



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

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA20/08717

Date and time of decision: 9 November 2020 15:41:00  
S McNeill, 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 Sri Lankan national. He arrived in Australia [in] April 2013 and on 11 April 2017 he lodged an application for a Temporary Protection visa (TPV).
2. On 12 October 2012 a delegate of the Minister for Immigration refused to grant the visa.

### Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. Information in the review material indicates that on 2 August 2019 the Department wrote to the applicant requesting him to attend an interview to discuss his TPV application and protection claims on 27 August 2019. On the information before me it is not apparent that the applicant attended this interview.
5. A departmental file note dated 17 August 2020 (confirmed by the delegate in his decision) indicates that during a conversation with the applicant regarding his intention to withdraw his application; the applicant stated that he had spoken to the International Organisation for Migration (IOM) in February 2020 and he had all his documents ready for an Assisted Voluntary Return (AVR) to Sri Lanka. The only barrier to him leaving Australia and returning to Sri Lanka was available flights. The applicant stated he would like to withdraw his TPV application but could not do it via email. He requested the Department to send him the 1446 form (Withdrawal of visa application) to his postal address. This form was posted to the applicant on 19 August 2020 along with a Prepaid envelope.
6. On 11 September 2020 the Department received an incomplete 'Form 1446 – Withdrawal of a visa application' signed by the applicant. On 14 September 2020 the Department emailed the applicant advising him that the Form 1446 had been received and advised him that he needed to confirm the details of the visa application he was seeking to withdraw. Once this had been received the withdrawal request could be actioned. The delegate in his decision noted the applicant had no other pending applications.
7. On 18 September 2020 the applicant called the Department regarding his withdrawal. The applicant said his company was closing and he was about to become unemployed; he would therefore like to access Centrelink benefits. The Departmental officer told the applicant he could not answer questions about Centrelink and whether he could access benefits; he suggested he ask Centrelink instead. The officer advised the applicant an email had been sent and that he needed to respond to it as soon as he can. The applicant confirmed he received the email but said that he would not respond to the email until he started getting Centrelink benefits.
8. On 23 September 2020 the delegate wrote to the applicant in accordance to s.57 of the Act inviting him to comment on adverse information before the Department outlining the above history regarding the withdrawal of his application and his declared intention to return to Sri Lanka would be the reason, or part of the reason, for refusing to grant him a visa. This information indicated that he did not have any fears of returning to Sri Lanka and the information may lead the Department to find that his claims were not credible. The applicant

was given 14 days to provide his response. The delegate noted in his decision of 12 October 2020 that to date no response had been received from the applicant. The IAA sent an email to the applicant on 13 October 2020 advising the applicant the Department's decision had been referred to the IAA for review and outlined the review process. A Tamil translation was also included. A courtesy letter was also posted to the applicant's address. To date the applicant has not contacted the IAA.

9. I am conducting a fast track review under Part 7AA of the Act. Under s. 473DC of the Act, the IAA may in relation to a fast track decision, get any documents or information (new information) that were not before the Minister when the Minister made the decision under s.65; and the Authority considers may be relevant. The Authority may invite the applicant either orally or in writing to give new information in writing or at an interview. However, the IAA does not have a duty to get, request or accept, any new information whether the Authority is requested to do so by an applicant or by any other person, or in any other circumstances.
10. I have considered whether to invite the applicant to give new information either in writing or by way of an interview. I note the applicant has since February earlier this year intended to return to Sri Lanka and withdraw his application for protection despite the form being completed incorrectly. The applicant has not sought to provide any new information to the IAA, nor has he requested an invitation to be interviewed. While the applicant was not interviewed by the Department in relation to his claims, I have before me his detailed statutory declaration dated 7 April 2017 included with his TPV application, outlining his claims with for protection. The applicant received the assistance of the Asylum Seekers Resource Centre (ASRC) in preparing his application and they also provided a country information submission in support of his claims.
11. Furthermore, I also have before me in the review material the applicant's Arrival and Induction (arrival) interview of 31 May 2013 undertaken almost two months after he arrived in Australia. The interviewing officer took a detailed response from the applicant when asked why he left Sri Lanka, and this provides further background evidence. Taking all these factors into consideration, specifically the applicant's long-term desire to return home, his obvious ability to correspond with the Department in English, which indicates he understood the process he was involved in, that he was provided information about the process in his Tamil language, that he did not respond to the Department s.57 invitation to comment and that he has provided no further information to the IAA, I have decided not to invite the applicant to give new information.
12. While the applicant provided country information to support his claims for protection in a submission prepared by the ASRC along with his TPV application; all country information cited including the Australian Department of Foreign Affairs and Trade's (DFAT) country information report for Sri Lanka is from 2016 or earlier. The delegate found the applicant's claims not to be credible and rejected his claims regarding his fear of harm in Sri Lanka in their entirety without referring to any country information. I have decided to assess the applicant's claims for protection and given the lack of up to date country information, I have obtained the DFAT country information report with a more recent publication date of November 2019.<sup>1</sup> This is new information. This report is informed by DFAT's on-the-ground knowledge and discussions with a range of sources in Sri Lanka. It takes into account relevant and credible open source reports, including those produced by the US Department of State, the UK Home Office, relevant UN agencies, leading human rights organisations such as Human Rights Watch, Amnesty

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

International and Freedom House; Sri Lankan non-governmental organisations (NGOs); and reputable news organisations. Taking the above factors into account, I am satisfied there are exceptional circumstances to justify its consideration.

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

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

- He was born in [year] in [location], [District 1], Eastern Province of Sri Lanka and is of Tamil ethnicity and a Hindu. He is married with one daughter.
- He grew up in an LTTE controlled area. He and his father had a store and the LTTE would purchase food from them, spending between eight to 10 lakh per week and his family was always interacting with LTTE soldiers for business.
- He has been beaten twice by the Karuna group. In 2003, after the Karuna separated from the LTTE, the two groups were fighting in his area. They came to his shop and told him not to sell anything over 10,000 rupees to anyone. He argued with them; they took him in their vehicle, tied him to a tree, beat him with a cable injuring his back. He still has pain from this incident.
- In 2006, fighting started [distance] from his shop. One night about 50 LTTE came to their shop and told them the Sri Lanka army (the Army) and police were coming; they wanted to flee but the LTTE told them to stay.
- In the morning there were increased numbers of LTTE vehicles and people. His elderly father was sent to an Army controlled area. The LTTE asked for food and in exchange they would supply him with LTTE timber later. He said to pay him in cash later.
- The LTTE left and the Army eventually took over their village of [Village 1]. He and his family lived in a refugee camp in the Army controlled area. He went to look for a place to rent.
- At the time the Karuna group heard he had given food to the LTTE for free. Five to 10 people from the Karuna group came looking for him in the camp but they had already moved to a rented house. They bulldozed his store. He believes, had they found him, they would have killed him as they were killing others suspected of supporting the LTTE.
- He moved to another town [Village 2], married and his father helped him establish another store. The Karuna group passed his details to the Criminal Investigation Division (CID). The CID came and questioned him about his LTTE connections and his support for them.
- Between 2007 and 2012 the Karuna group would come to his store and forcefully take goods worth about four to 5000 Rupees. They never paid him. He told the police. The police said you have been giving goods free to the LTTE and they expect the same. The police warned him not to complain.
- In September 2012 two to three Karuna group members came to his store asking for 50 to 60,000 rupees worth of goods for a sports festival. He said he could only give a small amount. They came into the store and tried to assault him, but four to five customers prevented it. The men told him to come to their office the following day.
- He went to the Karuna paramilitary camp the next day with his mother who was made to wait outside. He was physically assaulted and accused of giving the LTTE goods for free. They demanded free goods too and he explained this would put him out of business. They

took his ID and told him to return the next day. He was too afraid. His cousin with a store and another local brick trader had similar problems; they are both still missing.

- Two or three days later, Karuna group members broke into his home early in the morning broke with the intention of killing him. He escaped and went into hiding in several locations. From September 2012 to April 2013, he hid in the jungle and during this time Karuna group members came looking for him and tried to assault his wife.
- In April 2013 he decided it would be safer to leave Sri Lanka; after he went to Australia, Karuna group members came looking for him.
- He fears the Karuna group would still come after him as they are based in his area; they know everyone and have his ID details and know where his shop is. They still kill and abduct people. Anyone who used to help the LTTE or refuse to help the Karuna group is targeted.
- The Karuna group still trouble his wife and cousin at the shop he owns asking where he is; they are responsible for a lot of killings, beatings and abductions in the [District 1] area.
- He has asked the police to protect him, but they want Tamils to die and do not care.
- The Karuna group is now part of the government who have told them to do what they want if they come across anyone who helped the LTTE.
- The Sri Lankan government do not want Tamils to thrive in education or economically; there is discrimination against Tamils.
- If he relocated the widespread Karuna group would still find him. He does not speak Sinhalese which would impact on his ability to find work. It would not be safe for his wife and daughter to live outside a Tamil majority area. Tamils are at risk of rape and murder outside a Tamil majority area due to racial discrimination and their pro LTTE imputed political opinion. He would want to visit his parents in [District 1] and the Karuna group would find him.

## **Refugee assessment**

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14. 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**

15. 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.
16. There is no issue as to the nationality of the applicant. He has consistently claimed to be a Sri Lankan national and has provided copies of his Sri Lankan birth certificate, driving licence, national ID card and passport bio data page in support of this. I accept the applicant is a national of Sri Lanka and that Sri Lanka is the receiving country for the purpose of this review.
  17. Based on the consistent documentary evidence contained within the applicant's arrival interview of 31 May 2013 and his TPV application of 11 April 2017, I accept the applicant's background as follows: The applicant was born in [location], [District 1], Eastern Province of Sri Lanka in [year]; he is of Tamil ethnicity and a Hindu. The applicant married his wife in 2005, moved to [Village 2] and their daughter is [age] years old. The applicant studied up to year 10 then worked as a business owner with a store but also worked as a [Occupation 1]. His wife, daughter, parents and [number of] siblings all currently reside in Sri Lanka in [District 1]. The applicant has not claimed to fear harm on account of his Hindu religion, and I have not considered this matter further.
  18. I accept the applicant and his father did business with the LTTE given the applicant grew up in a former LTTE controlled area and that his family were also interacting with LTTE soldiers. According to the DFAT the majority Tamil civilian populations of the areas controlled by the LTTE were required to interact with the LTTE as a matter of course.<sup>2</sup> Country information also indicates government forces re-took the eastern part of the country from the LTTE in July 2007 and I accept the after the applicant and his family spent a period of time in a refugee camp in an Army controlled area.<sup>3</sup>
  19. The applicant's core claims are based on his fear of harm from the Karuna group. The applicant claimed he was beaten by Karuna group in 2003 and that in 2006 they bulldozed his shop when they had heard he had given the LTTE food and thought it was for free. The applicant claimed the Karuna group passed his details to the CID who then questioned him about his support for the LTTE. Between 2007 and 2012 the Karuna group members took goods from his shop in a forceful manner. In September 2012 two to three Karuna group members came to his shop, then asked him to come to their camp and he was assaulted in relation to provided goods to the LTTE. A few days later they came to his house and he fled to the jungle where he hid until April 2013 then left for Australia. After he went to Australia, Karuna members have come looking for him and they still trouble his wife and cousin at the shop he owns.
  20. I accept as plausible during the conflict and immediately following its end, the applicant had various interactions with the Karuna group stemming from their desire to take free goods from the applicant and accuse him of assisting the LTTE. While the applicant claimed Karuna group members assaulted him in 2003 and he still suffers pain from this incident, the applicant has not provided any medical evidence to support this. I am of the view the Karuna's groups exchanges with the applicant were opportunistic in nature and their desire to obtain goods

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<sup>2</sup> Department of Foreign Affairs and Trade (DFAT), "Country Information Report Sri Lanka", 4 November 2019, 20191104135244.

<sup>3</sup> Ibid.

without paying for them. Country information observes the LTTE surrendered in May 2009 bringing to an end Sri Lanka's 26 year civil war.<sup>4</sup> I am not persuaded the Karuna Group members assaulted him, threatened him with harm or came looking for the applicant in September 2012 in order to kill him because of his failure to give them 50 to sixty thousand rupees or because he sold goods in his store to the LTTE or that he hid in the jungle for eight months prior to his departure from Sri Lanka. The applicant claimed the Karuna group went to his nephew who had worked in his ship asking for him and that they also attempted to assault his wife. I am not satisfied by these events. I am of the view if the Karuna group members intended to pursue the applicant they would have taken more aggressive action against his nephew and on the limited information before me, it is unclear how they attempted to assault his wife or that she was able to prevent this assault. I find the applicant has exaggerated the Karuna groups interest in him given these events allegedly occurred three and a half years after the conflict ended. I accept it as plausible that soon after the applicant departed members of the Karuna group came looking for him or troubled his wife and cousin working in this shop, but the applicant has not claimed they were harmed or threatened by them. I am again persuaded that their intentions would be to obtain goods for free not because of the applicant's history of selling goods to the LTTE six years earlier.

21. The security situation in Sri Lanka, particularly in the north and east, has improved significantly since the end of the civil war in May 2009. The Sri Lankan Government exercises effective control over the entire country, including Tamil-populated areas.<sup>5</sup> Former Tamil paramilitary groups who were aligned with the previous government during the war, like the Tamil Makkal Viduthalai Pulikal (TMVP, formerly the Karuna Group) and the Eelam People's Democratic Party (EPDP), remain active, but have disarmed and are now engaged in politics. The TMVP, which operates in the east, registered as a political party in 2007. It won a majority in provincial council elections in the Eastern Province in 2008 and some seats in the February 2018 local government elections. The TMVP's founder, Vinayagamoorthy Muralitharan (nom de guerre Karuna Amman), the LTTE's senior commander in the Eastern Province before his defection to the government in March 2004, served as a member of parliament for the UPFA/SLFP from 2008 to 2015 and as Deputy Minister of National Integration under former President Rajapaksa (Muralitharan launched a new political party, the Tamil United Freedom Party, in February 2017).<sup>6</sup>
22. The Karuna Group/TMVP and the EPDP have been accused of committing serious human rights violations both during and after the war. The OISL found that both groups committed – with the alleged collusion of the authorities – unlawful killings and enforced disappearances of suspected LTTE members, attacked and kidnapped civilians, and recruited children during the war. Post-war, the TMVP has been accused of harassing and intimidating suspected former members of the LTTE and supporters of the TNA and UNP, its political rivals.<sup>7</sup>
23. DFAT understands the influence of the TMVP and the EPDP has waned considerably since the government of Sirisena took office in 2015, and they no longer maintain armed wings. Local sources told DFAT that the TMVP 're-emerged' and was visible in the east following the appointment of Rajapaksa, to whom it is aligned, as prime minister on 26 October 2018, although there were no reports of violence attributed to it. According to local sources, while some Tamils, particularly those with past links to the LTTE, continue to fear the TMVP and the EPDP, these groups no longer pose a major concern. Sources told DFAT that the TMVP had no formal presence in the north. DFAT assesses that, under the current government, the TMVP

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<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

and the EPDP present a low threat of violence and intimidation to members of the Tamil community.<sup>8</sup>

24. A report covering the period 2002 to 2011, found frequent occurrences of extrajudicial killings, disappearances and kidnappings for ransom during the war, particularly in the north and east. The report largely attributed these to government forces, the LTTE and paramilitary groups, although some related to business or personal disputes. 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.<sup>9</sup>
25. I note in his TPV application, the applicant claimed that he missed his family and wanted to return but they told him it was still not safe. In his arrival interview the applicant also stated their (Karuna group) were decreasing and if their numbers decreased, he would be safe. This statutory declaration was signed in April 2017. The applicant did not respond to the Department's letter of 23 September 2020 and he had not put forward any further evidence or information to the IAA to substantiate his claims. Given the applicant's intention to return home, his desire to withdraw his TPV application, his failure to respond to the Department's letter or communicate with the IAA, I am not satisfied the applicant continues to fear harm from the Karuna group (or the TMVP.)
26. Taking into consideration the significant passage of time since the war ended and eight years since the applicant departed Sri Lanka, that the paramilitary groups have disarmed and are now engaged in the political process, that these groups no longer pose a major concern and the applicant was not a former LTTE member, nor has he claimed to support the TMPV's political rivals, that DFAT assesses the TMVP present a low threat of violence and intimidation to members of the Tamil community and taking into account the applicant's desire to return home to Sri Lanka, I am not satisfied the applicant faces a real chance of any harm from the Karuna group members (or TMVP) because of his past interactions with the LTTE as a store owner or businessman or because he refused to help the Karuna group or for any reason. Given the paramilitary groups have disbanded, I am also not satisfied there remains throughout Sri Lanka or [District 1] from whence the applicant originates, Karuna paramilitary camps.
27. I have accepted the applicant is an ethnic Tamil from [District 1] in the Eastern Province of Sri Lanka. The applicant claimed the police would not protect him from the Karuna group, they wanted Tamils to die and didn't care what happened to him. The Sri Lankan government has tried to keep the Tamil people under their control. They do not want Tamil people to thrive in education or economically. Discrimination like this against Tamils has been happening for a long time. This is still happening, even if Tamil people are in government, they are under government control and do not represent all Tamil people properly.
28. Tamils, after Sinhalese, are the second largest ethnic group in Sri Lanka and comprise 93.8 per cent of the Northern Province. The Sri Lankan Constitution provides that 'no citizen shall be discriminated against on the grounds of race, religion, language, cast, sex, political opinion, place of birth or any such grounds.'<sup>10</sup> Since the end of the civil war, the LTTE has not carried out attacks since 2009 and DFAT assesses that the LTTE no longer exists as an organised force inside Sri Lanka. Following the end of the conflict government security forces arrested and detained large numbers of LTTE members; security forces questioned and monitored many civilians for possible LTTE activity, and for civil resistance or anti-government sentiment. Although not officially mandated, in many areas the military took a visible and active role in

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<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.



civilian life. Since 2015, the government has publicly committed to reducing military involvement in civilian activities. The government no longer restricts travel to the north and east. It removed checkpoints on major roads in 2019, although some were re-established following the 2019 Easter Sunday terrorist attacks, these have since been removed.<sup>11</sup>

29. Members of the Tamil community in the north and east continue to claim that authorities monitor public gatherings and protests, and practice targeted surveillance and questioning of individuals and groups. Security forces are likely to monitor people associated with politically sensitive issues related to the war, including missing persons, land release and memorial events. The previous government relaxed some commemorations of events associated with the Tamil's armed struggle for statehood. While sources told DFAT there is monitoring by the authorities, Tamils have been free to hold public ceremonies marking 'Great Heroes Day' since 2016 and were increasingly comfortable marking such events.<sup>12</sup>
30. DFAT assesses that, while monitoring of Tamils in day-to-day life has decreased significantly under the government, surveillance of Tamils in the north and east continues, particularly those associated with politically sensitive issues. Physical violence against those being monitored is not common. Whilst the country information does indicate Tamils, particularly in the north and east, may face harassment including monitoring, I am not satisfied this would amount to serious harm.
31. DFAT confirms the Sri Lankan authorities remain sensitive to the potential re-emergence of the LTTE throughout the country. DFAT assesses that Tamils are no longer considered vulnerable to mistreatment and torture by virtue of their ethnicity or LTTE links and the authorities were not actively looking for non-rehabilitated former LTTE members. One rehabilitation centre (of originally 24) remains open and currently houses one former LTTE member.<sup>13</sup>
32. I note the applicant completed his schooling in year 10. The applicant did not claim that he was prevented from continuing his education nor has he claimed that his [age]-year-old daughter is being denied an education on account of her Tamil ethnicity. Regardless of the difficulties he faced in the past running his store and business, his wife and cousin continue to operate this business despite the applicant being in Australia. The applicant has not claimed to have been involved in Tamil politics or separatist activities either in Sri Lanka or Australia nor has he claimed that any of his family members are. The applicant claimed that after the Karuna group gave his details to the CID, the CID came and questioned him about his support for the LTTE. The applicant did not otherwise claim to have been harmed by the CID or Sri Lankan authorities or that he was of any ongoing interest to them because of his past interactions with the LTTE. I am not satisfied the applicant will be imputed to support the LTTE or be associated with it based on the fact he is ethnically Tamil given his lack of past individual involvement or direct association with the LTTE, other than the fact he sold goods to the LTTE from his store, and on the evidence before me, he is not involved in Tamil separatism.
33. The Prevention of Terrorism Act (PTA) was enacted as a temporary measure in 1979 to counter terrorism and was made permanent in 1982. During the war the authorities detained more Tamils under the PTA than any other ethnic group. Whilst the PTA remains legally in force it was effectively suspended between 2016 and 2018 following the government commitment to repeal and replace it; however, during this time it was still used sporadically. It was used to detain persons following the 2019 Easter Sunday attacks. Country information indicates it was the Muslim community which was targeted by the authorities following the Easter Sunday

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<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

attacks. The Muslim community has come under increased scrutiny as part of the government's counter terrorism efforts following the Easter Sunday attacks monitoring signs of radicalism and 2,000 Muslims were questioned and, in many cases, detained for 'extremism' on the basis of limited evidence. Muslims have reportedly been targeted for vehicle searches at security roadblocks throughout the country. In early July 2019, police said 575 people had been arrested under the PTA; the majority being 537 Muslims, then 25 Sinhalese and 13 Tamils, while hundreds more had been arrested under emergency regulations. Country information indicates more Sinhalese and Muslims were arrested than Tamils.<sup>14</sup>

34. DFAT assesses that non-Muslim Sri Lankans, including Tamils, face a low risk of official or societal discrimination, including in their ability to access education, employment and housing. Some members of the Tamil community report discrimination in employment, particularly in relation to government jobs. Even the Tamil dominated north and east have relatively few public servants. DFAT assesses there is no official discrimination on the basis of ethnicity in the public sector employment. Rather, Tamils under-representation is largely the result of language constraints and disrupted education because of the war. Tamils have a substantial level of political influence, and their inclusion in political dialogue has increased since the change of government in 2015. DFAT assess there are no barriers to Tamil political participation.<sup>15</sup>
35. I accept there are still reports of continued human rights violations and the authorities acting with impunity in Sri Lanka. Overall, the security situation has improved considerably since the end of the conflict, particularly amongst the Tamil population. I am not satisfied that Tamils are being systematically targeted and subjected to persecution because of their ethnicity or provenance. I am not satisfied the applicant faces a real chance of any harm from the Sri Lankan authorities now or in the reasonably foreseeable future on his return to Sri Lanka on the basis of his ethnicity, or status as a Tamil male from the Eastern Province.
36. Although the applicant did not raise a claim of harm from returning as an illegal emigrant and asylum seeker it arises on the facts. On the consistent documentary evidence before me, I accept that the applicant departed Sri Lanka illegally by boat without his Sri Lankan passport. The applicant has claimed asylum in Australia, and I accept that on his return to Sri Lanka, he will be identified by the Sri Lankan authorities as a (Tamil) asylum seeker or failed asylum seeker or returnee from a western country who departed illegally.
37. Sri Lanka's Constitution entitles any citizen 'the freedom to return to Sri Lanka'. The Immigrants and Emigrants Act (the IE Act) governs exit and entry from Sri Lanka and makes it an offence to depart other than via an approved port of departure, such as a seaport or airport. Returnees who depart Sri Lanka irregularly by boat are considered to have committed an offence under the IE Act. According to DFAT, such persons are very likely to be questioned at the airport, enquiries undertaken and charged with an offence under the under the IE Act. DFAT reports that passengers on a people smuggling venture (such as the applicant) are fined, usually between AU\$122 and AU\$162, and are not subject to a custodial sentence. It is possible that as part of this process, a returnee may be held for several days at the airport if a magistrate is unavailable, but the country information indicates that they are not subject to mistreatment at the airport. It also indicates returnees are treated the same regardless of their ethnicity and religion.<sup>16</sup> There is information in the review material of failed asylum seekers being more likely to be readily associated with the LTTE either by virtue of the fact that they have sought asylum

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<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

or by presumption of their involvement with in Tamil diaspora activities which the Sri Lankan authorities view as being supportive of the LTTE; however, this information is from 2012 and is over eight years old.<sup>17</sup>

38. I accept the applicant will be subject to questioning, a relatively brief period of detention and a fine upon his return to Sri Lanka. In any event, it is clear the IE Act provisions that deal with a breach of the departure laws from Sri Lanka are not discriminatory on their face, nor do they disclose discriminatory intent nor are they implemented in a discriminatory manner. I do not accept that these processes and penalties rise to level that may be regarded as serious harm in this case. I also find the imposition of a fine, when combined with the brief detention, does not of itself constitute serious harm.
39. The Sri Lankan government has consistently stated refugees are welcome to return to Sri Lanka. DFAT notes that despite positive government sentiment, refugees and failed asylum seekers face practical challenges to successful return and most returnees have incurred significant expenses or debt to undertake their journey. Some refugees reported social stigma on return to their communities. Overall DFAT understands that societal discrimination is not a major concern for returnees, including failed asylum seekers. Many returnees have difficulty finding suitable employment and reliable housing. DFAT understands some returnees including returnees to the north and east with suspected LTTE links have been subject to monitoring including visits and telephone calls from the CID; most are not actively monitored on an ongoing basis.<sup>18</sup> I find the applicant does not have a profile to warrant any attention from the authorities on this basis and I am not satisfied he will be subject to monitoring on his return. The applicant has also not claimed to owe anyone money for his travel to Australia.
40. The applicant is [age] years old. I am satisfied the applicant will return to [District 1] in the Eastern Province, where he originates from and has always lived, and where wife, daughter, his parents and siblings continue to reside. The applicant has recent work experience in Australia, has previously worked in Sri Lanka farming and where he still owns his shop according to his written claims. The applicant has maintained daily contact with his wife, daughter and parents. The applicant has not claimed they are homeless. I accept the applicant may face some practical challenges re-integrating but overall, I am not satisfied that any challenges the applicant may face re-establishing himself in Sri Lanka or any social stigma he may experience as a returning asylum seeker or returnee from Australia amounts to serious harm for the applicant.
41. I am not satisfied the applicant faces a real chance of persecution on the basis of being a returned (Tamil) asylum seeker/failed asylum seeker from Australia who departed Sri Lanka illegally, now or in the reasonably foreseeable future
42. Considering the applicant's circumstances and profile as a whole and in the context of the current country conditions in Sri Lanka, I am not satisfied that the applicant faces a real chance of persecution now or in the reasonably foreseeable future. The applicant does not have a well-founded fear of persecution within the meaning of s.5J.

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<sup>17</sup> 'LKA105041.E Treatment of suspected members or supporters of the Liberation Tigers of Tamil Eelam (LTTE), including information about how many are in detention; whether the government continues to screen Tamils in an attempt to identify LTTE suspects', Canadian IRB: Immigration and Refugee Board of Canada, 11 February 2015, OGFDFC61A5.

<sup>18</sup> DFAT, "Country Information Report Sri Lanka", 4 November 2019, 20191104135244.

### **Refugee: conclusion**

43. 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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44. 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**

45. 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.
46. 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.
47. I accept that the applicant may face some treatment and challenges as a returnee to the east or as a failed asylum seeker. I am not satisfied that there is a real risk the applicant will be subject to the death penalty or will be arbitrarily deprived of his life or will face torture. Nor am I satisfied in relation to this treatment and challenges that there is any intention to inflict severe pain or suffering, pain or suffering that could reasonably be regarded as cruel or inhuman in nature or to cause extreme humiliation. I am not satisfied the applicant faces a real risk of cruel or inhuman treatment or punishment or degrading treatment or punishment.
48. I have otherwise concluded that the applicant does not face a real chance of any harm for the reasons claimed. Given 'real chance' and 'real risk' involve the same standard, I am not satisfied he faces a real risk of harm on these bases. For the same reasons as given above, I am not satisfied that there are substantial grounds for believing that, as a necessary consequence of the applicant's removal to Sri Lanka, he will face a real risk of significant harm.

### **Complementary protection: conclusion**

49. 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 vis a.

## 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.