



**Australian Government**  

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**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA21/10218

Date and time of decision: 22 March 2022 11:45:00  
D Hughes, 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 citizen of Sri Lanka. He applied for a protection visa on 8 June 2016. A delegate of the Minister for Immigration refused to grant the visa on 16 December 2016.
2. This matter was previously before the IAA. A decision to affirm the delegate's decision was made on 18 April 2017 (IAA16/01655). The matter was remitted to the IAA by consent orders made in the Federal Circuit and Family Court of Australia [in] December 2021.

### 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. The applicant provided his first submission to the IAA on 11 January 2017.
5. The submission included new information that was not before the delegate, specifically a claim that on [a day in] November 2016 the Sri Lankan Army (SLA) visited the applicant's family home in search of him. The applicant contends he was not aware of this information until he received the delegate's decision and spoke to his father who advised him of this incident.
6. The applicant also provided two new letters of support. The first letter is dated 24 December 2016 and written by a Justice of the Peace from the applicant's home village. The second is dated 26 December 2016 from a 'Grama Naladari' – an official from the applicant's village. Both letters are in large part identical in content. They are also visually very similar, albeit the stamps are different. Both refer to SLA visits to the applicant's home in November 2016. In his second submission to the IAA, the applicant provided a third letter, dated 12 January 2022, from the Grama Naladari. It refers to a further visit by the authorities (this time the Terrorist Investigations Unit).
7. In terms of the first two letters, I have some concerns about the documents given how similar they are in form and content. I do not consider the letters are spontaneous firsthand accounts – if they were, I do not accept they would be so similar in content. I consider both documents were prepared with the assistance of the applicant or his family, however this does not necessarily mean the documents are not genuine. The third letter is different in form, but I consider it too was prepared with the assistance of the applicant or his family.
8. The applicant contends that the first two letters could not have been provided earlier, as he was only advised of the November 2016 incident after the delegate's decision. Given the date of the letters, I accept each of three letters meet s.473DD(b)(i). However, having regard to his evidence that he remains in regular contact with his family, the late raising of the claim itself does raise some concerns for me. The applicant has not satisfied me that s.473DD(b)(i) is met in terms of the specific claim.
9. Nevertheless, in terms of the supporting documents and the claim itself, the applicant has satisfied me the information is, on its face, credible personal information, which was not previously known and, had it been known, may have affected the consideration of the applicant's claims. I consider it is credible in the sense that it is at least capable of being

believed and goes towards the question of whether he has an ongoing profile. I consider the letters and timely advice about the new claims may have been matters outside of his control. I am satisfied that there are exceptional circumstances to justify considering the new information.

10. The first submission included a legal submission from the applicant's former representative. To the extent the submission refers to the applicant's existing claims and information that was before the delegate, and responds to concerns with the delegate's decision, I am satisfied this is not new information and it has been considered in this assessment.
11. That initial IAA submission included reference to new country information (Amnesty International, 7 October 2014; Amnesty International, 24 February 2016; and Freedom House, 27 November 2015). Each of these documents predate the delegate's decision of 16 December 2016. No reason has been provided as to why these documents could not have been provided to the delegate before she made her decision. There is no contention these reports contain credible personal information in the relevant sense. The applicant has not satisfied me that the information could not have been provided to the Minister before the Minister's delegate made the decision. The applicant has not satisfied me the information is credible personal information which was not previously known and, had it been known, may have affected the consideration of the applicant's claims. I have not considered these reports.
12. One report from the UK Home Office is also referenced in the submission, but the hyperlink no longer works. Reference is made to a UK Home Office report from 2016 in the submission, which was before the delegate. The IAA had previously identified that the hyperlinked document was in fact the UK Home Office 'Sri Lanka, Tamil Separatism Version 4.0' report (March 2017). The 2016 version of this report was before the delegate.
13. The IAA had previously obtained the then most recent report on Sri Lanka from the Department of Foreign Affairs and Trade (DFAT), dated 24 January 2017. As discussed below, I have obtained the December 2020 version of the DFAT report.
14. There is no suggestion the country information includes credible personal information in the relevant sense. Given the publication date, the applicant has satisfied me that the 2017 UK Home Office report could not have been provided to the Minister before the Minister's delegate made the decision. The same is true of the 2017 DFAT report. While these reports are relevant, I note that I have obtained the most recent version of these reports from 2020 and 2021. It follows that I am not satisfied that there are exceptional circumstances to justify considering the new information in the 2017 reports.
15. Given the time that had elapsed since the initial delegate's decision was made, I considered there are exceptional circumstances to have regard to the latest country reports on Sri Lanka from the DFAT and the UK Home Office.<sup>1</sup> I note earlier versions of these reports were relied on by the delegate.
16. On 17 February 2022, I provided that new information to the applicant and invited him to provide any new information and comment. The applicant provided responses to the IAA on 28 February 2022 and a revised submission in response on 1 March 2022. There was some discussion about the provision of hyperlinks in the submission. The applicant indicated he

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<sup>1</sup> DFAT, 'Country Information Report - Sri Lanka', 23 December 2021; UK Home Office, 'Country Policy and Information Note. Sri Lanka - Tamil Separatism', Version 7.0, 17 June 2021; UK Home Office, 'Country Policy and Information Note Sri Lanka: Tamil Separatism', May 2020.

understood these may not be considered. I consider the applicant fairly summarised the information from the links in the submission.

17. The applicant is presently unrepresented. Over five years have passed since the delegate's original decision, which has included changes of government and developments in the security environment within Sri Lanka. His submission in large part extracts the country information he is relying on, which refers to matters from 2020 and 2021. There is no suggestion the country information contains credible personal information in the relevant sense, however the applicant has satisfied me that the information could not have been provided to the Minister before the Minister's delegate made the primary decision. In all the circumstances, I am satisfied that there are exceptional circumstances to justify considering the new information in the invitation, and the totality of the applicant's response.

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

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18. The applicant's claims can be summarised as follows:
  - He is a Tamil Hindu, born in Vavuniya District, Northern Province in June 1995.
  - He lived and studied in [Town 1] between [specified years]. His studies were interrupted when his family was displaced, but he resumed his studies when he and his family resettled in [Town 1] in 2010, and did so until 2012.
  - Between 1997 and early 2009, the applicant and his family were displaced several times by the ongoing civil war between the Sri Lankan Army (SLA) and the Liberation Tigers of Tamil Eelam (LTTE). They lost their home and possessions. The applicant witnessed many terrible events while living in the conflict zone.
  - [In] March 2009, the applicant and his family were taken by bus to an IDP camp near [City 1]. They remained at the IDP camp for ten months. Conditions were overcrowded and sanitary facilities, food and fresh water were in short supply.
  - As the applicant's father was born in an LTTE-controlled area and the family had most recently come from an LTTE-controlled area, the Criminal Investigation Department (CID) interrogated the applicant's parents for three consecutive days at the IDP camp. The CID accused them of supporting the LTTE, which they denied. The applicant's father suffered beatings. They were released, and the CID did not have any further interest in his parents.
  - In January 2010, the applicant and his family were released from the IDP camp and returned to [Town 1]. The applicant resumed his studies, and his father rebuilt their home, which had been damaged in the conflict.
  - From 2011, the SLA in [Town 1] photographed families and kept information about the local households.
  - His father owned a business selling [products] and the SLA would demand free goods. He had no choice but to provide them the goods.
  - Between 2011 and 2012, the applicant faced ongoing harassment and abuse from the SLA in [Town 1]. The applicant would face harassment while travelling to and from school and his private studies. The applicant and other Tamil students would be accused of being LTTE supporters. They would be stopped and questioned, and sometimes prevented from going to class.

- The applicant experienced harassment while shopping for his family. They would ask him for money for cigarettes. If he had no money, he would be hit and slapped and told to attend the camp to undertake labour.
- At the camp, he would be forced to clean the area of grass, and water the plants. On more than 50 occasions he was forced to do labouring work and purchase cigarettes for the SLA.
- At the camp he witnessed alcohol and gambling and sometimes witness young Tamil women being forced to sit with the soldiers. He saw a woman assaulted by the SLA, but was unable to assist her. On another occasion, he witnessed a female classmate sexually assaulted at the camp. The applicant was also forced to view pornographic imagery several times. On one occasion he was tied to a chair and forced to view the imagery.
- He was also forced to drink alcohol on several occasions and made to sit with the officers while they gambled. He was pushed around and beaten. On one occasion there was a confrontation at the camp. The applicant suffered a foot injury when a bottle was thrown at him. He was pushed around by a drunk soldier, who also pressed his throat as if he would be strangled.
- On another occasion, he was stopped by the CID who questioned him about his LTTE involvement. They asked him where the weapons were kept and ordered him to attend the camp to provide labour. They said he would be forced to do that until he signed a confession.
- He feared telling his parents about what was happening at the camp. The applicant had been taking money from his family to purchase the cigarettes. His mother found out and the applicant told his parents about what happened. His father was very upset at what was happening at the camp.
- The applicant knew of other Tamil students who had been detained at the camp, beaten and sexually abused. He was told that when he finished school, he would no longer have the protection of the school principal. His father told him he would need to move. The applicant was not able to focus on his studies and was unable to complete his A levels.
- In August 2012 the applicant saw a poster on the ground, which [featured] the former LTTE leader, Prabhakaran[...]. An LTTE logo was printed on the top of the poster. The applicant noticed more of these posters attached to trees, and he started taking them down because he did not want the SLA to punish local residents. Two uniformed soldiers came along the road and asked the applicant what he was doing. The applicant explained he was removing the posters, not putting them up, but the soldiers were angry and ordered him to take them to his house where they verbally abused the applicant and his mother and then left.
- The next day two men, one SLA and one CID, were standing outside the SLA camp as the applicant came past. They said they knew the applicant had been putting up pro-LTTE posters and accused him of supporting the LTTE. They said if the applicant confessed, he would not face future problems, but if he did not, he would be beaten until he did. They told the applicant to report to the camp at 10am the following morning and warned him not to tell anyone.
- When the applicant returned home and told his parents, his father called his friend in [City 1] who immediately arranged the applicant's journey to Australia.

- The applicant travelled to Colombo where he stayed for three nights and on [a day in] September 2012, he departed Sri Lanka by boat.
- Since the applicant has been in Australia the SLA has been to his family home, and his father's business, in search of him. The applicant's father told them he was in Colombo looking for work.
- The CID have also conducted a visit to his family home to take a new family photo, and noticed he was missing. The applicant's father told them he was in Australia.
- The SLA continue to take goods from his father's shop and his mother escorts his [siblings] to school because of the soldiers.

## **Factual findings**

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19. The applicant has been consistent about his identity. He has provided documentary evidence, including a copy of his national identity card. The applicant spoke with the assistance of a Tamil interpreter at the visa interview.
20. Based on the evidence before me, I am satisfied the applicant is a citizen of Sri Lanka born in Vavuniya District, Northern Province, and that he last resided in [Town 1]. His family continue to live in that area, and I am satisfied this is the area he would return to in Sri Lanka. I am satisfied he is of Tamil ethnicity and the Hindu religion. Based on his evidence, I find the applicant was an unaccompanied minor when he first arrived in Australia.
21. I have only summarised the applicant's claims above. I found the applicant's account of his and his family's experiences, hardship and trauma during the conflict and its aftermath to be detailed and credible. I also found his personal experiences of harm and mistreatment at the hands of the SLA and the CID to be plausible and consistent with historical country advice before me.<sup>2</sup> With limited exception, I accept the applicant's past claims as summarised above.
22. My concerns in relation to the applicant's claims are fairly limited. They relate to the incident with the LTTE posters prior to his departure, and more specifically whether he had an adverse profile when he left Sri Lanka and whether his family have been visited and threatened since then.
23. I consider the applicant was consistent in his evidence about the incident with the posters itself, and I found his account to be plausible. I accept the applicant was removing pro-LTTE posters when he was caught by SLA soldiers. I note he explained himself to the soldiers and was able to show them the crumpled and torn posters in his bucket, which indicated he was not putting posters up. I accept they still questioned him and asked him if he had been a member of the LTTE, or if he knew of anyone from [Town 1] who had been in the LTTE. I accept they went to his house and made accusations against his mother and verbally abused them.
24. I consider it plausible and accept that the applicant may have passed the camp the next day and that an SLA and/or CID officer may have again accused him of supporting the LTTE and putting up posters. I also accept that they may have told him to report to the camp the next morning.

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<sup>2</sup> Danish Immigration Service, 'Human Rights and Security Issues concerning Tamils in Sri Lanka', 1 October 2010, CIS19345; UK Home Office, 'Sri Lanka - Bulletin: Treatment of Returns', 1 December 2012, CIS28615; DFAT, 'Country Report - Sri Lanka', 16 February 2015, CISEC96CF1164; Freedom from Torture, 'Tainted Peace - Torture in Sri Lanka since May 2009', 1 August 2015, CISEC96CF13070; and others.

25. While I accept these aspects of his claims, I am not satisfied that the applicant was ever seriously considered to have any LTTE profile or associations, nor am I satisfied that he was ever seriously pursued by the SLA or CID for any other reason, such as the things he had witnessed at the camp.
26. Firstly, based on his written account, I consider it would have been quite clear to the SLA officers that the applicant was not putting up posters, but was removing them. His evidence was that his bucket contained damaged and torn posters. I consider that would have corroborated his account to the SLA officers that he was not putting up LTTE posters and he was not an LTTE supporter.
27. Secondly, while I consider it plausible that he and his family may have been threatened and verbally abused by SLA and/or CID officers, and that the applicant was told to attend the camp the next day, if it was the case that the applicant or his family were considered to have any LTTE associations or other adverse profile, I find it difficult to accept that he would not have been detained the day of the incident, or the following day when he was passing the camp.
28. I have considered the applicant's submissions about the failure to immediately detain him. I accept that he could have passed through checkpoints without issue. I also accept that a delay in detaining him is not of itself determinative, however it does raise questions for me about the SLA/CID perception about his profile. In my view, if the applicant was considered to have such an adverse profile (whether because of the poster incident or his experiences at the camp), then there would have been no cause to delay detaining and interrogating him. I accept the point that the SLA in his area may not necessarily have been a professional and disciplined force, but I also note the Sri Lankan security forces acted with impunity at the time and were not known for discretion or due process – arbitrary arrest and detention of LTTE suspects and supporters without charge was not uncommon, including those wrongly accused of having such a profile.<sup>3</sup> I also consider it relevant that the request to attend the camp the next day was consistent with his previous experiences, where on numerous occasions the SLA made him attend the camp and exploited his vulnerable position and forced him to provide labour and other goods or money to soldiers.
29. Thirdly, I share the delegate's concerns about the applicant's timeline. His evidence was that the poster incident occurred in August 2012, but he did not depart Sri Lanka until [September] 2012. At the interview, the applicant contended that he was in hiding until this time. However, his school records indicate his last day of attendance was [a day in] September 2012, two days before his departure from Sri Lanka. The applicant suggested that was a mistake on the document, and highlighted a minor error in the spelling of his name.
30. I have considered the applicant's submissions and I accept that administrative records may not always be determinative and that errors can arise, however I consider other aspects of his evidence raise concerns about his claims and may indicate that the school records were not in fact unreliable.
31. The applicant indicated he was in hiding and reiterated this through his IAA submission. In that submission, he clarified that he was in hiding for the "most part" and that he attended

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<sup>3</sup> Danish Immigration Service, 'Human Rights and Security Issues concerning Tamils in Sri Lanka', 1 October 2010, CIS19345; UNHCR, 'Eligibility Guidelines for Sri Lanka', 21 December 2012, UNB0183EA8; UK Home Office, 'Country Info & Guidance, Sri Lanka - Tamil separatism, Version 2.0', 19 May 2016, OGD7C848D17; DFAT, 'Country Information Report - Sri Lanka', 18 December 2015, CISEC96CF14; Freedom from Torture, 'Tainted Peace - Torture in Sri Lanka since May 2009', 1 August 2015, CISEC96CF13070; and others.

school sporadically during this period. I consider there is some equivocation in his evidence as to the degree to which he was in hiding.

32. A further concern is that it does not appear that the SLA or CID pursued him to any great extent after he failed to attend the camp. I consider his evidence indicates that they only looked for him once or twice during this period to be a strong indication that he had no profile of concern to the Sri Lankan authorities. As discussed below, I note the visit by the CID appears to have occurred when they were visiting every house in the area to take photographs of the family unit. This does not appear to be a visit to specifically look for the applicant and would suggest that prior to 2016, his family was only visited once or twice by the SLA.
33. I have weighed the applicant's evidence about later visits in 2016 and 2021. The first two letters, from December 2016, state that the applicant and his family were under pressure from the SLA. It states that his father was threatened by the SLA and CID several times. On one occasion, on [the day in] November 2016, the SLA visited his home and put a gun to his father's head. The letter from the village officer also states he was asked about the applicant's whereabouts several times. The third letter, dated 10 November 2022, states that two persons from the Terrorist Investigation Unit (likely the TID) visited his father and asked his whereabouts. It states they threatened his father verbally and asked him to bring his son to the [City 1] office.
34. While I have accepted the letters under s.473DD, they do raise some concerns for me. I note the letters only loosely relate to the applicant's claims – not referring to any specific past incident or his own claimed profile. Other than the reference by the village officer to being asked where the applicant was, the authors of these letters do not contend that they witnessed the events contained in the letters. As above, I do not consider they are firsthand accounts.
35. In view of all the evidence before me, I accept that the applicant's family was visited by the CID and SLA on at least two occasions in 2012. I accept that they may have related to the poster incident. Given the concerns of the Sri Lankan authorities about a resurgent LTTE,<sup>4</sup> I consider the SLA visiting and questioning his family about the applicant is plausible. However, the fact that the SLA did not visit the applicant's family again to ask about the applicant until 2016 demonstrates to me that the SLA did not consider the applicant was involved in or supportive of the LTTE or Tamil separatism, or that he otherwise had a profile of concern to the SLA or the CID. In my view, the limited number of visits by the SLA is more consistent with a visit to caution his father about the poster incident.
36. While I accept the 2012 visit by the CID occurred, I am not satisfied and do not accept it at all related to the applicant's claimed profile, the poster incident or any other aspect of the applicant's history in the area. I accept they may have asked his whereabouts given he was no longer present in the household, but based on the applicant's evidence, I find that visit was a part of routine monitoring and photographing of family units in that area. I am not satisfied and do not accept it was otherwise related to his claims.
37. I have weighed the 2016 incident. I am prepared to accept his family may have been visited by the SLA and they asked about his whereabouts, but I find it significant that this was over four years since the poster incident, and four years after he had last visited the camp. If the SLA had any concerns about the applicant's profile, whether related to the poster incident or

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<sup>4</sup> DFAT, 'Country Information Report - Sri Lanka', 18 December 2015, CISEC96CF14.

his past experiences at the camp, I do not consider they would have waited four years to visit, question or threaten his family. I have weighed the letters, but I am not satisfied either author witnessed the events. While I have some concerns about whether this visit occurred, I consider it plausible that the SLA may have questioned his family about his whereabouts, and I accept it occurred. However, I do not consider it plausible or credible that they would have threatened his father with a gun. I note his father had a history of cooperating with the SLA and I consider the applicant's profile was not at any level that would have evoked such a response. I also consider that if such a threat had been made, there would have been further visits from the SLA. However, it does not appear the SLA visited his family again. I am prepared to accept the letters provide some corroboration of the 2016 visit, but I consider the threat is an exaggeration in these documents and I am not satisfied it occurred. I find the SLA did not again visit his family.

38. The 2022 letter contends that the TID visited his family home in 2021, threatened his father verbally and told him to bring his son to the TID office [in City 1] for questioning. The letter makes no reference to any other context, nor did the applicant make any specific submissions about this letter. He provided no detail as to why the TID (who are separate from the CID or SLA) suddenly took an interest in him and his family, over nine years since the poster incident and his issues at the camp, and five years since the SLA last visited his family. The author of the letter also does not indicate whether they witnessed the incident.
39. Despite those concerns, I acknowledge that monitoring and spot checks of Tamils by the authorities can still occur.<sup>5</sup> Given he was a minor when he left the country, I consider it plausible the authorities may have visited his family and questioned them about his whereabouts. But in view of everything before me, I am not satisfied it relates to anything other than his time outside the country. Given his lack of profile, his age and the time that had passed, and his lack of history with the TID, I do not find it plausible that his father was threatened. I accept the letter provides some corroboration of a visit in 2021, but I again consider the reference to a threat is an exaggeration in this document and I am not satisfied it occurred.
40. Fifthly, while I accept the applicant's parents were detained, mistreated and questioned for three days during the conflict, I note they were released and never again detained or questioned. This is also the case during the years that have followed. That is a clear indication to me that the Sri Lankan authorities and security forces unequivocally considered his parents and family to have no LTTE associations at that time. I also consider that a clear indication that the applicant would not be imputed with any profile from his family. I accept his father's business was impacted by the SLA taking products without paying. I consider that consistent with the country advice. However, given the improvements for Tamils in the country, the removal of military checkpoints, the release of military-occupied land, and the decreased involvement of the military in civilian life,<sup>6</sup> I am not satisfied that the SLA continues to exploit his father or his business.

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<sup>5</sup> DFAT, 'Country Information Report – Sri Lanka', 23 December 2021, 20211223094818; UK Home Office, 'Country Policy and Information Note Sri Lanka: Tamil Separatism', May 2020.

<sup>6</sup> DFAT, 'Country Information Report - Sri Lanka', 18 December 2015, CISEC96CF14; DFAT, 'Country Information Report – Sri Lanka', 23 December 2021, 20211223094818; UK Home Office, 'Country Policy and Information Note. Sri Lanka - Tamil Separatism', Version 7.0, 17 June 2021; UK Home Office, 'Country Policy and Information Note Sri Lanka: Tamil Separatism', May 2020; DFAT, 'Country Report - Sri Lanka', 16 February 2015, CISEC96CF1164; US Department of State, 'Sri Lanka - Country Report on Human Rights Practices 2015', 13 April 2016, OGD95BE926320.

41. Lastly, I consider his age at the time of these events is significant. While I am aware that there were child conscripts during the civil war,<sup>7</sup> I am not satisfied the applicant had or would have been imputed with such a profile. The applicant was very young during the Sri Lankan civil war. At the conclusion of the war in 2009, he had not yet turned [age] years of age. He was registered in an IDP camp between March 2009 and January 2010. Both prior to and after the war, the applicant was enrolled in school whenever possible. Based on everything before me, while I accept that he suffered sustained harassment and mistreatment from the SLA and Sri Lankan authorities as a Tamil, I do not consider the Sri Lankan authorities ever considered the applicant to have an LTTE or separatist profile. I also do not consider he is a person of interest because of his experiences and the things he witnessed in the camp.
42. While I accept most of the applicant's claims, I do not accept his claims relating to his profile and the threat he faced on his departure from Sri Lanka. For the reasons above, I am not satisfied and do not accept he had any adverse profile with the Sri Lankan authorities or security forces when he left the country.
43. I accept that the poster incident did occur. I accept this was possibly the catalyst for his departure from Sri Lanka. The applicant was at a vulnerable age and was under repeated harassment and exploitation from soldiers at the local SLA camp. I accept he and his family feared he may be harmed if he continued to live there and that they decided it would be in his best interest and safety if he left the area entirely. While he may have been living discretely, I am not satisfied and do not accept he was in hiding before his departure. I accept his father was visited by the SLA, but I do not accept the CID or SLA were actively seeking the applicant at the time he left or afterwards, whether in relation to the poster incident, his failure to attend the camp two days later, his past experiences at the camp, or for any other reason. I consider any other visits to his family related to routine monitoring and any interest they had in him related to his irregular departure from the area as a minor.
44. Based on all evidence before me, I am not satisfied the applicant or his family ever had any LTTE associations, nor was he considered to have an adverse profile or concern to the SLA, CID or TID, or any other Sri Lankan authority. If he returned to Sri Lanka, I am not satisfied he has or would be seen as having any actual, suspected, or imputed LTTE profile, any other profile linked to Tamil separatism, or any other profile of concern.

### **Refugee assessment**

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45. 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**

46. Under s.5J of the Act 'well-founded fear of persecution' involves a number of components which include that:

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<sup>7</sup> DFAT, 'Country Report - Sri Lanka', 16 February 2015, CISEC96CF1164.

- 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.

### **Ethnic and related profile**

47. I have weighed the country advice for Tamils in Sri Lanka, including those living in the former LTTE controlled areas in the east and north of the country, as well as those with actual or imputed links to the LTTE or Tamil separatism.
48. According to DFAT, the Sri Lankan military presence in Tamil areas has largely been drawn down. Military checkpoints established in Tamil areas at the time of the conflict have been removed. The country advice indicates that while surveillance of Tamils in the north and east continues (particularly for those associated with politically-sensitive issues), ordinary Tamils living in the north and east of the country are at low risk of any official harassment. Tamils also face a low risk of official or societal discrimination based on ethnicity, including in their ability to access employment and housing. While many innocent Tamils were targeted during the conflict and in its aftermath, the advice indicates Tamils are now unlikely to face persecution based on their ethnicity alone.<sup>8</sup>
49. While the situation for Tamils has improved, the Sri Lankan Government remains determined to prevent any resurgence of Tamil separatism and there is no tolerance for the expression of separatist beliefs. The Sri Lankan authorities collect and maintain sophisticated intelligence on former LTTE members, supporters and other separatists, including 'stop' and 'watch' lists and electronic databases. DFAT understands these databases remain active. 'Stop' lists include names of those individuals who have an extant court order, arrest warrant or order to impound their Sri Lankan passport. 'Watch' lists include names of those individuals whom the Sri Lankan security services consider to be of interest, including for suspected separatist or criminal activities. While involvement with separatist activities may give rise to a risk profile on return to Sri Lanka, the information indicates that the Sri Lankan Government does not consider all members of the Tamil diaspora (Tamils living outside of Sri Lanka) as holding separatist views or being politically active, or that they would be at risk of harm on the basis of such a profile.<sup>9</sup>
50. Former LTTE members do not face legal barriers to participating in public life, including politics. Former LTTE members who come to the attention of the authorities, particularly

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<sup>8</sup> DFAT, 'Country Information Report – Sri Lanka', 23 December 2021, 20211223094818; UK Home Office, 'Country Policy and Information Note. Sri Lanka - Tamil Separatism', Version 7.0, 17 June 2021; UK Home Office, 'Country Policy and Information Note Sri Lanka: Tamil Separatism', May 2020.

<sup>9</sup> DFAT, 'Country Information Report – Sri Lanka', 23 December 2021, 20211223094818; UK Home Office, 'Country Policy and Information Note. Sri Lanka - Tamil Separatism', Version 7.0, 17 June 2021; UK Home Office, 'Country Policy and Information Note Sri Lanka: Tamil Separatism', May 2020.

those suspected of combat roles, may be detained and sent for rehabilitation. A low profile LTTE member might be monitored but would generally not be prosecuted. Tamils with former links to the LTTE, and who are not politically active, are generally able to lead their lives without concern for their security as a result of their past association with the LTTE.<sup>10</sup>

51. If the applicant returned to Sri Lanka, now or in the reasonably foreseeable future, I am not satisfied he would not be imputed with any LTTE profile, nor would his past profile otherwise be of interest to the Sri Lankan authorities. Based on the evidence before me, I do not consider he had any profile of concern when he left Sri Lanka. I consider it is not plausible that he could be imputed with any profile of concern or significance given his age and lack of any other activity of concern beyond the incident with the posters. In view of country information before me about the situation faced by Tamils, as well as those with limited LTTE profiles or associations, I am not satisfied he would face any real chance of harm for these reasons.
52. More broadly, the reports before me indicate the security situation for Tamils in Sri Lanka has continued to improve since the end of the civil war. I consider the weight of information before me confirms that while Tamils may sometimes be subjected to discrimination, Tamils do not face persecution based on their ethnicity alone, nor are Tamils specifically targeted or persecuted just for being Tamil.<sup>11</sup>
53. I accept the country advice indicates that there are risks for Tamils (and indeed other Sri Lankans) with certain profiles, such as political activists and journalists, former high profile LTTE members, and those actively involved with Tamil separatism. I accept that for those with such profiles there are credible risks of indefinite detention (under the Prevention of Terrorism Act), mistreatment, torture and other harm, from the Sri Lankan authorities and security forces.<sup>12</sup> I have weighed the country advice provided by the applicant and consider it is consistent with other advice before me. I accept it indicates recent instances of the targeting and harassment of former LTTE members,<sup>13</sup> human rights activists,<sup>14</sup> those involved with politically sensitive issues (notably Maaveerar Naal),<sup>15</sup> examples of heavy handed

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<sup>10</sup> DFAT, 'Country Information Report – Sri Lanka', 23 December 2021, 20211223094818.

<sup>11</sup> DFAT, 'Country Information Report – Sri Lanka', 23 December 2021, 20211223094818; UK Home Office, 'Country Policy and Information Note. Sri Lanka - Tamil Separatism', Version 7.0, 17 June 2021; UK Home Office, 'Country Policy and Information Note Sri Lanka: Tamil Separatism', May 2020.

<sup>12</sup> DFAT, 'Country Information Report – Sri Lanka', 23 December 2021, 20211223094818; UK Home Office, 'Country Policy and Information Note. Sri Lanka - Tamil Separatism', Version 7.0, 17 June 2021; UK Home Office, 'Country Policy and Information Note Sri Lanka: Tamil Separatism', May 2020; ITJP, 'Silenced - survivors of torture and sexual violence in 2015', 7 January 2016, CIS38A801275; US Department of State, 'Sri Lanka - Country Report on Human Rights Practices 2015', 13 April 2016, OGD95BE926320; and others.

<sup>13</sup> Sri Lanka Brief, 'Sri Lanka: Abducted ex- LTTE carder in CCID (Police) custody! Family threatened & son slapped by armed abductors', <https://srilankabrief.org/sri-lanka-abducted-ex-ltte-cadre-in-ccid-police-custody-family-threatened-son-slapped-by-armed-abductors/>, 29 September 2021.

<sup>14</sup> OMCT, 'Sri Lanka: Intimidation against prominent human rights lawyer Ambika Satkunanathan', <https://www.omct.org/en/resources/statements/sri-lanka-intimidation-against-prominent-human-rights-lawyer-ambika-satkunanathan>, 14 February 2022.

<sup>15</sup> Tamil Guardian 'Sri Lankan police summon Batticaloa council members over Sathurukondan massacre commemoration', <https://www.tamilguardian.com/content/sri-lankan-police-summon-batticaloa-council-members-over-sathurukondan-massacre>, 5 November 2021;

Tamil Guardian, 'Sri Lankan STF arrest Tamil youth for posting photo related to Maaveerar Naal on social media', <https://www.tamilguardian.com/content/sri-lankan-stf-arrest-tamil-youth-posting-photo-related-maaveerar-naal-social-media>, 27 November 2021; Tamil Guardian, 'Sri Lanka launches crackdown on Maaveerar Naal', <https://www.tamilguardian.com/content/sri-lanka-launches-crackdown-maaveerar-naal>, 27 November 2021.

policing,<sup>16</sup> civilian clashes with security forces, and an increasing military presence in the north.

54. I accept that there has been some re-militarisation in the north and that there is some evidence of regression or backsliding under the Rajapaksa Government, particularly when considered against the advances under former President Sirisena.<sup>17</sup> However, I am not satisfied that the country information indicates that a person with the applicant's profile would be at a real chance or risk of harm. I am not satisfied the applicant shares the additional risk profile of those discussed above, nor do I consider he would engage in politically sensitive activities on return to Sri Lanka. I also observe that he is no longer the vulnerable minor that he was when he left the country. For the reasons above, I find the applicant would not have any adverse profile on return to Sri Lanka, even accounting for his past experiences with the SLA and CID and his family's area of origin. It follows that I am not satisfied there is any real chance or risk of harm to the applicant for these reasons.
55. I have weighed recent advice before me about surveillance and discrimination against Tamils. While I note that country advice indicates that some monitoring and surveillance of Tamils still occurs, I consider the applicant has no adverse profile and would not be involved in politically sensitive issues. I find any surveillance or monitoring he may experience as a Tamil (if any) would be low level, would not be ongoing, and would not amount to serious harm. In terms of discrimination, I am not satisfied on the advice before me that it is at a level that would prevent him from accessing employment, accommodation or services. I am also not satisfied that any monitoring/surveillance or discrimination he may experience for these reasons, would be at a level that would threaten his capacity to earn a livelihood, cause him significant economic hardship, deny him access to basic services, threaten his capacity to subsist, or otherwise give rise to or constitute serious harm. I note he continues to have the support of his family.
56. The test before me is ultimately a forward looking one. While I have accepted the applicant has experienced considerable trauma and faced harm from the SLA and CID, I have also found he has no profile of concern, and that the situation in Sri Lanka has changed considerably in the nine years since he left the country.
57. In view of all of the above, including my assessment of his profile and the range of country information before me, I find there is not a real chance of the applicant facing harm from the Sri Lankan authorities or security forces (including the SLA, the CID or TID), or any other person or group, for reasons of his ethnicity, as a Tamil born in (or from) a former LTTE controlled area in the north of Sri Lanka, his past mistreatment and profile with the SLA and CID, or any other aspect of his profile as discussed above, if he were to return to live in Sri Lanka, now or in the reasonably foreseeable future.

### **Illegal departure and asylum claims**

58. The applicant claims to fear harm as a failed asylum seeker returning to Sri Lanka from a western country and having left Sri Lanka illegally. The applicant has consistently claimed to have departed Sri Lanka illegally and I accept that was the case. Given the time he has spent in Australia and his lack of any travel document, I am satisfied the Sri Lankan authorities would very likely determine that he left Sri Lanka illegally and sought asylum in Australia.

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<sup>16</sup> MediaLK, 'Media report', <https://medialk.com/tamil/archives/818>, 1 December 2021.

<sup>17</sup> DFAT, 'Country Information Report - Sri Lanka', 18 December 2015, CISEC96CF14; DFAT, 'Country Information Report – Sri Lanka', 23 December 2021, 20211223094818.

59. I invited the applicant to comment on updated country information about the situation for returnees to Sri Lanka and those charged under the Immigrants and Emigrants Act (the I&E Act) and the potential penalties and processes he may experience on return to Sri Lanka. The applicant made no specific reference to these matters, but I have weighed his broader concerns about the ongoing targeting and mistreatment of Tamils.
60. According to the advice before me, returnees are processed by immigration officials on return to Sri Lanka. Depending on their circumstances and personal history, they may be interviewed by other agencies, including police and security forces. These agencies check travel documents and identity information against immigration databases, intelligence databases and records of outstanding criminal matters. Returnees who are not recorded on the general security database maintained by the Sri Lankan Government, or whose entry is not such as to have placed them on either a stop list or the watch list, will in general be able to pass through the airport unhindered and return to their home area without being subject to any further action by the authorities. DFAT states it is not aware of detainees being subjected to mistreatment during processing at the airport.<sup>18</sup>
61. I accept the applicant would be processed and questioned on return to Sri Lanka. The applicant has no passport, but he does possess a copy of his national identity card. I am satisfied he could demonstrate his identity and Sri Lankan citizenship, and this would reveal to the Sri Lankan authorities that the applicant has no adverse profile or profile of interest. For the reasons given in the assessment above, I am not satisfied he would be seen as having an actual, suspected, or imputed LTTE profile during any return processing. There is nothing that would suggest the applicant has been involved in (or otherwise supportive of) Tamil separatism or active with other Tamil diaspora groups while in Australia. For that reason, I do not accept he would be on any stop or watch list. Given his age and lack of profile in Sri Lanka when he departed, and his lack of political or related activity while in Australia, I am not satisfied there is any reason the Sri Lankan authorities would impute the applicant with any adverse profile on his return to the country. The applicant did not claim to be involved with people smuggling and there is nothing before me to indicate the applicant has any other criminal or security profile, whether in Sri Lanka or Australia. Given his lack of any adverse profile, I consider any questioning and detention of the applicant is likely to be brief. I am satisfied he would pass through the airport unhindered and would return to his home area and he would not be subject to any further action by the authorities at the airport.
62. DFAT refers to some returnees, particularly those in the north and east with suspected LTTE links, have been the subject of monitoring by the authorities, including home visits and telephone calls. DFAT states that most returnees, including failed asylum seekers, are not actively monitored on an ongoing or long-term basis. Some Tamils who had failed to secure asylum in Australia and since returned to the Northern Province told DFAT they had no protection concerns and had not experienced harassment by the authorities, nor received monitoring visits, but DFAT advises that it cannot determine if this is the case for all such returnees.<sup>19</sup>
63. I have accepted the applicant may experience some monitoring, but as I have found he has no adverse profile (and would not be involved in politically sensitive issues), I again find any surveillance or monitoring he may experience (if any) would be low level, would not be ongoing, and would not amount to serious harm. Beyond that, I am also not satisfied he

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<sup>18</sup> DFAT, 'Country Information Report – Sri Lanka', 23 December 2021, 20211223094818.

<sup>19</sup> DFAT, 'Country Information Report – Sri Lanka', 23 December 2021, 20211223094818.

would face harassment or harm from the authorities because of his failure to obtain asylum in a western country.

64. In terms of violence, abduction and extortion more broadly, I accept these were prevalent when he left Sri Lanka,<sup>20</sup> but I consider there are strong indications that incidents of violence, abduction and extortion have continued to abate since the end of the war.<sup>21</sup> I have again weighed the applicant's submissions and I accept for persons with certain profiles there remain credible risks from the authorities in Sri Lanka, however I am not satisfied he shares such a profile or would engage in politically sensitive activities such that he would be targeted.
65. In terms of the stigma faced by returnees referred to in the submissions, more recent advice indicates that ordinary Tamils returning to Sri Lanka are not considered to have separatist or other adverse profiles.<sup>22</sup> DFAT does state that returnees may face financial difficulties reintegrating into their communities, including financial issues as a result of how they funded their irregular ventures overseas, but they do not experience societal discrimination for seeking asylum in another country. Some returnees experience pressure or resentment from their family and communities in terms of the failed attempt at irregular migration, but DFAT assesses that overall this is not a major concern for returnees.<sup>23</sup> The applicant appears to have the support of his family, and remains in contact with them. I have no reason to consider he would experience resentment or pressure from his own community. In any event, I accept there will be challenges and barriers for him in reintegrating (for example, delays in obtaining documentation), but based on the advice before me,<sup>24</sup> I am not satisfied any of these factors would constitute persecution in any relevant sense.
66. In terms of processing at the airport, based on current advice, I do not consider any questioning, short term detention and processing of the applicant by the authorities at the airport on arrival would constitute serious harm. I am not satisfied the applicant has any adverse profile that would put him at threat of harsher penalty, extended detention, or mistreatment, such as that which may be faced by those involved in Tamil separatism, people smugglers, those facing criminal charges, or others with adverse profiles.<sup>25</sup> I accept innocent Tamils have likely been targeted in the past, but again given my assessment of his profile and his age at the time of the war and when he left Sri Lanka, I do not consider there is a real chance or risk of the applicant being mistakenly suspected of holding such a profile.
67. I have accepted the applicant would be assessed as having departed Sri Lanka illegally. According to updated DFAT advice, returnees who departed illegally are referred to the authorities at the airport and charged accordingly. Once charged they are taken to the courts at Negombo where they are bailed and released. They may face charges for breaches of Sri Lanka's Immigrants and Emigrants Act (1948). This may include fines and court appearances. Fines are typically on the lower end and may be payable by instalment. In general, returnees would not face a custodial sentence, but may face 14 days prison if unable to pay any fine.

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<sup>20</sup> Immigration & Refugee Board of Canada, Immigration and Refugee Board of Canada, 'LKA103815.E: Sri Lanka: Information on the treatment of Tamil returnees to Sri Lanka', 22 August 2011, LKA103815.E.

<sup>21</sup> DFAT, 'Country Information Report - Sri Lanka', 23 December 2021, 20211223094818.

<sup>22</sup> UK Home Office, 'Country Policy and Information Note. Sri Lanka - Tamil Separatism', Version 7.0, 17 June 2021; UK Home Office, 'Country Policy and Information Note Sri Lanka: Tamil Separatism', May 2020.

<sup>23</sup> DFAT, 'Country Information Report - Sri Lanka', 23 December 2021, 20211223094818.

<sup>24</sup> DFAT, 'Country Information Report - Sri Lanka', 23 December 2021, 20211223094818.

<sup>25</sup> DFAT, 'Country Information Report - Sri Lanka', 23 December 2021, 20211223094818; ; UK Home Office, 'Sri Lanka - Bulletin: Treatment of Returns', 1 December 2012, CISC96CF1164; HRW, 'United Kingdom Halt deportation flight to Sri Lanka', 15 September 2012, CX311600; and others.

The reports before me indicate that the penalties and processes faced by returnees to Sri Lanka are not discriminatorily applied or enforced.<sup>26</sup>

68. The evidence before me is that the applicant would receive some cash and transportation assistance from the IOM after clearing the airport if he were to return voluntarily. Australian Border Force also provides removed returnees with cash assistance. The Sri Lankan Legal Aid Commission provides legal assistance to those charged with illegal departure.<sup>27</sup>
69. I have weighed the applicant's submission about the potential threat of a significant fine or long jail term. While highlighting the potential five year jail term, I note the older report cited indicates that no one to date had been given a custodial sentence.<sup>28</sup> If required to pay a fine, I am satisfied it would not be significant (between AUD350 and AUD1400). Given the support he may have, I am not satisfied the applicant would be unable to meet the penalty handed down. I am not satisfied such a penalty would constitute harm in any relevant sense. I am not satisfied there is a real chance or risk of the applicant facing any jail time.
70. DFAT's most recent advice appears to indicate that returnees may be required to participate in ongoing court proceedings related to their illegal departure and may need to appear in court every 3 to 6 months.<sup>29</sup> I accept these processes may be slow and frustrating and may present additional costs for the applicant, but I am not satisfied this would constitute harm or serious harm in any relevant sense, even when considered in connection with the other processes and penalties he may experience.
71. I again note that the advice before me does not indicate that the I&E Act, and any related processes or penalties for returnees, are discriminatorily applied.<sup>30</sup> I find that any penalty or process the applicant may face under the I&E Act would be the result of the non-discriminatory application of a generally applicable law and would not amount to persecution in any relevant sense.
72. It follows that I am not satisfied there is a real chance that the applicant would face persecution in connection with his return to Sri Lanka, any processing or penalty he may face in connection with his illegal departure, his unsuccessful asylum claims in a western country, or any other aspect of his profile, if he were to return to Sri Lanka now or in the reasonably foreseeable future.

### **Cumulative profile**

73. The applicant also contends to fear harm on the basis of his cumulative profile. I consider his cumulative profile (to the extent he has one) would be at its most acute before the Sri Lankan authorities in return processing, in that I consider all elements of his profile would be identified and assessed. I have found he would not face a real chance or risk of persecution in return processing, and I consider that reveals that he would not face a real chance or risk of harm on the basis of his cumulative profile more generally.

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<sup>26</sup> DFAT, 'Country Report - Sri Lanka', 16 February 2015, CISEC96CF1164; DFAT, 'Country Information Report - Sri Lanka', 23 December 2021, 20211223094818.

<sup>27</sup> DFAT, 'Country Information Report - Sri Lanka', 23 December 2021, 20211223094818.

<sup>28</sup> DFAT, 'Country Information Report - Sri Lanka', 31 July 2013, CIS26001.

<sup>29</sup> DFAT, 'Country Information Report - Sri Lanka', 23 December 2021, 20211223094818.

<sup>30</sup> DFAT, 'Country Report - Sri Lanka', 16 February 2015, CISEC96CF1164; DFAT, 'Country Information Report - Sri Lanka', 23 December 2021, 20211223094818.

74. I have accepted he may experience monitoring and societal discrimination on the basis of his profile, but I have found that this would not amount to serious harm or persecution. As he reintegrates into his home area, I consider his profile would return to that of an ordinary Tamil living in the north of Sri Lanka. Based on the advice before me, I am not satisfied he would face a real chance of harm on the basis of his cumulative profile if he were to return to Sri Lanka now or in the reasonably foreseeable future.

#### **Refugee: conclusion**

75. 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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76. 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**

77. 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.
78. 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.
79. While I have not accepted all aspects of the applicant's profile, I have accepted much of the applicant's past claims of harm. I consider some of the treatment the applicant experienced at the hands of the Sri Lankan authorities in the past would constitute significant harm. However, the question before me is again a forward looking one.
80. In relation to the applicant's illegal departure, I have found that any processing, detention, penalty or proceedings he may face on return to Sri Lanka would not constitute serious harm. Given my assessment that he has no adverse profile, I have also found he would not face any additional threat of harsher penalty, detention, or treatment on return to Sri Lanka. Having regard to the same considerations and country advice relied on above, I am also not satisfied any of these factors would rise to the level of significant harm as defined or involve the necessary element of intention.
81. While I have accepted there will be challenges for the applicant if he returns to Sri Lanka, having regard to the same information and analysis above, I also do not consider any

monitoring or discrimination he may face for these reasons, would constitute significant harm as defined.

82. I have otherwise found there is no real chance of the applicant facing harm for any of the reasons he has claimed, including on the basis of his cumulative profile. Having regard to the same information and analysis, I find there is not a real risk of the applicant facing significant harm in Sri Lanka for these reasons.

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

83. 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.

#### **Decision**

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

## Applicable law

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### **Migration Act 1958**

#### **5 (1) Interpretation**

In this Act, unless the contrary intention appears:

...

**bogus document**, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly

...

**cruel or inhuman treatment or punishment** means an act or omission by which:

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature;

but does not include an act or omission:

- (c) that is not inconsistent with Article 7 of the Covenant; or
- (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

**degrading treatment or punishment** means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:

- (a) that is not inconsistent with Article 7 of the Covenant; or
- (b) that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

**receiving country**, in relation to a non-citizen, means:

- (a) a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or
- (b) if the non-citizen has no country of nationality—a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.

...

**torture** means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant;

but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

#### **5H Meaning of refugee**

(1) For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a refugee if the person:

- (a) in a case where the person has a nationality—is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or
- (b) in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Note: For the meaning of *well-founded fear of persecution*, see section 5J.

...

### 5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
  - (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
  - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
  - (c) the real chance of persecution relates to all areas of a receiving country.  
Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.  
Note: For effective protection measures, see section 5LA.
- (3) A person does not have a well-founded fear of persecution if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country, other than a modification that would:
  - (a) conflict with a characteristic that is fundamental to the person's identity or conscience; or
  - (b) conceal an innate or immutable characteristic of the person; or
  - (c) without limiting paragraph (a) or (b), require the person to do any of the following:
    - (i) alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith;
    - (ii) conceal his or her true race, ethnicity, nationality or country of origin;
    - (iii) alter his or her political beliefs or conceal his or her true political beliefs;
    - (iv) conceal a physical, psychological or intellectual disability;
    - (v) enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
    - (vi) alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.
- (4) If a person fears persecution for one or more of the reasons mentioned in paragraph (1)(a):
  - (a) that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and
  - (b) the persecution must involve serious harm to the person; and
  - (c) the persecution must involve systematic and discriminatory conduct.
- (5) Without limiting what is serious harm for the purposes of paragraph (4)(b), the following are instances of **serious harm** for the purposes of that paragraph:
  - (a) a threat to the person's life or liberty;
  - (b) significant physical harassment of the person;
  - (c) significant physical ill-treatment of the person;
  - (d) significant economic hardship that threatens the person's capacity to subsist;
  - (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
  - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.
- (6) In determining whether the person has a **well-founded fear of persecution** for one or more of the reasons mentioned in paragraph (1)(a), any conduct engaged in by the person in Australia is to be disregarded unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.

### 5K Membership of a particular social group consisting of family

For the purposes of the application of this Act and the regulations to a particular person (the **first person**), in determining whether the first person has a well-founded fear of persecution for the reason of membership of a particular social group that consists of the first person's family:

- (a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in paragraph 5J(1)(a); and
- (b) disregard any fear of persecution, or any persecution, that:
  - (i) the first person has ever experienced; or

- (ii) any other member or former member (whether alive or dead) of the family has ever experienced;

where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.

Note: Section 5G may be relevant for determining family relationships for the purposes of this section.

#### **5L Membership of a particular social group other than family**

For the purposes of the application of this Act and the regulations to a particular person, the person is to be treated as a member of a particular social group (other than the person's family) if:

- (a) a characteristic is shared by each member of the group; and
- (b) the person shares, or is perceived as sharing, the characteristic; and
- (c) any of the following apply:
  - (i) the characteristic is an innate or immutable characteristic;
  - (ii) the characteristic is so fundamental to a member's identity or conscience, the member should not be forced to renounce it;
  - (iii) the characteristic distinguishes the group from society; and
- (d) the characteristic is not a fear of persecution.

#### **5LA Effective protection measures**

- (1) For the purposes of the application of this Act and the regulations to a particular person, effective protection measures are available to the person in a receiving country if:
  - (a) protection against persecution could be provided to the person by:
    - (i) the relevant State; or
    - (ii) a party or organisation, including an international organisation, that controls the relevant State or a substantial part of the territory of the relevant State; and
  - (b) the relevant State, party or organisation mentioned in paragraph (a) is willing and able to offer such protection.
- (2) A relevant State, party or organisation mentioned in paragraph (1)(a) is taken to be able to offer protection against persecution to a person if:
  - (a) the person can access the protection; and
  - (b) the protection is durable; and
  - (c) in the case of protection provided by the relevant State—the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system.

...

#### **36 Protection visas – criteria provided for by this Act**

...

- (2) A criterion for a protection visa is that the applicant for the visa is:
  - (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee; or
  - (aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or
  - (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
    - (i) is mentioned in paragraph (a); and
    - (ii) holds a protection visa of the same class as that applied for by the applicant; or
  - (c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
    - (i) is mentioned in paragraph (aa); and
    - (ii) holds a protection visa of the same class as that applied for by the applicant.
- (2A) A non-citizen will suffer **significant harm** if:
  - (a) the non-citizen will be arbitrarily deprived of his or her life; or
  - (b) the death penalty will be carried out on the non-citizen; or
  - (c) the non-citizen will be subjected to torture; or
  - (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
  - (e) the non-citizen will be subjected to degrading treatment or punishment.

- (2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:
- (a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or
  - (b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or
  - (c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

...

*Protection obligations*

- (3) Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.
- (4) However, subsection (3) does not apply in relation to a country in respect of which:
- (a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or
  - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.
- (5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:
- (a) the country will return the non-citizen to another country; and
  - (b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.
- (5A) Also, subsection (3) does not apply in relation to a country if:
- (a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and
  - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country.

*Determining nationality*

- (6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.
- (7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.