being from the North or a formerly LTTE controlled area puts him at risk either. I note also the applicant's family continues to reside in [City 1] and there was no evidence or claim of harm on their behalf.
55. I do not accept that there is a real chance the applicant would be imputed with a pro LTTE or separatist or anti-government profile.

56. I do not accept the applicant, as a young Tamil male from the North, that there is a real chance he will be of any adverse interest to the authorities upon return, or that he faces a real chance of harm.
57. I accept that if the applicant returns to Sri Lanka, he would do so as a returning asylum seeker on a temporary travel document. I accept that he may face questioning at the airport as a returned asylum seeker.
58. The DFAT reports indicate that thousands of Tamils have been returned to Sri Lanka since the end of the Sri Lankan civil war, including from Australia, and claimed asylum. Although there have been reported instances of returnees being harmed, the information before me suggests those were people with substantial links to the LTTE or outstanding warrants and I have not accepted that the applicant has such a profile or would be reported as such. I have not accepted that he is or will be of interest to authorities or anyone.
59. Credible country information in the DFAT reports indicates that there is returnees are not mistreated upon arrival or questioning at the airport. All returnees are treated the same regardless of their ethnicity and religion and the laws are not applied in a way that is discriminatory or selectively enforced against a particular group of those returnees. I do not accept that Tamil returnees are treated differently.
60. While not claimed, I note country information in DFAT 2018 report about failed asylum seekers reporting social stigma from their communities upon return and that they may face practical difficulties finding employment and accommodation. However, I do not consider the applicant in this case faces a real chance of harm as a returnee resettling, finding employment or accommodation. He is contact with his family who continue to reside in Sri Lanka. His siblings live at the family home. The applicant has completed O levels and [a]course and worked in [an industry] in Sri Lanka. In Australia he has worked in [a business]. I am not satisfied the applicant will be precluded from employment and accommodation. On the evidence, I am not satisfied that he faces a real chance of social stigma or other difficulties as a returnee. Further and in any event, I do not consider social stigma amounts to serious harm.
61. Based on the country information and the applicant's circumstances I do not accept the applicant faces a real chance of torture, interrogation, mistreatment on arrival in Sri Lanka or during the questioning process to establish his identity and any criminal history. I have not accepted he was or will be of adverse interest to authorities or anyone. Further, I do not accept he faces a real chance of any harm as a result of authorities checking with his home area about his identity as I do not accept he was, is or will be of adverse interest to police, army, CID, the authorities or anyone.
62. I have not accepted the applicant departed Sri Lanka illegally or that he will be perceived as having done so. I therefore do not accept he faces any penalties for illegal departure.
63. I have had regard to all of the evidence before me including the totality of the personal circumstances of the applicant. I am not satisfied the applicant has a well-founded fear of persecution from anyone, now or in the reasonably foreseeable future, if he returns to Sri Lanka.

## Refugee: conclusion

64. 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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65. 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

66. 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.
67. As to treatment and any questioning upon return as a failed asylum seeker or returnee I am not satisfied there is a real risk of significant harm. I am not satisfied that he faces a real risk of social stigma or other difficulties amounting to significant harm as a returnee. Further and in any event, I do not consider social stigma amounts to significant harm.
68. I do not accept he departed Sri Lanka unlawfully and I am not satisfied that the questioning and processing he may face on re-entry to Sri Lanka amounts to significant harm or would lead to significant harm. as defined under s36 and s5 of the Act.
69. In relation to the remainder of applicant's claims, which I have accepted, I have found that the applicant does not have a real chance of harm on any of these bases. For the same reason and applying the authority in *MIAC v SZQRB* [2013] FCAFC 33, I am not satisfied the applicant will face a real risk of any harm, including significant harm on any of those bases if removed to Sri Lanka.

## Complementary protection: conclusion

70. 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.