



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

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA20/07795

Date and time of decision: 20 February 2020 12:36:00  
L Hill, Reviewer

**Decision**

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

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

## Background to the review

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### Visa application

1. The referred applicant (the applicant) claims to be a citizen of Sri Lanka. He arrived in Australia in April 2013 and applied for a Safe Haven Enterprise Visa (protection visa) on 02 May 2017. A delegate of the Minister for Immigration (the delegate) refused to grant the visa on 22 January 2020.

### 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) (the review material).
3. The review material contains:
  - an email with attachments dated 22 January 2020, pertaining to financial checks on this applicant; and
  - an internal email dated 22 January 2020, relating to internal administrative records.
4. Despite these documents being included in the review material, the delegate made no mention of them in the decision record or during the interview and it is not apparent what bearing their contents has on the assessment of the applicants' claims under s.36(2) of the Act. I conclude that this email and its attachments are not relevant to this review and I have disregarded them.
5. In the review material is a Department of Home Affairs email dated 22 January 2012. In summary the delegate states that at the time of finalising her decision on 22 January 2020 she was not aware that a post-interview submission had been received by the Department from the applicant on 1 October 2019. She states that she had not considered it in her decision.
6. The review material includes the email from the applicant's former representative attaching a submission dated 1 October 2019 (post-interview submission) and supporting documents. It is apparent that these materials were not before the Minister when the Minister made the decision and is new information. The new information addresses the applicant's claims for protection and the concerns raised by the delegate at the protection visa interview, referring to country information and provides new documents in support. It should have been considered by the delegate but by administrative oversight was not. I am satisfied that there are exceptional circumstances to justify considering this new information.

### Applicant's claims for protection

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7. The applicant's claims can be summarised as follows:
  - He is a Tamil male born in [City 1] in the Northern Province of Sri Lanka.
  - His father was injured in landmine blast in 1991.
  - During the civil conflict, his relatives were members of the Liberation Tigers of Tamil Eelam (LTTE).

- Between October 2008 and August 2012, he travelled to [Country 1], [Country 2] and [Country 3]. While in [Country 2] he was injured in a motorcycle accident. He spent four to five months in hospital.
  - In August 2012, he returned to Sri Lanka. He applied to study in [Country 4].
  - In 2012, he was at a bus stop in Colombo when he was approached by two people who asked him to “find a location”. He told them how to get to the location. He then boarded a bus. On the bus he was approached by a man and told to get off at the next bus stop. He suspected the man was from Criminal Investigation Department (CID). After he got off the bus with the man a white van pulled up and he was put into the back. He was questioned about the people he had spoken to, what group he belonged to and the very fresh wound on his [Body Part 1]. They took his name and address. He was told he would be followed and had to come when called. He was then dropped at the next bus stop.
  - One week later he received a phone call from an unknown number. He was questioned him about where he was and what he was doing and asked about the people he had spoken to at the bus stop. He was told if he was lying, they would hurt him.
  - One week later, he was at the gym when a man asked him to go outside and answer questions. He was taken into a van. He was questioned about the people he had spoken to at the bus stop and the wound on his [Body Part 1]. They told him they suspected he was from a pro-Tamil group. They then found his home number and telephoned his mother and questioned her about him.
  - When travelling to [City 1] he received a call from a man who he believes was from the CID. They told him they knew he was travelling to [City 1]. It made him feel unsafe as they were clearly following him. While in [City 1], men who he believed to be from the CID came to see him. As his father is missing part of his [Body Part 2] and uses [mobility aids] the men suspected his father has also been associated with a pro-Tamil group.
  - On two occasions the CID visited his house to see what he was doing. He was told he was not allowed to leave the country. The CID regularly called and checked on him and what he was doing. They asked who he knew and if he knew certain people.
  - On 4 February 2013, he was contacted by CID and asked what he was going to do on Independence Day and if he knew certain people. He believed it was clear that they suspected he was part of a pro-Tamil group.
  - He told his friend what had been happening. His friend told him he could not stay and live like that. His friend then told him how to leave Sri Lanka illegally by boat so the CID would not detect his travel.
8. The applicant has claimed he fears he will be harmed on return by the Sri Lankan authorities including the CID because of his ethnicity, actual and/or imputed political opinion arising from his father’s injuries, his past experiences in 2012 and 2013, his familial relationship to former members of the LTTE, the prominent scars on his [body parts] and his return as a failed asylum seeker, illegal departure, the release of his details on the Department of Immigration’s website in 2014.

### **Refugee assessment**

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9. 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**

10. 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.
11. The applicant claimed, and I accept, that he is a Tamil male born in [City 1] in Northern Province of Sri Lanka, and a national of Sri Lanka. Sri Lanka is the receiving country for the purpose of this review.
12. The applicant claimed, and I accept, that his father was injured in landmine blast in 1991 and lost part of his [Body Part 1] and uses [mobility aids]. While the applicant made no mention of this claim prior to the protection visa interview, I am satisfied that the Uthayan article which was verbally translated by the interpreter at the protection visa interview evidences this aspect of his claims.
13. At the protection visa interview, the applicant claimed that his he had relatives who had been members of the LTTE. His mother’s brother son (cousin) was a member of the LTTE. He provided a newspaper article in support. In summary, the article was translated to say that the person depicted had been martyred. He had been a member of the intelligence unit. He was born in [City 1] and died [in] September 2000 during combat. The applicant was asked who had provided him with the article. He stated his mother had sent it to him.
14. The applicant was asked if any other members of his family had been members of the LTTE. He stated that his mother’s brother’s wife’s sister (aunty’s sister) husband. He had been a [rank] in the LTTE. They were not sure if he was alive or not. He further stated that his father’s sister’s husband had been hung upside down and shot by the Sri Lankan authorities. He also provided another newspaper article in support of these claims. It depicts a man in an LTTE uniform. He was asked who had given him this. He stated his mother did. He believes it may depict another relative.
15. In the post-interview submission, the former representative contended that:

*He was not involved in any terrorist organization even though the latest evidence found that his family had a very strong ties with the Liberation of Tamil tigers in Sri Lanka. [The*

*applicant] advised me this information was not shared before and sharing this information could give the case officer as lie, but I asked if there is enough evidence of the LTTE involvement in the family. After speaking to his mother, he was able to bring some further evidence to suggest that sufficient evidence is there to prove that the family had a very close tie with the LTTE organization. One of his mother's brother son was a member of the LTTE organization [rank] [Mr A] was living with them initially and killed by the military forces. Another cousin brother [rank] [Mr B] was also killed during the war.*

*As this was the last instant where he could present his case fully, I asked the applicant to give this evidence to substantiate his claim. Therefore, I would like the case officer to see the birth certificate of the mother of the applicant and his uncle's birth certificate to prove the relationship the [Mr C] (uncle) and [Ms D] (mother) both have the surname or father's name [Mr E]. Further to this [the applicant] also had another cousin brother who was recently arrested by the CID due to his membership with the Tamil tiger organization and has been rehabilitated as part of the rehabilitation but it was found that recently according to [the applicant's] mother, he was missing since 2015.*

*The family believes that [Mr F] could have been killed by the military as this has been happening throughout Sri Lanka. This was one of the well-founded fears the applicant predicted could happened to him and this was one of the reasons why [the applicant] fled Sri Lanka by taking a dangerous sea route to Australia. Hope the case officer accepts the fact the family link to the LTTE is overweigh any other reason to kidnap or kill [the applicant] by the military forces.*

16. I accept on the documentary and oral evidence provided that the applicant's cousin (mother's brother son) was a member of the LTTE and killed in battle in 2000. I am satisfied that the family name in Register of Birth for his uncle and Certificate of Birth for his mother and the name of the person depicted in the article corroborates that the person depicted in the article is related to the applicant in the manner claimed.

17. However, I am not satisfied that his claims regarding his other relatives and their membership or involvement in the LTTE are credible. Unlike that relating to his cousin, the applicant's oral evidence in this regard was superficial and unconvincing. For example at interview he was not sure whether his cousin brother had been killed and did not know whether his other cousin brother had served a period of rehabilitation. While he has sought to clarify these details in the post-interview submission, which appears to be as a result of conversations with his mother following encouragement from his former representative, the information provided is general in nature, and it remains that I find his inability to provide the information about his other relatives spontaneously at the interview does call into question the veracity of the claims. Furthermore, in contrast to his claims regarding his cousin, I am not satisfied it can be established from the details of the article and photographs that the depicted individuals have any relationship with him or his claims for protection.

18. In the post-interview submission, it has also been contended that:

*According to [the applicant] their family usually live in a big house and all live together, cousins were considered as part of the family. Military forces and villagers always known them as one family. This was the dangerous fact why [the applicant] could have been a target by the military forces.*

19. The applicant made no mention that he and his family had lived with his extended family, including his cousin or cousin brothers in his previous interactions with the Department

including at the protection visa interview, and the delay in the provision of such significant information suggests it may have been contrived in order to enhance his claims for protection. Additionally, the claims that he had lived with members of his extended family including his cousin and cousin a brother is difficult to reconcile with his level of knowledge of these individuals. In light of the foregoing, I am not satisfied that the applicant claims that he and his family lived with members of his extended family including his cousin, cousin brothers or aunty sister husband are true.

20. In summary, the applicant claimed and I accept that;
- [In] 2008, he was issued a Sri Lankan passport by the Sri Lankan government.
  - In November 2008, he was issued a student visa by [Country 1] government.
  - In December 2008, he departed Sri Lanka and travelled to [Country 1]. He entered legally using the student visa.
  - Between December 2008 and January 2009, he resided [at location] in [Country 1]. He did not make a claim for asylum.
  - In January 2009, he returned to Sri Lanka. He returned because his mother was unwell and his uncle, who had promised to support him in [Country 1], refused to do so.
  - Between January 2009 and June 2009, he resided in [suburb], Sri Lanka. He applied for, and was issued, a student visa by the [Country 2] government. On one occasion he departed Sri Lanka and travelled to [city], [Country 3]. He stayed for approximately one week before returning to Sri Lanka.
  - In June 2009, he departed Sri Lanka and travelled to [Country 2]. He entered legally using the student visa.
  - Between June 2009 and August 2012, the applicant resided in [Country 2]. He studied and undertook work experience during this period. In 2010, he returned to Sri Lanka for a short period before returning to [Country 2] (entry and exit stamps in passport).
  - While residing in [Country 2] the applicant was injured in a motorcycle accident. He spent four to five months in hospital.
  - In August 2012, he returned to Sri Lanka. On return he applied to study in [Country 4]. In October 2012, his application to study at [University 1 in Country 4] was successful.
21. These aspects of the applicant's evidence were detailed and spontaneously provided at the protection visa interview and have been generally consistent throughout his interactions with the Department. They are also corroborated by the details of the information in the referred materials including the pages of his passport including [Country 1] and [Country 2] visas, [University 1] letter and an internal Department email dated 20 September 2019.
22. I note that in the post-interview submission the applicant's former representative has stated that:
23. *"In the past my client has used an internal officer to flee the country. If he forced to go back to Sri Lanka through the Airport, we could not imagine what would happen to [Alias 1]"*.
24. Apart from it not referring to the applicant (the applicant's name is not "[Alias 1]"), the applicant has never claimed before that he was ever assisted by anyone including an internal officer to depart or return to Sri Lanka. I am not satisfied that this information relates to the applicant.

25. The applicant's passport was issued by the Sri Lankan government. There is no credible evidence before me to suggest that he had any problems at the airport when departing or returning to Sri Lanka or that there was any corruption and/or bribery involved. Nor has he claimed that while he was outside of Sri Lanka that he was of interest or his whereabouts sought by the Sri Lankan authorities or any groups or individuals. In 2012 and 2013 UK Home Office reported that the international airport in Sri Lanka maintains a system capable of checking documents of people and anyone leaving Sri Lanka must have a valid passport. All passengers are mandated to pass through immigration. A list of persons-of-interest by law enforcement agencies that have violated Sri Lankan law, which is updated regularly, is also held at the airport. These lists include the names of those of interest to the authorities or those have an extant court order or arrest warrant. I am satisfied that had the applicant been of interest to the Sri Lankan authorities including for his familial relationship to a member of the LTTE who had been killed some years previously, he would have been stopped and questioned and/or detained during his various departure and returns. In light of the foregoing, I am not satisfied that the applicant was of any interest to the Sri Lankan authorities or any groups or individuals for any reason prior to his return to Sri Lanka in August 2012.
26. In the protection visa statement, the applicant claims that because of events between 2012 and February 2013 he feared for safety and made arrangements to leave Sri Lanka in March 2013.
27. The applicant claimed that in 2012 he was at a bus stop in Colombo when he was approached by two people who asked him to "find a location". The two people looked and sounded like they were from [City 1]. He conversed with them in Tamil and told them how to get to the location they were after. He then boarded a bus. On the bus he was approached by a man and told to get off at the next bus stop. The man shoved him and spoke to him in a scary tone. He suspected the man was from CID.
28. The applicant claimed after he got off the bus with the man a white van pulled up and he was put into the back. Inside, the man and the driver asked why he had been talking to the people at the bus stop. He told them they had asked for direction. One of the men told him they had been following the people as they were suspected of being from a pro-Tamil group. They then noticed the wound on his [Body Part 1], which had had sustained in the motorcycle accident in [Country 2] and suspected that he had received this wound from fighting in a pro-Tamil group. He knew this because they asked him questions about it. One of the men held his forearm behind his back. This hurt him. The men kept asking him how he knew the people at the bus stop. He denied knowing them. He was also asked what group he belonged to. They swore at him. They took his name and address. They told him that as he had spoken to the people at the bus stop, he would now be followed and called upon at random times answer their phone calls and come to them whenever they wanted. He was in the van for approximately fifteen minutes before they dropped him at the next bus stop.
29. The applicant claimed that approximately one week later he received a phone call from an unknown number. The man on the phone questioned him about where he was and what he was doing. He then asked him if he had assisted the people in finding the location. He said he was an honest person and had done nothing wrong. He said if he was lying, they would hurt him. They then hung up. He felt scared.
30. The applicant claimed that one week later, he was at the gym when a man knocked on the glass door and asked him to come out and answer questions. He went outside and went into the van. There were two to three people in the van. They had some questions about the

people he had assisted and the wound on his [Body Part 1]. They told him they suspected he was from a pro-Tamil group. They then found his home number and telephoned his mother. They asked his mother his name. From their reaction they knew that his mother was aware something was wrong. They asked his mother where he was. He then told his mother what had happened. His mother then knew somebody was after him. His father and mother were scared for him.

31. The applicant claimed that on one occasion when travelling to [City 1] he received a call from a man who he thinks was from the CID. They told him they knew he was travelling to [City 1]. He did not know how they knew this. It made him feel unsafe as they were clearly following him. He realised how dangerous the situation was becoming for him. He was scared and terrified. While in [City 1] men who he believed to be from the CID came to see him. As his father is missing part of his [Body Part 2] and uses [mobility aids] the men suspected his father had also been associated with pro-Tamil group.
32. The applicant claimed that on two occasions the CID visited his house to see what he was doing. After this the people in his neighbourhood did not want to speak to him. They were too scared. On one occasion, they said he was not allowed to leave the country and if he did they would try to catch him. He was scared if he was caught he would be mistreated and treated like a slave. The CID use to regularly call and check on him and what he was doing. They asked who he knew and if he knew certain people.
33. The applicant claimed that on 4 February 2013, CID called him and asked what he was going to do on Independence Day. They asked if he knew certain people. He did not know who they were talking about. He believed it was clear that they suspected he was part of a pro-Tamil group. On Independence Day, he was in a restaurant with a friend and told him what had been happening. His friend told him he could not stay and live like that. His friend then told him how to leave Sri Lanka illegally by boat so the CID would not detect his travel.
34. The applicant's evidence at the protection visa interview was generally consistent with the protection visa statement and while he was able to succinctly detail each event in which he claimed to be confronted and questioned, unlike the other aspects of his evidence which I have accepted, overall I found his evidence in this regard was presented in a rehearsed manner and was not reflective of a lived experiences.
35. Additionally, I have a number of concerns as noted below, which I consider undermines the credibility of these aspects of his claims.
36. The applicant's claims that he was followed, harassed and questioned over a six month period by people he believed to be from the CID is also difficult to reconcile with the country information published by the UNHCR in 2012 which indicates that at the time claimed, the Emergency Regulations were still in place and this allowed Sri Lankan authorities including the CID to detain certain persons including those they suspected of being involved in nefarious activities under the Prevention of Terrorism Act (PTA) for up to 18 months without charge, and I consider that if he were of such interest as claimed he would have been detained rather than followed, harassed and questioned over such a prolonged period as claimed.
37. The applicant's evidence in his protection visa statement that when he was in the white van the men noticed a 'very fresh' wound on his [Body Part 1] and suspected he had received it from fighting in a pro-Tamil group is also difficult to reconcile with the country information in



the review material such as UNHCR, UK Home Office and DFAT that the civil conflict had ended at least three years before in 2009.

38. I also find the applicant's claims regarding the type of treatment he claimed to be subjected in the first instance because he merely provided directions/location to two people at a bus stop to be highly improbable. Nor does it make sense that if the two men had been followed and/monitored by the Sri Lankan authorities as claimed why his provision of directions/location was not observed as anything more than an innocuous conversation.
39. Finally, I have considered the details of the country information reports and videos reporting on white van abductions and enforced disappearances. However I note that the individuals reported on in the 'Return of the White Van' article and Aljazeera article and video were either taken to detention and remanded in custody or remain missing, they were not released and allowed to go in the manner claimed by the applicant.
40. In light of the foregoing, I am not satisfied that the events between 2012 and 2013 and which the applicant claimed led to his decision to leave Sri Lanka are true. Nor do I accept that any of his subsequent events including that his mother has moved and his father is in hiding are true. I am satisfied that the applicant has contrived these events in 2012 and 2013 in their entirety to enhance his claims for protection.
41. I am not satisfied the applicant was of any interest to the Sri Lankan authorities or any groups or individuals for any reason prior to his return to Sri Lanka in August 2012. I do not accept the applicant claims regarding his past experiences in 2012 and 2013 which he claimed led to his decision to leave Sri Lanka. There is no other credible evidence before me to suggest why the applicant would have been of interest to the Sri Lankan authorities, groups or individuals for any other reason at the time of his final departure in 2013, and I am not satisfied that he was.
42. The applicant has claimed he fears he will be harmed on return by the Sri Lankan authorities including the CID because of his ethnicity, actual and/or imputed political opinion arising from his familial relationship to former member of the LTTE, the prominent scars on his face and legs and his return as a failed asylum seeker, his illegal departure, the release of his details on the Department of Immigration's website in 2014 and other matters which I have found not to be credible.
43. I have had regard for the former representative's various contentions including that the army is still present in large numbers in any part of Sri Lanka especially in the north and east of Sri Lanka, that they have taken over 'every aspect of civilian life', including the fertile Tamil land and that "nothing has changed since the [Siresena] government was installed". I have weighed these contentions and country information against the contemporary information in the review material, including the 2019 DFAT report which indicates that the overall situation for Tamils in Sri Lanka has improved considerably since the end of the civil conflict in 2009. Tamils have a substantial level of political influence, and their inclusion in political dialogue has increased since 2015. Forced registration of Tamils has ceased and security checkpoints on major roads in the north and east were removed in 2015. As a consequence of the improving situation, DFAT assessed that non-Muslim Sri Lankans, including Tamils, face a low risk of experiencing official or societal discrimination based on ethnicity or caste, including in relation to access to education, employment or housing.
44. I accept the applicant is a Tamil male, who has resided for periods of time in areas in the Northern Province. However, the country information before me published by DFAT, UK

Home Office and US Department of State overwhelming suggests that absent any other concerns, a person's gender or origin or residence in Sri Lanka would not impute them with an adverse profile or that they would be perceived to be pro-LTTE or pro-Tamil or anti-Sri Lankan government and harmed on this basis on return.

45. I have had regard to the former representative's contentions and the country information including Al Jazeera articles and Amnesty report regarding the documented cases of ill-treatment, abduction, torture, sexual violence, arbitrary detention, murder of ethnic Tamils carried out by the Sri Lankan authorities including the army, security personal and its collaborators and that this remains prevalent; and while I accept that there is credible reports of serious harm being perpetrated against certain Tamils including those associated with, or perceived to be associated with, the LTTE by the Sri Lankan authorities in pre and post-war Sri Lanka, the country information on which the contentions about the applicant have been based pre-dates the contemporary 2019 DFAT report by a year and relates to cases from some years ago, and as such I consider it to be of very limited value in the assessment of the applicant's circumstances on return.
46. The 2019 DFAT report, while not suggesting that there does not continue to be issues of concern in Sri Lanka, indicates that it is individuals who have or are perceived to have had a significant role in the LTTE and in post-conflict Tamil separatism or a renewal of hostilities within Sri Lanka are now at risk of serious or significant harm on return. Sri Lankan authorities collect and maintain sophisticated intelligence on former LTTE members and supporters, including 'stop' and 'watch' electronic databases. DFAT understands these databases remain active. 'Stop' lists include names of those individuals that have an extant court order, arrest warrant or order to impound their Sri Lankan passport. 'Watch' lists include names of those individuals that the Sri Lankan security services consider to be of interest, including for suspected separatist or criminal activities.
47. DFAT assessed that those at highest risk of monitoring, arrest, detention or prosecution are high profile former LTTE members, including the former leadership, and former members suspected of terrorist or serious criminal offences during the conflict or of providing weapons or explosives to the LTTE. It also reported that while some Tamils with imputed LTTE links continue to report police monitoring and harassment, it assessed that Tamils with links to the LTTE are generally able to lead their lives without concern for their security as a result of their past association with the LTTE. Tamils, including those with imputed links to the LTTE, are no longer considered vulnerable to mistreatment and torture by virtue of their ethnicity or LTTE links, and accords with the other recent country information before me.
48. I do not accept the applicant's claims regarding the events involving the events in 2012 or that subsequent to such events he made his decision to leave Sri Lanka or that his family has moved and/or are in hiding. However, I do accept that during the civil conflict, nearly twenty eight years ago his father was injured in a bomb blast and his cousin was a member of the LTTE and killed during combat. However, these events happened at least nineteen years ago, and there is no credible evidence before me to suggest that the applicant was targeted to or of interest to the Sri Lankan authorities. Rather, I have found at the time his departure from Sri Lanka in 2013 he was not of interest to the Sri Lankan authorities or any groups, organisations or individuals for any reason. On the information before me he has not committed any terrorist or criminal acts in Sri Lanka or been involved in any LTTE or Tamil separatist or diaspora activities since the civil conflict ended. He did not have, and nor do I accept he would now be perceived to have had, a role in the LTTE or in post-conflict Tamil separatism or a renewal of hostilities on return.

49. The applicant has claimed that he fears he will be targeted and people will assume he is from a pro-Tamil group because of the prominent scars on his [body parts]. While I accept that he has these scars the information published by UK Home Office and DFAT overwhelming indicate that he will not be of adverse interest and/or harmed on this basis on return.
50. The applicant departed Sri Lanka in 2013, and I am not satisfied given the passage of time, the applicant's or his family's past or present circumstances, that the applicant would be perceived as being associated with and/or involved with the LTTE or any pro-Tamil organisations or groups. I am not satisfied the applicant faces a real chance of any harm as a Tamil male who has originated from and resided in the Northern Province and has prominent scars, and his familial relationships on his return to Sri Lanka now or in the reasonably foreseeable future.
51. I accept the applicant left Sri Lanka illegally and he would return to Sri Lanka on temporary travel document. I accept he has applied for asylum and on return to Sri Lanka may be identified as a former asylum seeker. I also accept that, although I consider it unlikely, the applicant's details may have been obtained by the Sri Lankan authorities as a result of the Department of Immigration's data breach in 2014 and that he may be identifiable. Information disclosed about persons subject to this data breach included: the applicant's name; date of birth; nationality; gender, the reason for and location of his detention; and whether he had any family members in detention. There is no evidence before me that this data breach has resulted in any harm in Sri Lanka for those affected.
52. I have had regard to The Guardian article published in 2016 and the Tamil Guardian article published in 2017 provided in support of the applicant's return as a failed asylum seeker however I note that both pre-date the contemporary 2019 DFAT report by at least two years and as such are of very limited value.
53. The 2019 DFAT report states that for returnees travelling on temporary documents, police undertake an investigative process to confirm identity. This would identify someone trying to conceal a criminal or terrorist background, or trying to avoid court orders or arrest warrants. This often involves interviewing the returning passenger, contacting police in the person's claimed hometown, contacting claimed neighbours and family, and checking criminal and court records.
54. I accept, as a person returning on a temporary travel document, the applicant may be detained at the airport with other returnees for processing by the Sri Lankan authorities. I accept that during this process the authorities will become aware of the applicant's past circumstances. However, as discussed above, I am not satisfied the applicant will be imputed with an adverse profile arising from his or his family's past circumstances on his return to Sri Lanka. There is no evidence before me that he has outstanding court orders, arrest warrants or a criminal or terrorist background. There is also no independent information before me to suggest that absent any other concerns, that on return those who have returned after an extended period of residence in Australia and sought asylum unsuccessfully are imputed with an adverse opinion or that such factors would put him at risk of harm on return. I am not satisfied that the applicant will be at risk of attracting the attention of the authorities on this basis.
55. DFAT advises that returnees are treated according to the standard airport procedures, regardless of their ethnicity and religion. The process can take several hours, due to the administrative processes, interview lengths and staffing constraints at the airport. Returnees are processed in groups, and individuals cannot exit the airport until all returnees have been

processed, although returnees are free to go to the bathroom and talk to one another during this time. The information before me indicates that the processing of returnees at the airport is not done in a discriminatory manner or that there is a real chance the applicant will be subject to any mistreatment. Overall, I am satisfied that any period of detention that would occur during the investigative process would be brief and not exceed the several hours that the group processing generally takes.

56. DFAT reports that the Immigrants and Emigrants Act (I&E) governs entry and exit to Sri Lanka. The I&E makes it an offence to depart Sri Lanka other than via an approved port of departure, such as seaport or airport, and without a valid passport. Returnees who depart Sri Lanka irregularly by boat are considered to have committed an offence under I&E Act.
57. I accept on return the applicant may be charged under I&E for departing Sri Lanka other than via an approved port of departure. DFAT understands that on return where an illegal departure is suspected, returnees are arrested and charged under I&E by police at the airport. During this process, the police will take photographs, fingerprints and statements from returnees, and further enquire about activities while abroad of returnees are suspected to be former LTTE members. After processing returnees can remain in police custody at the airport for up to 24 hours. At the earliest available opportunity returnees are transferred to the closest Magistrate's Court where a Magistrate will make a determination on the next steps for each returnee. Should a Magistrate not be available – for example because of a weekend or public holiday – those charged may be detained for up to two days in an airport holding cell. In 2019 DFAT reported that it is not aware of mistreatment or returnees during this process.
58. DFAT reports that penalties for leaving Sri Lanka illegally can include imprisonment of up to five years and fine. The Sri Lankan Attorney-General's Department, which is responsible for the conduct of prosecutions, claims no fare-paying passenger on a people smuggling venture has been given a custodial sentence for departing Sri Lanka illegally (as distinct from facilitators or organisers). However, fines are issued to fare-paying passengers as a way of deterring future illegal departures. The evidence before me does not indicate that the applicant would be perceived and treated as anything other than a mere fare-paying passenger on the people smuggling venture. I am not satisfied that there is a real chance the applicant would be given a custodial sentence.
59. If the applicant pleads guilty to departing Sri Lanka illegally, he will be required to pay a fine, which can be paid in instalments, and will subsequently be able to go free. Where a fare-paying 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. The applicant has not claimed and the information before me does not indicate he would not be granted bail on personal surety, if he does in fact plead not guilty.
60. Returnees charged under I&E Act will only need to return to court when their case is being heard, or if summonsed as a witness in a case against the facilitators or organisers of the people smuggling venture. There is no general requirement to report to police or police stations between hearings. However, DFAT notes that, while the fines issued for fare-paying passengers of people smuggling ventures are often low, the cumulative costs associated with regular court appearances (if required) over protracted lengths of time can be high.
61. In the case of this applicant, I am not satisfied that the conditions of detention for a brief period at the airport, a fine and the costs associated with regular court appearances, if they

are required, amount to serious harm. In addition, the information before me does not indicate that I&E Act is discriminatory on its terms, that it is applied in a discriminatory manner or that it is selectively enforced. Accordingly, I am not satisfied that any investigation, prosecution and punishment would amount to persecution for the purpose of ss.5H(1) and 5J(1) of the Act.

62. DFAT reported that between 2010-11 and 2018-19; 3,716 Sri Lankan nationals returned from the Australian community or were removed from Australian onshore immigration detention centres to their country or origin or a third country. Most returnees are Tamil. The Sri Lankan Government has consistently stated that refugees are welcome to return. DFAT understands that most returnees, including failed asylum seekers, are not actively monitored on an ongoing basis. It is not aware of returnees, including failed asylum seekers, being treated in such a way that endangers their safety and security. Failed asylum seekers receive limited reintegration assistance. Many returnees have difficulty finding suitable employment and reliable housing on return. Those who have skills that are in high demand in the labour market are best placed to find well-paid employment. Limited job availability in the north and east further contributes to difficulties in securing employment and housing. DFAT assesses that reintegration issues are not due to failure to obtain asylum, but rather due to the employment and accommodation difficulties returnees may face. DFAT understands that returnees may face financial difficulties reintegrating into their communities, including due to sale of their belongings to fund irregular ventures overseas, but do not experience societal discrimination for seeking asylum elsewhere. In 2019, DFAT assesses that returnees face a low risk of societal discrimination upon return to their communities.
63. I have accepted that the applicant was born in [City 1] in Northern Province of Sri Lanka however his protection visa application indicates he has resided in the capital, Colombo since 1998 and I am satisfied this is the area to which he will return. The applicant has previously departed and returned to the country after residing abroad on two occasions and he has not claimed that he was not able to secure accommodation and employment on return. He has completed qualifications as an [Occupation 1] and been employed in various roles in [Industry 1] in Sri Lanka and Australia. Having regard to the applicant's individual circumstances, I am not satisfied that he will experience any difficulties finding employment or housing on return.
64. I am not satisfied that, as a Tamil asylum seeker with his background who departed illegally and whose details were released on the Department's website, the applicant faces a real chance of persecution on his return to Sri Lanka, now or in the reasonably foreseeable future.
65. I am not satisfied the applicant has a well-founded fear of persecution.

#### **Refugee: conclusion**

66. 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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67. 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**

68. 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.
69. The expressions 'torture', 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' are in turn defined in s.5(1) of the Act.
70. I accept the applicant would return to Sri Lanka (whether involuntarily or otherwise) on temporary travel document. I accept he may be detained at the airport for processing on return and questioned. I also accept he may be arrested and charged with departing Sri Lanka illegally and detained briefly at the airport if a magistrate is unavailable, fined and possibly incur costs associated with bail and regular court appearances. I am not satisfied there is a real risk of the death penalty being carried out or of him being arbitrarily deprived of his life or tortured. Further, on the information before me I am not satisfied that there is an intention to inflict pain or suffering that could reasonably be regarded cruel or inhuman in nature, severe pain or suffering, or an intention to cause extreme humiliation. I am not satisfied there is a real risk of significant harm on this basis.
71. I have otherwise found the applicant does not face a real chance of harm on any or the bases claimed now or in the reasonably foreseeable future. As 'real risk' involves the same standard as 'real chance', I am also not satisfied that the applicant faces a real risk of significant harm on these bases.

### **Complementary protection: conclusion**

72. 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.