



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

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA16/00777

Date and time of decision: 31 January 2017 09:19:00  
Joanne Jennings, Reviewer

**Decision**

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

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

## Background to the review

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### Visa application

1. The referred applicant (the applicant) claims to be a Tamil from Batticaloa, Sri Lanka. He lodged an invalid application dated [July] 2013 for a Subclass 866, Protection visa. [In] September 2015 he lodged an application for a Safe Haven Enterprise Visa (SHEV), Subclass 790. He claims that he fears harm from the Sri Lankan authorities and the paramilitary Karuna group because he has been imputed with a Liberation Tigers of Tamil Eelam (LTTE) profile.
2. [In] September 2016 a delegate for the Minister of Immigration and Border Protection (the delegate) refused to grant the visa. The delegate was not satisfied that the applicant had a profile that would indicate he would face a real chance of serious harm or a real risk of significant harm in Sri Lanka.

### Information before the IAA

3. I have had regard to the material referred by the Secretary under s.473CB of the *Migration Act 1958* (the Act). No further information was obtained or received.

### Applicant's claims for protection

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4. The applicant's claims are contained in the information referred to the IAA. They can be summarised as follows:
  - The applicant is a Tamil from Batticaloa, Eastern Province, Sri Lanka.
  - He is a Hindu and at times when he has applied the holy ash Buddhist priests have told him to remove it and at times when attending the Hindu temple he has been told to go to the Buddhist temple and pray before attending the Hindu temple.
  - His father has been missing since he was a child. His father worked [for] the LTTE and he thinks he was killed by the army on suspicion of being involved with the LTTE.
  - He returned to the family home in [year] after completing his A levels in a [school] in Batticaloa. There was an army camp in the area of his village and he was regularly stopped at the checkpoint and harassed by the Criminal Investigation Department (CID) officers from the camp who asked him who he was and what he was doing.
  - In 2001 he confronted soldiers from the army camp who were clearing trees on the family property. He asked why they were clearing good coconut trees and argued with them. Later that day, (or the next day as stated in the statement of claims), they returned and took him to the camp where he was threatened with a knife, beaten, and made to do the demeaning task of cutting grass. He was also humiliated by having to remove his clothes and swim. He was held at the camp about five hours in total. His [relative] came to the camp and was physically abused; he was then released and left with his [relative]. The applicant explained at his SHEV interview that the references in his statement of claims to "when I refused" , and "whenever they felt like it they would call me over and force me to do chores", and "after all this they still came back and cut

down the trees”, are in fact all references to events on that same day. The applicant clarified at his interview that although the statement of claims stated “they demanded I return the next day to the camp to do chores like lifting rocks, cutting trees and building barricades” that he did not return the next day, or at any other time, and did not undertake these tasks.

- The applicant also clarified at his SHEV interview that this was the first time the army or CID came to the family home, and that there was not a visit in 2000 as stated in his statement of claims.
- After this incident his family, in particular his [siblings], were harassed by army soldiers because their enmity to the applicant. The army would come to the family home to buy items and to ask for things to cut the trees and they would enquire about the applicant. The applicant was afraid to go out at night and when he did go out during the day and had to pass the camp drunken soldiers grabbed him, used foul language, beat him and urinated on him.
- He studied and worked in Batticaloa from 2001 to 2004. He visited the family home on some weekends, but came in secret to avoid any harassment. He made friends with some fellow students who were involved with the LTTE intelligence wing, although he did not know of their involvement at the time. The security authorities regularly came to the [business] where he was working and the applicant believes from the way they looked and pointed at him that they were looking for him, but as it was a period of peace (ceasefire) they did not detain anyone publicly and they only detained people at night in secret.
- During this period he was eating in a restaurant with a friend who was involved with LTTE intelligence. His friend recognised CID officers and the two left the restaurant and were chased by the CID officers but they escaped on a bus.
- In 2003 army soldiers with weapons visited the family home and showed his family photographs of him with his school friends. The army told the family that he was linked to the LTTE and that they wanted to detain him. They interrogated and physically assaulted family members, checked for weapons, and took money and jewellery.
- In 2004, while he was still in Batticaloa town, the LTTE attacked the army camp near his home. The army suspected him of involvement with this attack. In his statement of claims the applicant stated that it was after this incident that the CID went to the family home to capture him and when they found he was not there they interrogated his family, beat them and stole money and jewellery.
- After this he went to work in another district. The CID came to the hostel where he was staying and he hid to avoid them.
- From 2005 to 2008 his [sibling] was harassed by CID officers and eventually [was] forced to tell them of his whereabouts. He was in fear for his safety and made arrangements to travel to [Country 1] to work. He bribed officials at the airport so that he could leave the country and departed in September 2008. He stayed in [Country 1] until April 2011 when he returned to Sri Lanka and stayed mostly indoors at home for his safety.
- In January 2012 he opened a [business] near the family home. The [business] was open seven days per week and he was there each day in the morning, and to close the [business] at 7.00pm each night, although he was frequently out of the [business] during the day getting supplies. He lived at home, but often spent nights at the houses of friends and family to avoid detection. He had no problems until April 2012 when a CID officer came to the [business] and asked the [staff] about him. In May 2012 the

same CID officer visited his mother and told her the applicant had to visit this officer at the army camp. The applicant did not attend. CID officers came to the [business] in June 2012 and took some [products] (at his interview he clarified the ambiguity in the statement of claims about the number of times this occurred and stated that this occurred on the one occasion in June). When the staff asked them to pay [they] refused and told them to come to the camp to collect the money. The applicant believes that this was a ploy by the CID to get him to come to the camp.

- In a later incident in July 2012 army soldiers came to the [business] and noticing his bike outside came in looking for him. The applicant was in the back [and] when he heard them asking for him he left undetected and hid nearby.
- Later that day he and his mother went to the police station to lodge a complaint. The police were dismissive of his complaint and told him to come back when the senior officer was available. He did not return home with mother, but disguised himself [and] went with a family friend to stay at his [relative]'s home. That same night the CID visited the family home and told his mother they would kill him if they caught him. The CID came back for him each day for the next three days.
- The applicant made arrangements to close his [business] and departed Sri Lanka illegally in July 2012. The CID continued to look for him and visited the family home for five months after his departure and only stopped when his mother told them he was in Australia.
- He fears harm from the CID, army and the Karuna group on return to Sri Lanka. He fears he will be identified at the airport and sometime after returning home will be arrested and handed over to the CID, army or Karuna group and tortured and killed.
- In his SHEV application the applicant stated that “after the incident in 2000, my family sought the help of the courts. The CID officers who presented had four people who were accused on their behalf for committing the crime. They were charged and imprisoned but let out shortly after, due to the corruption. This case further aggravated the CID officers and they continued to harm me and my family. We were too scared to confess the four charged were not the four who committed the abuse and my family were threatened by the CID to not divulge this information”.

### **Factual findings**

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5. The applicant has consistently claimed to be a Tamil from Batticaloa, Sri Lanka, and has provided identity documents in support of his claimed identity. I accept the applicant's identity as stated and that Sri Lanka is the receiving country for the purpose of this review. I accept that the applicant is a Hindu.
6. The applicant has given accounts of his claims that vary across his Arrival interview, invalid 866 application, SHEV application and SHEV interview and I find that there are significant internal inconsistencies in the applicant's account that bring the veracity of some claims into doubt.
7. I accept as plausible that his father is missing and may have been killed by the army on suspicion of being involved with the LTTE.
8. I accept that from [year] the applicant was regularly stopped at the local checkpoint and identity checked and harassed by CID officers.

9. I accept as plausible that in 2001 the army cut down some trees and when the applicant confronted them he was taken to the camp and mistreated as claimed. I accept as plausible that his [relative] was physically assaulted when she came to the camp. I note the applicant's clarification that this occurred on one occasion.
10. I do not accept the claim advanced at the SHEV interview that the army came to the family home to buy items and to ask for things to cut the trees and they would enquire about the applicant. At his SHEV interview the applicant initially stated that after the incident with the trees the army came to his house to buy things and on these occasions they would ask about his whereabouts. When asked to explain what things the army would buy, the applicant responded that they would come and ask for things to cut down the trees. When asked to explain why they would ask his family for things to cut down the trees, he responded that his house was remote and the only one in the area. I find the applicant's account to be unconvincing. Furthermore, from the applicant's account, the army only came to the family home on the one occasion in 2001 to cut down the trees, and did not return until the claimed 2003 visit relating to the photographs. I do not accept that the army had an ongoing interest in the applicant after the incident with the trees and the day spent working at the camp, and I do not accept that the army made visits to the family home after the events in 2001 to enquire about him.
11. Noting that the army came on only the one occasion to the family home, and I have not accepted that they had an ongoing interest in the applicant, I do not accept that his [siblings] were specifically targeted by the army for harassment. I accept that the applicant's family and [siblings] would have had to pass the army checkpoint when moving about and that on such occasions they were subject to abuse from soldiers.
12. I accept that the applicant would also have been harassed at the checkpoint and it is plausible that this may have included being sworn at, beaten and urinated on.
13. I accept as plausible that the applicant studied in Batticaloa with students who had links to the LTTE and I accept that this may have resulted in the CID observing the applicant with these students. However, I do not accept that if the CID was conducting an observation of the applicant that they would tell his family, thereby alerting the applicant, and possibly the LTTE, to their activity. Conversely, if the CID had plans to take direct action and detain or question the applicant, as chasing him and his friend from a restaurant would indicate, then I consider that they had opportunity to do so. I am not convinced by the applicant's explanation that they took no direct action against him because at this time they only detained people at night in secret or that he and a friend evaded the CID by running from a restaurant and catching a bus. The applicant was studying, working and residing at the same address during this time, providing the CID significant opportunities to detect and detain him if he was of concern.
14. The applicant's account lacks plausibility and casts doubt on his claim to have socialised with LTTE intelligence wing operatives and to have been of interest to the CID as a result. I accept that there may have been LTTE intelligence wing operatives studying with the applicant, but noting that the CID never detained or questioned him, despite having opportunity to do so, I find that the applicant's association with these students, if there was any association, was not of a sufficiently high level to have imputed him as being linked to the LTTE. I have also taken into account the applicant's ability to travel overseas in 2008 when assessing whether he was imputed with an LTTE profile at this time and was of interest to the authorities.
15. I accept that there was an LTTE attack on the army camp near his home in 2004 and that following this attack security would have been increased and would have resulted in further

suspicion of Tamils in general and of any potential LTTE links. However, I do not accept as plausible that the army suspected the applicant of being involved with this attack and they went to the family home to capture him. I have not accepted that he was associated with LTTE intelligence wing members to a level that attracted an imputed LTTE profile and there is no reason to believe that the CID would otherwise suspect him of involvement in this attack. Furthermore, the claim that the CID went to the family home rather than seek him at his school, place of work or residence, belies his earlier claim that they were observing him while he was in Batticaloa.

16. I give significant weight to his ability to obtain a passport in April 2008 and travel to [Country 1] to work in 2008. The Sri Lankan civil war was still underway when the applicant was issued his Sri Lankan passport in April 2008, and when he left for [Country 1] in September 2008, and a wide ranging security regime was in force at the time<sup>1</sup>. I have had regard to advice from the Department of Foreign Affairs and Trade (DFAT) and the UK Home Office regarding security checks at the airport. DFAT advise of “stop” and “watch” electronic databases which record “names of those for whom Sri Lankan security services consider to be of interest, including for separatist or criminal activities” and the UK Home Office report cites the experiences of Tamils travelling to and from Sri Lanka during this period<sup>2</sup>.
17. I do not accept that he bribed officials at the airport so that he could leave the country and, even if I were to accept this claim, this does not explain how the applicant was able to re-enter the country 2011 without incident. I give significant weight to the DFAT information which demonstrates the Sri Lankan security authorities maintain sophisticated systems at Colombo airport to detect people of concern and I do not accept that by payment of a bribe that the applicant would be able to subvert these checks if he was viewed as of concern. If the applicant had been of interest to the authorities I find it implausible that he was issued a passport and able to avoid detention when he travelled via Colombo airport in 2008 and 2011.
18. I have not accepted that the applicant was imputed with an LTTE profile and that he was of interest to the authorities and I do not accept that when he moved to work in another district in 2004 after the camp attack, that the CID came to the hostel where he was staying and he hid to avoid them. It follows that I do not accept that from 2005 to 2008 his [sibling] was harassed by CID officers until [he/she] revealed his whereabouts.
19. I am not satisfied that the applicant was imputed with an LTTE profile because fellow school students were linked to the LTTE and I do accept that the CID came to his place of work and observed him, I do not accept that he ran from a restaurant and was pursued by the CID from whom he escaped by catching a bus, nor that the CID photographed him and visited the family home and showed these photographs to his family and told them they wanted to detain him. I have not accepted that the CID suspected he was involved in the 2004 attack on the camp or that after this attack the CID came to the family or the hostel looking for him. As I have not accepted that he had a profile and that the CID came to the family home on the claimed occasions after 2001, it follows that I do not accept the claim that the CID interrogated and physically assaulted family members, checked for weapons, and took money and jewellery.
20. I note that when the applicant returned to Sri Lanka in 2011 he did not come to attention at the airport, nor for the 12 months after his return, and that he was able to live openly at home and establish a business. I do not accept that he was of interest to the CID because of an

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<sup>1</sup> Landinfo, “Sri Lanka: Human rights and security issues concerning the Tamil population in Colombo and the Northern Province”, 1 December 2012, CIS25286

<sup>2</sup> Department of Foreign Affairs and Trade (DFAT), “DFAT Country Information Report – Sri Lanka”, 18 December 2015, CISEC96CF14143; UK Home Office, “Sri Lanka: Tamil separatism. Version 2.0”, 19 May 2016, OGD7C848D17

imputed LTTE profile and therefore I do accept that from April 2012 a CID officer began to make enquiries about him because of an imputed LTTE profile, or for any other reason. Furthermore, if he was of interest to the CID his account of the CID's numerous unsuccessful attempts to locate is simply not plausible considering he attended his place of business every day at regular opening and closing hours.

21. I accept that in 2012 the Eastern Province was highly militarised and the general Tamil population experienced harassment<sup>3</sup> and abuse from the security authorities and it is possible that the CID and army came to his [business] and pilfered [product]. However I note this was an isolated incident and I do not accept that they took the [product] as a ploy to lure the applicant to their office; had he been of interest to the CID there was no apparent impediment to the CID coming to his place of work on any day when he was regularly there at opening and closing hours and questioning or detaining him.
22. I accept that he may have complained to the police about this stealing and that the police were dismissive of his complaint. I do not accept as plausible that this resulted in a group of seven to eight CID officers visiting the family home that night and for the next three days threatening to shoot the applicant and that the applicant evaded them by disguising himself [when] travelling to stay with [a relative]. I am not satisfied that the applicant was of sufficient interest to the CID to warrant the claimed level of attention, notwithstanding his complaint to the police about the theft of [product] from his [business], and I am not satisfied that his claim is a genuine account.
23. I note that the applicant has not claimed in any his accounts to have had any contact or encounters with the Karuna group. He speculates that the Karuna group may have passed information about him to the CID. I accept his claim that the Karuna group worked closely with the security authorities in the past, however I have found that the applicant was not of adverse interest to the authorities. I do not accept that the Karuna group had an interest in the applicant and I am not satisfied that the Karuna group passed information about him to the authorities.
24. I accept that during 2012 Tamils experienced harassment, regular monitoring and that there are reports of human rights abuses committed by the army, and that at time the applicant departed Sri Lanka illegally and sought asylum in Australia.
25. Having found that the applicant has no profile of concern to the authorities I do not accept that the CID made regular enquiries about him after his departure.
26. I have had regard to the applicant's claim regarding a court case involving the CID "after the incident in 2000". As already noted, the applicant clarified at his SHEV interview that the reference earlier in his statement of claims to an incident with the CID in 2000 is a mistake and did not occur. Noting the applicant's statement that there was no incident in 2000 I have considered whether this may refer to the incident in 2001 involving the cutting down of the trees, however at his SHEV interview the applicant stated that the family did not report or complain to any authority about this incident. There is no further credible information before me that points to "crimes" being committed by the CID against the applicant or his family. I have not accepted the claims that the CID came to the family home in 2003, 2004 or 2012 and abused family members and stole property, and accordingly I find that there was no subsequent court action following these claimed events. Noting that I have found the applicant

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<sup>3</sup> Landinfo, "Sri Lanka: Human rights and security issues concerning the Tamil population in Colombo and the Northern Province", 1 December 2012, CIS25286

has not been credible with regard to other claims he has made, and that there is no credible evidence before of crimes by the CID that may have prompted a court case, I am not satisfied that this claim is genuine and I find that the applicant has fabricated this account to enhance his protection claims.

## **Refugee assessment**

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27. 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**

28. 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.

29. It is speculation on the applicant’s behalf that his father was killed due to suspicion of LTTE links, however I have accepted this claim as plausible as many thousands of people went missing during the civil war and the army has been implicated in many incidents of killings of Tamils they suspected of having LTTE connections<sup>4</sup>. Although the applicant describes himself as young when his father disappeared I have considered whether he could have been, or would be now on return to Sri Lanka, imputed with an LTTE profile because of his father. The current UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka<sup>5</sup> provides guidance on the profiles of people at risk of harm and likely to be in need of protection and notes that family members of LTTE members may be at risk. However, in the applicant’s case, there is no indication that the disappearance of his father has resulted in any interest in him in the past from the authorities and there is no indication that he has ever been questioned about his father’s involvement or accused of having LTTE links because of his father’s activities. Nor has his mother, or other immediate or extended family members, attracted any adverse attention or been imputed with an LTTE profile because of

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<sup>4</sup> Landinfo, “Sri Lanka: Human rights and security issues concerning the Tamil population in Colombo and the Northern Province”, 1 December 2012, CIS25286; UK Home Office, “Sri Lanka March 2012”, 7 March 2012, 3523

<sup>5</sup> UH High Commissioner for Refugees, “UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka”, 21 December 2012, UNB0183EA8

their association with his father. I find that the applicant has not been imputed with an LTTE profile on the basis of his father and that there is not a real of harm to him because of any suspicion that this father worked for the LTTE and has been missing for many years.

30. Throughout the war and in the immediate period following the Tamil population was subject to scrutiny, monitoring, harassment and ongoing checks for links with the LTTE. It was in this environment that from [year] the applicant had his identity checked by the army at checkpoints and was asked about his activities and any LTTE links and that he was basely abused by drunken army soldiers, his family and [siblings] were abused at checkpoints, and in the immediate aftermath of the war the CID pilfered [product] from his [business] and the police were dismissive of his subsequent complaints. Country information confirms that security authorities, in particular the army, acted with impunity in abusing the civilian Tamil population and confirms that Tamils were regularly vetted and subject to systemic human rights abuses. I accept that from his past experience and as a Tamil the applicant has concerns for his safety and future in Sri Lanka. However, since the applicant left Sri Lanka in 2012 and the defeat of the repressive Rajapaksa government in 2015, there has been a significant change in the country circumstances and I am not satisfied that there is a real chance he would experience harm on return to Sri Lanka for reason of his Tamil ethnicity.
31. The Emergency Regulations that provided the security authorities broad powers to arrest and detain suspects have been lifted<sup>6</sup>. There are credible reports of ongoing arrests and disappearances in Sri Lanka, however I note that DFAT<sup>7</sup> reports the improvement in the security situation has resulted in a decrease in Tamils held in detention and the election of the Sirisena government in 2015 has led to greater political cooperation. The Sirisena government has adopted a more proactive approach to human rights and reconciliation and has been engaging constructively with the Tamil political parties<sup>8</sup>. DFAT<sup>9</sup> reports that the monitoring and harassment of Tamils from former LTTE areas has decreased under the Sirisena government. The Sirisena government has taken steps to remove checkpoints and decrease the levels militarisation in the east and north, and I note the army camp near the applicant's village was closed after the war. The UNHCR's current Guidelines<sup>10</sup> for assessing the eligibility of Sri Lankans for asylum state that being of Tamil ethnicity alone does not give rise to protection needs and there is no longer a presumption of a requirement for protection for reason of being a Tamil from a former LTTE controlled area.
32. I accept there are reports of Sri Lankans, including Tamils, being abducted and of ongoing human rights violations in Sri Lanka, and I note the reports of returnees who have been able to leave the airport after arrival in Sri Lanka but have been arrested later at their home. However, the indications are that those involved had links with the LTTE. The applicant does not have a real or imputed LTTE profile.
33. I am not satisfied that the applicant has a real chance of harm from the Karuna group. I note that he had no interaction with the Karuna group in the past and there is no information before me which indicates that he would be of interest to the Karuna group, who are now reported to be involved in criminal activities, on return to Sri Lanka now.

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<sup>6</sup> US Department of State, "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320

<sup>7</sup> DFAT, "DFAT Country Information Report – Sri Lanka", 18 December 2015, CISEC96CF14143

<sup>8</sup> ibid

<sup>9</sup> ibid

<sup>10</sup> UN High Commissioner for Refugees, (UNHCR), "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka", 21 December 2012, UNB0183EA8

34. I am not satisfied that the applicant has been imputed with an LTTE profile and I find there is not a real chance that the applicant faces harm on the basis of being a Tamil from an LTTE controlled area, his father's disappearance/death, being harassed by soldiers and CID during and after the civil war, arguing with soldiers about the cutting of trees on the family farm and being taken to the camp and humiliated by soldiers on that day, the CID pilfering [product] from his [business] or because he reported this to the police.
35. The applicant did not advance any claims to fear harm on the basis of his religion, or to have been restricted in the practise of his religion, in his SHEV application. At his SHEV interview the delegate asked the applicant if he had experienced any trouble as a Hindu and the applicant recounted being told by Buddhist priests to remove the holy ash and to pray at the Buddhist temple before attending the Hindu temple. The applicant has not claimed to fear from this harassment by Buddhist priests, or that he was otherwise restricted from practising his Hindu religion in his chosen manner. The Sri Lankan Constitution provides for religious freedom and all citizens have the right to practise their religion unhindered<sup>11</sup>. Country information<sup>12</sup> supports that there have been tensions at times, mostly as a result of radical Buddhist groups harassing and violently attacking the minority Hindus and Muslims, and DFAT<sup>13</sup> is aware of reports that the former Rajapaksa government sanctioned religious discrimination. In assessing whether the applicant would be restricted in the future in practising his religion to the extent that it amounts to serious harm I have taken account of the improvements in the security situation since the applicant departed Sri Lanka. In 2015 DFAT<sup>14</sup> assessed that most members of religious groups in Sri Lanka are able to practise their faith freely. I am satisfied that the applicant would not be restricted in the practise of his religion and there is not a real chance he will experience serious harm on return as a Hindu.
36. I accept that, on his return to Sri Lanka, the applicant would be considered by the authorities to be a failed asylum seeker who departed Sri Lanka illegally. Entry and exit from Sri Lanka is governed by *the Immigrants and Emigrants Act 1949* (I&E Act) and under this Act it is an offence to depart other than from an approved port of departure. Penalties for leaving Sri Lanka illegally include imprisonment of up to five years and a fine of up to 200,000 Sri Lankan rupees. In practice, penalties are applied on a discretionary basis and are almost always a fine<sup>15</sup>.
37. Returnees are generally considered to have committed an offence under the I&E Act if they departed Sri Lanka irregularly by boat and I accept that on the basis of his illegal departure the applicant will be liable to penalty under the Act<sup>16</sup>.
38. DFAT advises that on arrival in Sri Lanka, involuntary returnees are processed by the Department of Immigration and Emigration (DoIE), the State Intelligence Service (SIS) and a unit of the CID based at the airport. During the processing of returnees, DoIE officers check travel document and identity information against the immigration database. SIS checks the returnee against intelligence databases. The CID verifies a person's identity to determine whether there are any outstanding criminal matters. The police may undertake an investigation to confirm the person's identity, to identify any criminal or terrorist background or court orders or arrest warrants. This may involve interviewing the returnee, contacting local police, contacting neighbours and family and checking criminal and court records. The

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<sup>11</sup> DFAT, "DFAT Country Information Report – Sri Lanka", 18 December 2015, CISEC96CF14143

<sup>12</sup> US Department of State, "Sri Lanka – Country Report on Human Rights Practices 2015", 13 April 2016, OG2B06FAF8

<sup>13</sup> DFAT, "DFAT Country Information Report – Sri Lanka", 18 December 2015, CISEC96CF14143

<sup>14</sup> *ibid*

<sup>15</sup> *ibid*

<sup>16</sup> *ibid*

administration process can take several hours to complete. DFAT assesses that returnees are treated according to these standard procedures, regardless of their ethnicity and religion, and are not subject to mistreatment during their processing at the airport<sup>17</sup>.

39. As a returnee it is likely that applicant will be questioned by police at the airport and charged under the I&E Act. As part of this process, most returnees will be fingerprinted and photographed. Returnees are transported to the nearest Magistrates Court at the first available opportunity. However, returnees may be required to remain in police custody at the CID Airport Office for up to 24 hours. In circumstances where a Magistrate is not available before this time, such as a weekend or public holiday, returnees may be held at a nearby prison. DFAT advises general prison conditions in Sri Lanka do not meeting international standards because of a lack of resources, overcrowding and poor sanitary conditions<sup>18</sup>.
40. DFAT understands that no returnee who was merely a passenger on a people smuggling boat has been given a custodial sentence for departing Sri Lanka illegally, instead fines have been issued as a deterrent. The amount of the fine may vary and can be paid by instalment if the returnee faces difficulty with payment. If a person pleads guilty, they will be fined and released. In most cases, when a returnee pleads not guilty, they are immediately granted bail on personal surety by the Magistrate, or may be required to have a family member act as guarantor. Returnees may sometimes need to wait until a family member comes to court to act as guarantor. Bail conditions are imposed on a discretionary basis, although DFAT understand conditions are rarely applied. An accused will only need to return to court when the case against them is being heard. DFAT assesses that ordinary passengers are generally viewed as victims and penalties are more likely to be pursued against those suspected of being facilitators or organisers of the people smuggling<sup>19</sup>.
41. Once before the Court, and if not dealt with on the spot if the applicant were pleading guilty, the returnee would ordinarily be released unconditionally or be bailed to return to Court at a later date. If a Magistrate is not available at that time, for example due to the weekend or a public holiday, the applicant could be held in a nearby prison for a short time. Although the maximum penalty includes five years imprisonment, the country information indicates custodial sentences are not imposed on returnees who were merely a passenger on a people smuggling boat but that fines are issued to act as a deterrent<sup>20</sup>.
42. The applicant was only a passenger on the boat; there is no indication that he was involved in a people smuggling venture. Based on country information I find that the applicant may be detained and questioned at the airport for up to 24 hours, be fined for breaching the I&E Act and, may face a period of time held in prison.
43. The High Court endorsed in *MIBP v WZAPN*<sup>21</sup>, that whether a risk of loss of liberty constitutes serious harm required a qualitative judgment, including an evaluation of the nature and gravity of the loss of liberty. Should the applicant be held over a weekend or public holiday until seen by a Magistrate, I am satisfied the applicant would face only a brief period in detention. Even having regard to general poor prison conditions, I do not consider that a brief period in detention would constitute the necessary level of threat to his life or liberty, or to significant physical harassment or ill treatment under s.5J(5) of the Act or otherwise amount to serious harm for the applicant.

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<sup>17</sup> DFAT, "DFAT Country Information Report – Sri Lanka", 18 December 2015, CISEC96CF14143

<sup>18</sup> *ibid*

<sup>19</sup> *ibid*

<sup>20</sup> *ibid*

<sup>21</sup> *MIBP v WZAPN; WZARV v MIBP* (2015) 254 CLR 610

44. I also do not consider any likely questioning of the applicant by the authorities at the airport on arrival, any surety imposed, or the imposition of a fine under the I&E Act, to constitute a threat to his life or liberty, or to be significant physical harassment or ill treatment under s.5J(5) of the Act or otherwise amount to serious harm.
45. Additionally, the country information states that all persons who depart Sri Lanka illegally are subject to the I&E Act on return. That law is not discriminatory on its terms. Case law states that a generally applicable law will not ordinarily constitute persecution because the application of such a law does not amount to discrimination. In this case, the evidence does not support a conclusion that the law is selectively enforced or that it is applied in a discriminatory manner. I find that the investigation, prosecution and punishment of the applicant under the I&E Act would be the result of a law of general application and does not amount to persecution for the purpose of ss.5H(1) and 5J(1) of the Act.
46. I accept that an asylum seeker with actual or perceived links to the LTTE may be at risk of harm when processed at the airport or soon after arrival. However, based on my findings, the applicant has not been imputed with an LTTE profile and I do not accept that the applicant will be at risk of adverse attention from the Sri Lankan authorities on return to Sri Lanka.

#### **Refugee: conclusion**

47. 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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48. 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**

49. 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.
50. I have found that there is not a real chance that the applicant faces harm on the basis of being a Tamil from an LTTE controlled area, his father's disappearance/death on suspicion of LTTE links, being harassed by soldiers and CID during and after the civil war, arguing with soldiers about the cutting of trees on the family farm and being taken to the camp and humiliated by soldiers on that day, the CID pilfering [product] from his [business] or because he reported this

to the police. Noting that the Full Federal Court<sup>22</sup> has held that the “real risk” test for complementary protection is the same standard as the “real chance” test, and based on the same information, and for the reasons set out above, I am also satisfied that there is not a real risk that he would face significant harm for these reasons.

51. I accept that the applicant will be identified on return as a person who departed illegally and an asylum seeker and that there is a real risk that the applicant will be investigated and detained for several hours at the airport, and possibly detained on remand for some days pending bail, and then fined. I am not satisfied that this treatment, either during the investigation process or while being held at the airport, amounts to significant harm. As noted above, DFAT has confirmed that returnees may, in some circumstances, be held for a short time in prison while waiting to appear before a magistrate. However, even if the applicant is required to spend a period of time in prison while waiting to appear before a magistrate, I am not satisfied that he will face significant harm as defined.
52. I accept that the applicant may be subjected to poor prison conditions during any possible brief period of detention but country information confirms that this is due to overcrowding, poor sanitation and lack of resources. I have also accepted that the applicant will be questioned, charged, briefly detained and fined under the I&E Act with the offence of leaving Sri Lanka illegally and fined as a result but that he is unlikely to face a custodial sentence. This does not amount to the death penalty, arbitrary deprivation of life or torture and the evidence does not indicate there is an intention to inflict pain or suffering or severe pain or suffering or cause extreme humiliation. I am not satisfied that questioning, or the imposition of a fine, or the poor prison conditions to which the applicant may be subject constitute significant harm as defined under ss.36(2A) and 5 of the Act. Accordingly, I am not satisfied the applicant will face a real risk of significant harm during any possible brief period in detention.
53. I accept there are reports of mistreatment of asylum seekers who have been returned to Sri Lanka, however I note that DFAT reports there have been thousands of asylum seekers returned to Sri Lanka since 2009 with relatively few allegations of torture or mistreatment. DFAT reports that the risk of torture or mistreatment for the majority of returnees is low including for those suspected of an offence under the I&E Act<sup>23</sup>. I have found above the applicant is not a person of interest to the Sri Lankan authorities. I am therefore not satisfied that there is a real risk that the applicant would be subjected to mistreatment during any possible brief period in detention on return to Sri Lanka.

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

54. There are not substantial grounds for believing that, as a necessary and foreseeable consequence of being returned from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm. The applicant does not meet s.36(2)(aa).

#### **Decision**

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

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<sup>22</sup> *MIAC v SZQRB* (2013) 210 FCR 505

<sup>23</sup> DFAT, “DFAT Country Information Report – Sri Lanka”, 18 December 2015, CISEC96CF14143

## Applicable law

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### **Migration Act 1958**

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

...

**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.