



**Australian Government**  

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**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA20/08584

Date and time of decision: 18 August 2020 10:49:00  
K Allen, Reviewer

**Decision**

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

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

## Background to the review

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### Visa application

1. The referred applicant (the applicant) claims to be a Tamil Hindu from [Location 1] in the Vavuniya District of the Northern Province of Sri Lanka. On 21 March 2017 he lodged an application for a Safe Haven Enterprise visa (SHEV).
2. On 18 July 2019 a delegate of the Minister for Immigration (the delegate) refused to grant the visa because the delegate found the applicant is not a person in respect of whom Australia has protection obligations and referred the matter to the IAA.
3. On 15 August 2019 the IAA affirmed the decision of the delegate not to grant the visa. [In] July 2020 the Federal Circuit Court of Australia remitted the matter to the IAA by consent for reconsideration on the basis that the Secretary of the Minister's department did not refer material in his possession or control to the IAA.

### 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).
5. In accordance with s.473DD of the Act, I can only consider new information in very limited circumstances. For the purposes of making a decision in relation to a fast track reviewable decision, I must not consider any new information provided by the applicant unless: I am satisfied that there are exceptional circumstances to justify considering the new information; and the referred applicant satisfies me that the new information: was not, and could not have been, provided to the Minister before the Minister made the decision under s.65; or is credible personal information which was not previously known and, had it been known, may have affected the consideration of the referred applicant's claims.
6. On 6 August 2019 the applicant sent a submission to the IAA claiming that the delegate overlooked one of his claims. He stated that, as he was a young Tamil male in the north at the time of the war, he will be suspected now and that Sri Lankan authorities are attempting to exclude asylum seekers from Sri Lankan citizenship. This is two claims. I am satisfied that at the primary stage the applicant made the claim that because he was a young Tamil male in the north at the time of the war, he will be suspected now of supporting the Liberation Tigers of Tamil Eelam (LTTE) or holding an adverse political opinion. I am satisfied that this is not new information and I have considered that claim. In relation to the second claim that Sri Lankan authorities are attempting to exclude asylum seekers from Sri Lankan citizenship, the applicant refers to the Sri Lankan Citizenship Act stating that a person should inform the Sri Lankan authorities of their intention to become a citizen of another country before turning the age of 22, and that this applies to him as he is over 22 now. He further claims that because he has not done so he will be questioned on his return about that. The applicant goes on to state that he could not do so as the protection visa form asks whether he had contacts with any embassy or high commission. I have reviewed all the applicant's claims made at the primary stage. I do not accept that the applicant made this claim at the primary stage including in his SHEV application, or during the SHEV interview, despite the delegate giving him a number of opportunities at the conclusion of the interview to add any further information. I am satisfied that this claim is new information.

7. The applicant has not explained why he did not make this claim at the primary stage. I note here that the applicant made a number of other claims at the primary stage and was assisted by a migration agent to prepare his SHEV application. The applicant has not provided any information that supports his view that Sri Lankan authorities are attempting to exclude asylum seekers from Sri Lankan citizenship. He did not provide the information he referred to from the Sri Lankan Citizenship Act stating that a person should inform the Sri Lankan authorities of their intention to become a citizen of another country before turning the age of 22, and that this applies to him as he is over 22 now, and because he has not done so he will be questioned on his return about that. I also note that none of the other independent information before me points to such a provision. Contrary to the applicant's new claim there is a significant amount of evidence before supporting that the applicant is already a Sri Lankan citizen and not a citizen of any other country. In his SHEV application he stated that he was born in Sri Lanka and that he is a Sri Lankan citizen. He also indicated that his parents and siblings are Sri Lankan citizens. The supporting documentation he provided with his SHEV application is consistent with that declaration. His birth certificate states that he was born in Sri Lanka to Sri Lankan Tamil parents who were both born in Sri Lanka. The bio data page of his expired Sri Lankan passport issued in [2009] indicates his nationality as being Sri Lankan. The applicant has not indicated that he has been stripped of his citizenship and he has not explained the significance of contact with an embassy or high commission or the relevance of the age of 22 years. Given that this claim is speculative and unsupported and that could have been made at the primary stage, I am not satisfied there are exceptional circumstances to justify considering the new information.
8. The IAA has now obtained a copy of the relevant trim file which the Secretary of the Minister's department did not refer to the IAA. It contains a transcript of the applicant's arrival interview which is consistent with his other claims and does not change my assessment of his claims, some administrative documents related to his detention and release into the community and copies of his identity documents which had already been referred to the IAA. I am satisfied that these documents were before the delegate and note that the applicant obtained a copy of this file in the context of his court proceedings. To that extent, it does not appear that this information is new information as it was before the delegate, however, should this be characterised by the court as new information, given that this was the basis of the remittal of this matter back to the IAA, I am satisfied that there are exceptional circumstances to justify considering the new information to the extent that it is relevant to his claims.
9. The IAA obtained a copy of the 4 November 2019 Department of Foreign Affairs and Trade (DFAT) country report on Sri Lanka, "DFAT Country Information Report Sri Lanka" (2019 DFAT report). The 2019 DFAT report is an update of a report considered by the delegate in the decision to refuse the applicant's protection visa. The 2019 DFAT report has been prepared by the DFAT for protection status determination purposes and is informed by DFAT's on-the-ground knowledge and discussions with a range of sources in Sri Lanka and takes into account relevant and credible open source reports. It provides DFAT's best judgement and assessment at time of writing and is distinct from Australian Government policy with respect to Sri Lanka. I am satisfied that there are exceptional circumstances to justify considering the new information. On 31 July 2020 the IAA sent the applicant a copy the 2019 DFAT report. The applicant was invited to comment on specified information from the 2019 DFAT report that may be the reason, or part of the reason for affirming the decision of the Minister for Immigration to refuse his application for a protection visa. The applicant did not provide any comments.

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

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10. The applicant's claims can be summarised as follows:

- He was born in the Vavuniya District of the Northern Province of Sri Lanka in [year].
- His home area was under the control of the LTTE, and in December 1999 problems in the area began when Sri Lankan Army (SLA) soldiers entered the village, and thereafter arrested, beat and threatened people, including himself and his father. They were questioned about where the LTTE members were.
- He left the village with his family and went to another area of the Vavuniya District, where they suffered.
- In mid-2002 he and his family moved back to their home village, anticipating the problems were over. The SLA viewed their village as an LTTE village, and continually beat, threatened and questioned them about whether they saw the LTTE. His father was beaten and his shoulder injured.
- In 2005 his cousin, who lived next door, was arrested by the SLA and has not been seen since.
- In 2006 he was taken by the SLA and tortured, and received an injury such that he could not work with both his hands for a period of time. Due to fears for his safety his parents sent him to [Country 1] for three months.
- On return to his village the problems continued and the SLA questioned him about where he had been hiding, and he was beaten and tortured.
- He moved to live with distant relatives in a different village in the Vavuniya District. SLA officers harassed and threatened his father and younger brother when they could not find him. As a result of these problems his father asked him to go to Australia, and in September 2012 he left Sri Lanka for Australia.
- After he arrived in Australia the SLA continued harassing his family.
- He cannot return to Sri Lanka because the SLA would not leave him alive.

## **Factual findings**

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### **Identity**

11. The applicant has providing a consistent and compelling account of his life in Sri Lanka. His account is consistent with the documentation he provided in support of his claimed identity which included his birth certificate, national identity card, passport and Sri Lankan drivers' licence. I accept that the applicant is a Tamil Hindu man who was born in the Vavuniya District of the Northern Province of Sri Lanka in [year].
12. The applicant claims that his family was displaced from [Location 1] for a time during the conflict and lived in [Location 2] in Vavuniya District before returning to [Location 1] in 2002. The applicant advised that he attend school in Sri Lanka from 1995 until 2006 and the addresses of his schools are consistent with his claimed living locations. The applicant claimed that after finishing school he worked with his father on the family farm. The applicant claimed that he obtained a Sri Lankan passport [in] 2009 which was valid to [2019]. He used the passport to travel to [Country 1] on a tourist visa and stayed in [city] from October 2010 to January 2011.

The applicant claimed that after returning from [Country 1] he was employed as [an Occupation 1] in [Location 3] from May 2011 to September 2012. I accept that this was the case. I accept that the applicant's father, mother and brother continue to live in the Northern Province in [Location 1] and that his sister and her family live nearby in [Location 3]. I note that the applicant has not made any claims in relation to his religion or stated that he has been prevented from practising his faith in Sri Lanka.

13. Overall, I am satisfied that the applicant is a Sri Lankan national and that Sri Lanka is the receiving country for the purpose of the application. There is no information before me to suggest that the applicant has a right to enter and reside in any country other than Sri Lanka and I am satisfied he does not.

### **Involvement in the LTTE**

14. The applicant claimed that he and the other members of his family were not LTTE members, were not involved with the LTTE and did not have any contact with the LTTE. He also claimed that he and his family were not involved in any political activities or organisations. In the body of his SHEV application, the applicant stated that his uncle [Mr A] was a fighter with the LTTE, and when the applicant was born, he died in the war. This would indicate that the applicant's uncle died around the year that the applicant was born, in [year]. In his SHEV interview, when asked if he or his family members were ever members of the LTTE, involved with the LTTE, or had any contact with the LTTE, the applicant answered 'no' to each question. The applicant did not refer to any uncle being in the LTTE in his statement of claims, or during the SHEV interview.
15. DFAT reports<sup>1</sup> that the LTTE was supported by foreign funding, primarily from the Tamil diaspora, and both voluntary and forced recruitment of Tamils. Given that the applicant's family is from a former LTTE controlled area and that the conflict between Sri Lankan authorities and the LTTE started in 1983, it is plausible, and I accept, the applicant had an uncle who fought with the LTTE, and who died around the time the applicant was born in [year]. However, given that the applicant has not claimed to have been harmed on this basis and he did not mention this in his statement of claims or his SHEV interview, I do not consider that the Sri Lankan authorities were aware of his uncle's involvement with the LTTE or that he or his family were ever questioned about the uncle or harmed on that basis. Given that the fact that the applicant's uncle died over 30 years ago, the applicant and his family have never been harmed because of [Mr A] and his family continue to live safely in Sri Lanka, I am not satisfied the applicant's connection to a relative who was a fighter in the LTTE who died at the time of his birth has been or would be of interest to Sri Lankan authorities.

### **Harassment by the LTTE**

16. The applicant has described being harassed by the SLA at the time his home area was under the control of the LTTE. He claimed that in December 1999 problems in the area began when SLA soldiers entered the village, and thereafter arrested, beat and threatened people, including himself and his father. They were questioned about where the LTTE members were. He left the village with his family and went to another area of the Vavuniya District, where they suffered. He claimed that in mid-2002 he and his family moved back to their home village, anticipating the problems were over. The SLA viewed their village as an LTTE village, and continually beat, threatened and questioned them about whether they saw the LTTE. His father was beaten and his shoulder injured. In 2005 his cousin, who lived next door, was arrested by the SLA and has

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<sup>1</sup> Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244, 3.55

not been seen since. He claimed that in 2006 he was taken by the SLA and tortured, and received an injury such that he could not work with both his hands for a period of time. In his SHEV interview he clarified that it was a shoulder injury. The applicant claimed that due to fears for his safety his parents sent him to [Country 1] for three months. On return to his village the problems continued and the SLA questioned him about where he had been hiding, and he was beaten and tortured. He claimed he moved to live with distant relatives in a different village in the Vavuniya District. SLA officers harassed and threatened his father and younger brother when they could not find him. As a result of these problems his father asked him to go to Australia, and in September 2012 he left Sri Lanka for Australia.

17. In his SHEV interview the applicant discussed these claims with the delegate. He said that he and other young people in his area were detained two to three times for a couple of hours in around 2006. He also said that he was questioned on his return from [Country 1] about his travel but not harmed and he was detained again for two to three hours in April 2011. His evidence about his treatment is consistent with country information about the experiences of Tamils in LTTE controlled areas during the conflict. DFAT describes<sup>2</sup> the displacement of hundreds of thousands of people, and frequent occurrences of disappearances during the long civil conflict. Many Tamils, including civilians, particularly in the north and east, reported being monitored, harassed, arrested or detained by security forces during the conflict, and that security forces also imputed LTTE support based on ethnicity, as almost all LTTE members and supporters were Tamil. Towards the end of the civil conflict in May 2009, the government security forces arrested and detained a large number of LTTE members, most of whom were sent to government-run rehabilitation centres for rehabilitation programs that were typically for one year<sup>3</sup>.
18. I accept the applicant's account at interview of being detained, questioned and mistreated by the SLA, and regarding his cousin disappearing. I also note that during the SHEV interview the applicant said he and other young people from the village were regularly detained, questioned and beaten by the SLA, and that they were normally detained for two to three hours before being released together. I consider the treatment the applicant described from the SLA was indicative of the routine treatment of young Tamil men at that time and not indicative of him being of any particular interest to the authorities. Although he was detained and questioned about the LTTE on a number of occasions, he was never detained for more than a few hours, which indicates to me that he was not of any personal or particular interest to Sri Lankan authorities. The country information before me indicates that if the authorities had genuinely suspected the applicant of having links to the LTTE he would not have been released on each occasion and ultimately he would have been arrested and jailed or sent to a rehabilitation camp.
19. Additionally, I consider that if the applicant had been of interest to the authorities, he would not have been able to obtain a passport in July 2009, travel by train to Colombo and fly to [Country 1] and back. The applicant did not report having any problems in either obtaining a passport and visa or in being able to travel across and in and out of the country during the conflict.
20. Further, the applicant remained living and working in his home village until about April 2011, and then in another area of the Vavuniya District until he departed Sri Lanka thus indicating that he was not of any strong interest to the SLA. In his SHEV interview the applicant stated

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<sup>2</sup> DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244, 3.10

<sup>3</sup> Danish Immigration Service, "Human Rights and Security Issues concerning Tamils in Sri Lanka", 71, 1 October 2010, CIS19345, p. 7 and 9

that he was not detained again because he had gone to [Location 3], where he resided and worked from May 2011 to September 2012 when he departed the country. He confirmed he did not have any problems in [Location 3]. The delegate asked the applicant why he did not remain in [Location 3] if he did not have any problems while he was living and working there, and he responded that the whole country was under control of the army and it was only a matter of time before he would be detained and questioned again.

21. Overall, I accept the applicant was harassed and detained for short periods of time approximately four or five times during the conflict and in the immediate aftermath. I also accept as plausible that he was mistreated during those periods of detention. I accept that his treatment was consistent with the treatment of other Tamil men at the time and I accept that this treatment formed at least part of the reason he decided to leave Sri Lanka and travel to Australia. I do not accept that the applicant was ever of any personal interest to the authorities or genuinely suspected of LTTE involvement and this is supported by the fact that he was never arrested, detained for more than a few hours or sent to rehabilitation.

#### **Continued harassment since departure**

22. The applicant claims that after he arrived in Australia the SLA continued harassing his family and that he cannot return to Sri Lanka because the SLA would not leave him alive. The applicant claims to be in regular contact with his family yet he has not provided any details about this claim including when or how often this had occurred, the last time it occurred, or the reason it occurred. At the SHEV interview the delegate asked the applicant whether his family had any problems or issues with Sri Lankan authorities since he departed Sri Lanka the applicant responded 'no', and when asked what he thought would happen to him if he were to return to Sri Lanka he replied that he did not know that.
23. Given the treatment of Tamils in the post war period, I accept as plausible that the SLA made enquiries about the applicant's whereabouts after he left his village in about May 2011 as they did after his return from [Country 1]. The lack of detail provided by the applicant on this matter and the fact that he did not have an adverse security profile at the time he departed Sri Lanka does not lead me to conclude that the applicant's family have been harassed, or that the questioning of the applicant's family is ongoing, or that they have been questioned recently. I do not accept that the applicant's family have been continually harassed since his departure from Sri Lanka.

#### **Claim of risk of harm as a failed asylum seeker**

24. The delegate considered that if the applicant is not granted a protection visa he will be considered a failed asylum seeker. The applicant claims to have departed the country illegally having given up his passport to an agent on his return from [Country 1]. I accept that the circumstances of the applicant's return on temporary travel documents may mean that the authorities at the airport on his return will be aware that he spent time and sought asylum in Australia.

#### **Refugee assessment**

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25. 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**

26. 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.
27. I accept that the applicant's profile is as claimed, that he is a young Tamil male from the Northern Province of Sri Lanka. I accept that the applicant lived in an LTTE controlled area during the conflict and that he and his family members were imputed to have an adverse political opinion at that time due to their ethnicity. I accept that the applicant and his family were subject to routine monitoring, harassment and questioning by the SLA during the war and in the post war period. I do not accept that the applicant was ever genuinely suspected of supporting the LTTE or that he held a profile of concern to the authorities, noting he was never detained for more than a few hours and he was never arrested or sent for rehabilitation.
28. The applicant has confirmed that his family continue to live in the family home in [Location 1]. In the past he worked for his father on the farm. In these circumstances I consider that the applicant would most likely return to live with them at least until he is re-established in Sri Lanka. He has not indicated any intention to live elsewhere. I have turned my mind to whether the applicant would face a real chance of harm on his return to the Northern Province of Sri Lanka as a result of being a Tamil male from a former LTTE controlled area and whether his cumulative profile, background and previous experiences as set out in his claims, could result in him being imputed to be a supporter of the LTTE.
29. DFAT reports<sup>4</sup> that Tamils constitute the largest ethnic minority, at 15.3 per cent of the population. Most Sri Lankans tend to live within their own ethnic communities, although different ethnic groups live within close proximity in major urban areas. DFAT reports that the Northern Province has a majority Tamil population. DFAT reports<sup>5</sup> that the civil war, which continued until May 2009, displaced hundreds of thousands of people and killed tens of thousands of people on both sides. As noted above many Tamils, particularly in the north and east, reported being monitored, harassed, arrested or detained by security forces during the conflict. This is consistent with the experiences of the applicant and his family at that time.

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<sup>4</sup> DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244, 2.7

<sup>5</sup> Ibid. 2.2



30. DFAT report that there have been significant improvements in the security situation since the applicant departed Sri Lanka including in the Northern Province<sup>6</sup>. The number of incidents of extrajudicial killings, disappearances and abductions for ransom, including incidents of violence involving former LTTE members, has significantly reduced since the end of the war and DFAT understands that white van abductions and disappearances are no longer common and that Sri Lankans face a low risk of mistreatment on a day-to-day basis.
31. DFAT reports<sup>7</sup> that several local and international organisations have alleged torture by Sri Lankan military, intelligence and police forces, mostly from the period immediately following the war and involving people with imputed links to the LTTE. The 2015 OISL report found that ‘victims of war-related torture perpetrated by Government forces...were generally Tamil, often arrested and detained in Government controlled areas...under the PTA and the Emergency Regulations’. The OISL documented ‘particularly brutal use of torture by the Sri Lankan security forces’ in the immediate post-war period, following the LTTE’s surrender. Local sources told DFAT<sup>8</sup> that the police routinely mistreat suspects during criminal investigations, including as a way of extracting confessions. Sources also told DFAT that mistreatment was common in prisons. Mistreatment could range from a slap to the face to severe beatings, and, in some cases, may amount to torture. According to sources, mistreatment in prison, where it occurs, does not discriminate on ethnicity. While there are some reports of mistreatment of people in detention in certain circumstances, DFAT assesses that Sri Lankans face a low risk of torture overall. I do not accept that the applicant is wanted for any outstanding criminal activity or that he is suspected of working with the LTTE and that he is at risk of detention and torture.
32. The UK Home Office reports<sup>9</sup>, that although the LTTE no longer exists as an organised force in Sri Lanka, Sri Lankan authorities remain sensitive to the potential re-emergence of the LTTE throughout the country. The government’s present objective is to identify those who pose a threat to the government or a unified Sri Lanka, through involvement with Tamil separatist activities in the country or through links to the Tamil diaspora. Former LTTE leaders and former members suspected of committing serious criminal acts during the conflict are most at risk. The UK Home Office and DFAT assess that simply being of Tamil ethnicity, or a Tamil from an area formerly under LTTE control, no longer gives rise to a need for international protection, the rationale being that almost every Tamil who resided in those areas during the conflict had some sort of connection with the LTTE.
33. The Sri Lankan constitution provides for race equality<sup>10</sup> and DFAT assesses there are currently no official laws or policies that discriminate on the basis of ethnicity or language and that Tamils face a low risk of official or societal discrimination on the basis of ethnicity including in their ability to access education, employment or housing.
34. Recent developments in Sri Lanka’s political landscape are significant and indicative of a more positive future for Tamils. DFAT considered the improvements under the Sirisena government which was elected in January 2015. It found that his government prioritised human rights and

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<sup>6</sup> DFAT, “DFAT Country Information Report Sri Lanka”, 4 November 2019, 20191104135244, 4.29

<sup>7</sup> DFAT, “DFAT Country Information Report Sri Lanka”, 4 November 2019, 20191104135244, 2.43, 4.20; Freedom From Torture, “Sri Lanka – Update on torture since 2009”, 6 May 2016, CIS38A8012881; Freedom From Torture, “Tainted Peace: Torture in Sri Lanka since May 2009”, August 2015, CISEC96CF13070; International Truth & Justice Project (ITJP), “Unstopped: 2016/17 Torture in Sri Lanka”, 14 July 2017, CISED50AD4849; ITJP, “Silenced: survivors of torture and sexual violence in 2015”, 7 January 2016, CIS38A801275; ITJP, “Joseph Camp”, 16 March 2017, CISED50AD3592; ITJP, “Sri Lanka’s Special Task Force”, 23 April 2018, CIS7B83941895

<sup>8</sup> DFAT, “DFAT Country Information Report Sri Lanka”, 4 November 2019, 20191104135244, 4.24

<sup>9</sup> UK Home Office, “Country Policy and Information Note Sri Lanka: Tamil separatism. Version 5.0”, 15 June 2017, OG6E7028826; DFAT, “DFAT Country Information Report: Sri Lanka”, 23 May 2018, CIS7B839411064

<sup>10</sup> DFAT, “DFAT Country Information Report: Sri Lanka”, 23 May 2018, CIS7B839411064, 3.1

reconciliation and made significant progress, including: replacing military governors in the Northern and Eastern Provinces with civilians; returning some of the land held by the military since the conflict-era back to its former owners; and engaging constructively with the UN. DFAT reported that following its election, the Government also established an Office of National Unity and Reconciliation to develop a national policy on reconciliation and has committed to establishing a range of offices to give effect to reconciliation measures such as an Office on Missing Persons; an Office for Reparations; a Truth, Justice, Reconciliation and Non-Recurrence Commission; and a Judicial Mechanism with a Special Counsel<sup>11</sup>. The applicant has not indicated that this situation has deteriorated.

35. DFAT reported that since 2015, the government has reviewed some cases of persons still detained under the PTA and released some detainees, mostly Tamils. The government committed to repeal and replace the PTA with counter-terrorism legislation that is human rights compliant as part of its broader reconciliation and transitional justice undertakings. Further, DFAT reports that there is only one Tamil person currently still held in rehabilitation and notes 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<sup>12</sup>.
36. There have also been a number of symbolic changes in recent years in Sri Lanka, including changing the name of the day commemorating the end of the conflict from 'Victory Day' to 'War Heroes Remembrance Day' and giving official approval for memorial events to take place in the north and east. A local source told DFAT the atmosphere at war commemorations was 'constructive' and Tamils were increasingly comfortable marking such events. The June 2017 UK Home Office report on Tamil separatism opines that a person being of Tamil ethnicity would not in itself warrant international protection and neither, in general, would a person who evidences past membership or connection to the LTTE, unless they have or are perceived to have had a significant role in it; or if they are, or are perceived to be, active in post-conflict Tamil separatism and thus a threat to the state<sup>13</sup>. I am not satisfied that that the applicant holds such a profile.
37. I have had regard to a range of country information before me about return procedures<sup>14</sup>. I consider that the 2019 DFAT report provides the most recent description and evaluation of the process of returning to Sri Lanka and it has been prepared for the express purpose of assessing protection claims<sup>15</sup>. DFAT reports 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. Many others returned from the US, Canada, the UK and other European countries. Most returnees are Tamil. The government has consistently said that refugees are welcome to return to Sri Lanka and, in

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<sup>11</sup> DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244, 2.43-2.50; DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064

<sup>12</sup> DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244, 3.62

<sup>13</sup> UK Home Office, "Country Policy and Information Note. Sri Lanka: Tamil separatism. Version 5.0", 15 June 2017, OG6E7028826

<sup>14</sup> Including, Danish Immigration Service, "Human Rights and Security Issues concerning Tamils in Sri Lanka", 71, 01 October 2010, CIS19345; Immigration and Refugee Board of Canada, "LKA106007.E Sri Lanka: entry and exit procedures at international airports, including security screening and documents required for citizens to enter and leave the country; treatment of returnees upon arrival at international airports, including failed asylum seekers and people who exited the country illegally; factors affecting the treatment, including ethnicity and religion (2015-November 2017)", 10 November 2017, OG020B81694, LKA103815.E; UK Home Office, "Sri Lanka - Bulletin: Treatment of Returns", 1 December 2012, CIS28615; DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064; Sri Lanka Mirror, "Another Tamil returnee arrested", 1 July 2015, CXBD6A0DE16698; TamilNet, "16 Batticaloa Tamils arrested within last 100 days at Colombo airport", 3 May 2015, CXBD6A0DE6027

<sup>15</sup> DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244, 5.43-5.50

August 2016, released a 'National Policy on Durable Solutions for Conflict- Affected Displacement'. During a visit to Australia in February 2017, Prime Minister Wickremesinghe stated publicly that failed asylum seekers from Australia would be welcomed back to Sri Lanka. Human rights groups greeted this statement with caution.

38. DFAT reports that for returnees travelling on temporary travel 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. I do not consider that the applicant would hold one of these profiles of interest. The verification process often involves interviewing the returning passenger, contacting police in their claimed hometown, contacting claimed neighbours and family, and checking criminal and court records. All returnees are subject to these standard procedures, regardless of ethnicity and religion. DFAT understands detainees are not subject to mistreatment during processing at the airport.
39. The applicant claims to have departed Sri Lanka illegally and I am satisfied that there would not be a record of his departure. Where an illegal departure is suspected, returnees can be charged under the *Immigrants and Emigrants Act (I&EA)* and DFAT is not aware of mistreatment of returnees during this process. At the earliest available opportunity police transport the individual to the closest Magistrates' Court. The Court then makes a determination as to the next steps for each individual. Should a magistrate not be available – for example, because of a weekend or public holiday – those charged may be held at the airport for up to two days. Bail is normally granted to fare-paying passengers of a people smuggling venture. Bail conditions are discretionary, and can involve monthly reporting to police at the returnee's expense, including for those who have subsequently relocated to other parts of the country. The 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). A guilty plea will attract a fine, which can be paid in instalments, and the defendant is free to go. Where a passenger returnee pleads not guilty, the magistrate will usually grant bail on the basis of personal surety or guarantee by a family member. DFAT notes that, while the fines issued for passengers of people smuggling ventures are often low, the cumulative costs associated with regular court appearances over protracted lengths of time can be high. The Sri Lankan Government claims no returnee from Australia to Sri Lanka has been charged under the PTA.
40. DFAT has assessed that refugees and failed asylum seekers face practical challenges to a successful return to Sri Lanka due to the expenses incurred to undertake their outward journey and subsequent court costs, difficulty finding suitable employment and reliable housing and delays in obtaining official documentation. In 2016, the Sri Lankan Government undertook to recognise the educational and professional qualifications acquired by refugee returnees outside Sri Lanka. The IOM provides eligible returnees with livelihood assistance and makes regular visits to monitor the welfare of returnees. DFAT understands that some returnees, including returnees in the north and east with suspected LTTE links, have been the subject of monitoring by the authorities, involving visits to returnees' homes and telephone calls by the CID. DFAT understands that most returnees, including failed asylum seekers, are not actively monitored on an ongoing basis. DFAT is unable to verify whether monitoring, where it occurs, is specific to former LTTE cadres. DFAT is not aware of returnees, including failed asylum seekers, being treated in such a way that endangers their safety and security. Additionally, some refugees and failed asylum seekers reported social stigma upon return to their communities, including for being beneficiaries of financial reintegration assistance. DFAT assesses that returnees face a low risk of societal discrimination upon return to their communities.

41. The applicant was educated and Sri Lanka and worked both on the family farm and for a distant relative as [an Occupation 1]. In Australia he has been employed in [other occupations]. He has not pointed to any conditions he has that would prevent him from finding work in Sri Lanka. He has advised that he still has family in Sri Lanka. Overall, I do not accept that any challenges that the applicant may face in terms getting established, finding employment, or any social stigma he may experience as a returning asylum seeker from Australia, if it does occur, amounts to serious harm.
42. Overall, I accept that serious mistreatment of some Tamils with certain links is an ongoing issue in Sri Lanka but the weight of the evidence indicates that it has significantly reduced and that the chance of such treatment for being a Tamil or a Tamil male with the background, profile and type of experiences that the applicant has had are remote. Given the improved situation in the country, the length of time since the cessation of the conflict and the applicant's overall profile, I am not satisfied the applicant faces a real chance of any harm on his return in the reasonably foreseeable future for any of the reasons or combination of reasons set out above. Further I am not satisfied that the applicant faces a real chance of harm as a result of his departure from Sri Lanka or that he would face a real chance of serious harm as a result of seeking asylum and spending time in Australia or any combination or accumulation of those factors.
43. I am not satisfied that the applicant has a well-founded fear of persecution.

#### **Refugee: conclusion**

44. 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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45. 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**

46. 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.
47. 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.

48. Overall, I have accepted that, on his return to Sri Lanka, the applicant may face challenges as a returning asylum seeker as outlined above including in re-establishing himself and finding work and facing some social stigma in the community and as a person who has not lived in Sri Lanka for a long time. I am not satisfied that these difficulties and treatment would amount to significant harm as defined. I am not satisfied that it would amount to the arbitrary deprivation of life or the death penalty. I am also not satisfied that it would amount to being subject to torture, cruel or inhuman treatment or punishment or degrading treatment or punishment as defined in the Act. I am not satisfied that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Sri Lanka there is a real risk he will suffer significant harm.
49. In relation to the remainder of the applicant's claims, I have found that there is not a real chance that the applicant will face any harm on his return to Sri Lanka. Real chance and real risk involve the same standard<sup>16</sup>. On the same factual findings, I am similarly not satisfied that the applicant faces a real risk of suffering any harm on any of the remaining grounds he has raised or on those grounds cumulatively, including significant harm, should he be returned to Sri Lanka.

#### **Complementary protection: conclusion**

50. 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.

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<sup>16</sup> MIAC v SZQRB (2013) 210 FCR 505

## 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.