



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

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA16/01175

Date and time of decision: 19 May 2017 12:59:00  
Katrina Fairburn, Reviewer

**Decision**

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

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

## Background to the review

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### Visa application

1. The referred applicant (the applicant) claims to be a Hindu Tamil from Batticaloa District in the Eastern Province of Sri Lanka. He fears returning to Sri Lanka because he would be at risk of being harmed by the Sri Lankan authorities, including armed groups such as the Karuna Group, for imputed association with the Liberation Tigers of Tamil Eelam (LTTE) or imputed anti-government opinion due to his ethnicity, for having worked with non-government organisations (NGOs), and for supporting the Tamil National Alliance (TNA). [In] January 2016, the applicant lodged an application for a Safe Haven Enterprise (subclass 790) visa.
2. [In] October 2016, a delegate of the Minister for Immigration and Border Protection refused to grant the visa.

### 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).
4. On 24 January 2017 the Department of Foreign Affairs and Trade published an updated Country Information report on Sri Lanka.<sup>1</sup> Relevantly to this decision, the report provides information about the position of Tamils, persons perceived to have connections to the LTTE, persons who departed Sri Lanka illegally and returning asylum seekers. I consider this report may be relevant to assessing the application, was not before the delegate and constitutes new information. The report was published after the delegate's decision and the delegate relied upon an earlier DFAT report on Sri Lanka published on 18 December 2015. I am satisfied there are exceptional circumstances to justify considering the new information.

### Applicant's claims for protection

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5. The applicant's claims can be summarised as follows:
  - He is a Hindu Tamil from the Batticaloa District in the Eastern Province of Sri Lanka.
  - From January 2005, the applicant undertook employment in [a certain] industry. He undertook contracts to work with a number of different NGOs during the period from 2005 until March 2012.
  - In 2009, a good friend of the applicant's was imprisoned, mistreated and detained for about [number] months and then imprisoned again for a further [number] months. After being released on the second occasion, his friend took his own life.
  - The applicant has heard a lot of stories about Tamil people being taken away by the Karuna Group and abducted for ransom. Some people he personally knows have been taken and mistreated. He is aware of one person who was taken and his body was later found.
  - The applicant's family have a history of being politically active supporters of the Tamil United Liberation Front (TULF) and later, the TNA. The applicant attended regular TNA

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<sup>1</sup> Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

meetings with his father and other relatives. In 2010, the applicant and his family supported a TNA candidate in the Presidential election.

- In September 2010, when he was working for an NGO, the applicant had a confrontation with men from the Karuna Group at [a workplace] when he refused to accept poor quality [material] from them. The men said to him “You will see the consequences and learn a lesson from this”. The applicant also clashed with the Karuna men at the [workplace] over who would handle the payroll cash on behalf of the workers.
- Around February 2012, the applicant was again threatened by the Karuna men that he would be killed if he did not hand over the payroll monies. He made a complaint to the [senior personnel] which resulted in a community meeting to discuss the complaint. Members of the public went directly to the Karuna Group to make a complaint about their interference in the work projects. The Karuna men agreed they would not interfere further with the [job] and the NGO’s work.
- A couple of days after the meeting, the applicant was stopped by 5-6 uniformed army officers at the army checkpoint near his [workplace]. He was taken by gunpoint to an area off the road and his motorbike and mobile phone were confiscated. His hands were tied and he was assaulted by different men who had arrived. He sustained a bad back injury from the beating. He believed the men were from the Karuna Group.
- When he was discovered some time later, he was taken by his father to [location] in Batticaloa where he recovered from his injuries. Following the conclusion of his work contract [in] March 2012, he did not continue to work in [the industry].
- In June 2012, he started campaigning full-time for the TNA candidate, Mr T, in the 2012 Provincial Council elections. Karuna’s sister was a candidate in the same election. Mr T provided the applicant with a van and the applicant travelled throughout the region with other campaigners. He handed out leaflets and was responsible for setting up public meetings and, occasionally when the candidate was running late, he would speak at the meeting until they arrived.
- Since 2004 the applicant had been a member of [a sports club] and from 2010, he was the [Office bearer] of the Club. During the 2012 election campaign, men from the Karuna Group approached the applicant in his capacity as [Office bearer] of the Club, demanding the use of the building and that Club members assist with the Karuna campaign. The applicant put the proposition to the club members, but a decision was delayed.
- Men from the Karuna Group approached the applicant at the Club building, grabbed his shirt and lifted him from the ground. They threatened him, telling him to make the members come to a decision quickly or they would burn down the building and harm the club committee members.
- Shortly after this incident, in about August 2012, four Karuna men went to the applicant’s house on motorbike and badly beat his father. The men asked for the applicant’s whereabouts and threatened them both if they continued to support the TNA. The applicant’s mother called him and told him not to come home. The applicant stayed away from his home until he left for Australia in September 2012.
- Just before the election, the applicant was campaigning in the van when they were stopped by a group of four men with guns who ordered them out of the van. The applicant and the others were called ‘LTTE’ and told not to support the TNA. The men

took the leaflets and burned them by the roadside. They were told they would be hurt or killed if they were found supporting the TNA in that area again.

- On another occasion, while the applicant was handing out leaflets, a man wearing civilian clothing hit him many times in the face and told him to leave immediately for supporting the TNA.
- While campaigning again, the applicant and others were handing out leaflets, speaking with people and asking for donations. They were approached by four men with guns who made them throw away all the banners and leaflets and drive to a lonely place. The men took the cash donations they had collected and told them to stop supporting non-Government candidates in the election. They said they would shoot the applicant and fellow campaigners immediately. A police motorcycle group came along the road and the men left.
- [In] September 2012, the applicant left Sri Lanka illegally and travelled to Australia by boat.

## **Refugee assessment**

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6. 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**

7. 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.
8. The applicant provided information about his background and family connections in both his application and during his visa interview. During his visa interview, he was assisted by a Tamil interpreter and spoke fluently in the Tamil language. As part of his visa application and also at interview, he provided documents to support his identity. Based on the documentation provided by the applicant and his personal information (which was accepted by the delegate), I

accept the applicant's identity is as claimed and that he is a Hindu Tamil from the Batticaloa District in the Eastern Province of Sri Lanka.

9. I accept that he is a national of Sri Lanka and of no other country.
10. The applicant has claimed he fears harm on return to Sri Lanka from Sri Lankan authorities, including armed groups such as the Karuna Group, due to his Tamil ethnicity, and imputed LTTE association and political opinion as a supporter of the TNA.
11. The applicant provided details in his visa application and during the visa interview about his background, including that up until his departure from Sri Lanka he had resided in the Batticaloa District and attended schooling in the area. In conjunction with undertaking private study in 2006, he was successful in completing his 'A' levels. Following secondary schooling, the applicant commenced but did not complete a [qualification] at [educational institution] and, in 2007, commenced but did not complete a [degree] at [a] University. The applicant provided documentary evidence in support of his qualifications. I accept the applicant undertook studies as he has claimed.
12. The applicant claimed to be actively engaged in his local community through participating in [Society 1] and the [sports club] in [town]. In particular, he claimed to have been a member of the [sports club] from about 2004. From 2010 until 2012 he was [Office bearer] of the Club. Prior to his presidency, he undertook the role of Secretary for one year. As part of his visa application, the applicant submitted an undated reference signed by the [Office bearer] and Secretary of the [Society 1] attesting that he had been an active member in 2009 and an undated letter signed by the [Office bearer] and Secretary of the [sports club]. The letter from the Sports Club misstated the applicant's term as [Office bearer] and confirmed the Club's support of the TNA during the 2012 Provincial Council election and that as a result there were threats made to the café by unknown persons and caused the applicant to abscond.
13. During the visa interview, the delegate raised a concern with the applicant about the letters from [Society 1] and the [sports club] as they were both undated, and seemed to both be signed by the same Secretary. The applicant confirmed that his father had requested the letters after the applicant had arrived in Australia. He stated that the two organisations were linked, with the [sports club] having a stronger youth membership and headed by a youth as [Office bearer]. There was overlap in membership between the two groups which is why the letters shared a signature from the same Secretary. The applicant described that if [Society 1] wanted to engage in a project for the village, they would approach the Sports Club for resources and people to help with the work. The applicant also confirmed that the [Office bearer] of the [sports club] who signed the letter did not hold the position at the time the applicant left Sri Lanka. There is no information before me to indicate whether the signatories of the letter from the [sports club] had any direct knowledge of the threats directed towards the applicant and the café and on this basis, I give less weight to this aspect of the letter. Overall, I found the applicant's explanation about the issues raised by the delegate to be credible. I am satisfied that the applicant was involved with both [Society 1] and the [sports club], and held the role of [Office bearer] of the Sports Club between 2010 and 2012.
14. The applicant claimed as part of his visa application that from January 2005 he engaged in employment in [a certain] industry in [occupation], including for a number of different NGOs undertaking projects in the Batticaloa area. The applicant provided a number of documents to corroborate his employment including a document certifying he had been employed as a [occupation] with [an] organisation, [Agency 1] at Batticaloa, from [August] 2010 until [March] 2012. I accept the applicant's claims about his work history.

15. The applicant specifically referred to the experience of a good friend who in 2009, had been arrested, imprisoned for a period of 12 months and mistreated. He described his release from imprisonment and harassment by the Sri Lankan police. Following a further period of imprisonment for [number] months, the friend committed suicide. I acknowledge that this was a distressing event for the applicant, but am not satisfied on the evidence before me, that it is connected with the applicant's own claims for protection or that it would give rise to a real chance the applicant would face serious harm.
16. Similarly, the applicant referred to having heard stories about Tamil people being taken away by members of the Karuna Group and in some instances, abducted for ransom. He cited instances of people known to him who were abducted, but on the information provided, there does not appear to be a connection of these instances with the applicant's own circumstances and I am not satisfied they, of themselves, give rise to a real chance of harm to the applicant.
17. During the visa interview, the applicant accepted that he had not personally had any encounters with the Sri Lankan authorities where he was suspected of having any connection with the LTTE, either directly or imputed through the activities of his relatives. Consistent with the applicant's evidence, I note that he applied for, and was issued with, a National ID card in July 2012 without any apparent impediment or adverse interest being shown from the authorities. I am satisfied the applicant has not been imputed with LTTE involvement or anti-government opinion by the authorities or otherwise attracted their adverse interest until this time.
18. However, the applicant indicated that he had encountered problems with members of the Karuna Group (whom he associated interchangeably with members of the TMVP) commencing from about September 2010, in relation to his role as [occupation] [at a workplace] for [Agency 1]. At this time, the NGO was required to receive all the materials it needed for [the job] from the Karuna Group. On one occasion the Karuna men supplied [material] of poor quality which the applicant refused to accept. After he complained about the quality of the [material], they were returned to the Karuna men. The applicant stated that this started a strained relationship between him and the Karuna men. The applicant claimed that relations were further strained over a dispute with the Karuna men about who would take care of the payroll money to pay the workers at the end of each week. On several occasions, the men from the Karuna Group wanted to take control of the money but the applicant refused to hand the money over to them. Given the applicant's [role] [at the workplace], I accept that he would have responsibility for material [at the workplace] and securing the payroll money. I consider it plausible that the financial aspect of these responsibilities led to the applicant coming in to conflict with the Karuna men, as he has described.
19. In February 2012, the Karuna men made a further demand and threatened to kill the applicant if he did not hand over the payroll money. He responded by making a formal complaint to the [senior personnel], who raised the issue for discussion at a community meeting. The applicant believes that through the community meeting he was identified as the person who initially raised the complaint. Following the meeting, members of the public took issue directly with the men from the Karuna Group who subsequently agreed not to interfere further with the [work].
20. The applicant's account of his role and interaction with the Karuna men was detailed and credible. Country information before the delegate indicated that the Karuna Group operated in association with security forces towards the end of the war and in its aftermath. The Karuna

Group also formed an associated political party, being the TMVP.<sup>2</sup> Having accepted that the applicant came into conflict with members of the Karuna Group in relation to his work responsibilities, and given the public nature of a community meeting, I consider it plausible that it would become known that he instigated the complaint against the Karuna men. There is no information before me, and the applicant has not claimed, that in the course of his work with NGOs he was ever targeted by Sri Lankan authorities or suspected for holding imputed anti-government sentiment. I am satisfied that the Karuna men's focus on the applicant was not due to the fact that he worked for an NGO per se, but rather because he refused to engage in work practices that would result in a financial benefit to them.

21. A couple of days after the community meeting, the applicant claims he was stopped at the army checkpoint near his [workplace]. They checked his bag and searched him whereas previously they had let him through. He stated during his visa interview that his mobile and motorbike were taken from him and he was taken off to the side of the checkpoint. The same men from the Karuna Group who had clashed with him over the payroll money arrived and he was severely beaten over the course of 4-5 hours. Given the closeness in time of the assault to the community meeting and the applicant's identification of the men being the same, I am willing to accept that the Karuna men retaliated against the applicant for making the complaint and subjected him to a severe beating.
22. The applicant stated that he recalled he was nearly unconscious when he was found and his father arrived. There was consideration of whether he should be admitted to hospital for his injuries, which included a bad back injury. Due to concern about having to disclose to police that he had been beaten at the [workplace], he agreed to be treated by family members and receive local medication instead. When the delegate queried why he was prepared to be treated by family members instead of by trained people at the hospital, the applicant indicated that a lot of his relatives had some medical training. His [relative] and her husband are nurses, [one relative] is a [occupation] at the hospital and another [relative] is a midwife. I am satisfied on the basis of the applicant's account that despite not receiving treatment at the hospital for his injuries or making a report to police, he sustained significant injuries as a result of the beating he had received.
23. The applicant's contract with [Agency 1] ended [in] March 2012. He indicated during the visa interview that he did not undertake any further work contracts with the NGO due to fear of further harm from the Karuna men. I accept the applicant's encounters with the Karuna Group may have been a factor in his decision to discontinue working in the [industry] at this time.
24. The applicant claimed his family had been politically active in supporting the TULF and then later the TNA. In the 2010 Presidential elections, the applicant's family had supported the TNA candidate, Mr Y. The applicant stated he attended regular TNA meetings with his father and other relatives as well as attending meetings of the youth wing. The applicant confirmed that he did not encounter any problems with authorities or rival political parties during the 2010 campaign as he and his friends would simply run away whenever an issue presented. He believed he experienced no difficulties during this campaign because he only helped out on the weekends and was not involved in any leadership activities. The applicant provided a forthright and plausible account of his family's support for the TNA and his own participation in political activities. I accept the applicant and his family had a history of supporting the TNA, and supported the TNA candidate during the 2010 Presidential election. I am satisfied the

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<sup>2</sup> UK Home Office, "Country Information and Guidance. Sri Lanka: Tamil Separatism. Version 2.0", 19 May 2016, OGD7C848D17, p.38

applicant's support for the TNA at this time was not prominent or involve any significant campaign responsibilities.

25. The applicant stated that his family also supported the TNA candidate, Mr T, in the local Provincial Council elections in 2012. While other members of his family, including his father, were less involved in campaigning due to work and study commitments, in June 2012 the applicant undertook full-time campaigning for Mr T. He described his role as campaigning throughout a number of small villages in a van provided by Mr T and setting up and running public meetings. He travelled with other campaigners and they would hand out leaflets door-to-door, at major shopping centres, temple compounds and at public meetings. As part of his role he would set up and conduct public meetings at home and in other villages including setting up the sound system, and organising seating and refreshments for the speakers. He claimed to have spoken publicly at these meetings. When questioned by the delegate about this aspect of his campaign support, the applicant clarified that often the candidate would be late for the meeting. When this occurred, he would speak to the meeting attendees until the candidate arrived. He said this occurred at least 4-5 times. He continued to undertake this work up until his departure from Sri Lanka [in] September 2012.
26. In support, the applicant provided an undated letter from Mr T, confirming that the applicant actively supported his campaign in the Provincial Council election from [June] 2012 until [September] 2012 as well as a letter from Mr A, a Member of Parliament dated [in] January 2013, confirming his affiliation with the TNA and that he was being threatened and searched by an unknown armed group while in Sri Lanka. I have given little weight these letters insofar as they relate to threats to the applicant, as it was established during the visa interview this information was not personally known by the authors at the time incidents involving the applicant occurred. However, I accept that the applicant undertook full-time campaigning for Mr T and was responsible for driving a van to distribute leaflets, setting up public meetings and occasionally speaking at meeting when the candidate was late in arriving.
27. I accept that during the 2012 election campaign the applicant's role was more senior and prominent than his activities in the 2010 Presidential campaign. However, I consider his role remained supportive and largely administrative. When speaking at the public meetings, the applicant was filling in time before the candidate's speech, rather than being the main focus of the meeting. I am satisfied that while the applicant may have been recognised in his local area as supporting the TNA and working for Mr T's campaign, he did not otherwise hold a prominent role in the TNA and did not attract adverse interest of the Sri Lankan authorities for holding for anti-government opinion during the course of the campaign.
28. As part of his application and during the visa interview, the applicant outlined a number of incidents during the course of the campaign where he felt threatened and harassed. Specifically, he referred to a time when he was in the van [campaigning]. He and his colleagues were called LTTE and threatened by four armed men to cease supporting the TNA. The men took all the leaflets in the van and burned them by the roadside. On another occasion, he was slapped in the face a number of times by a villager when they were campaigning in [location]. The man told the applicant to get into his van and leave immediately as he was supporting the TNA. During the visa interview, the applicant surmised that people in the community who supported other parties would not abide by people trying to change their political position and this resulted in anger being directed towards him. Given the public nature of the applicant's support for the TNA campaign and the credibility of his testimony, I am satisfied that he was subjected to physical intimidation and harassment by a number of unknown people who supported other candidates.

29. The applicant acknowledged during his visa interview he was aware that campaigning on behalf of the TNA candidate would cause him problems, including with members of the Karuna Group, and that he had only recently ceased working with the [Agency 1] organisation to avoid further harm from them. He stated that he undertook full-time campaigning as he needed to obtain work and this was a means to obtaining a reference and assistance from the TNA to get a job. He also said that he was motivated to help the Tamil community. I note that prior to June 2012, the applicant had been in relatively continuous employment, had achieved 'A' levels, was engaged in study to achieve a university qualification and had a number of references from previous employers. For these reasons, I do not accept that it was essential for the applicant to engage in campaigning work for the TNA as his only pathway to future work. I consider his willingness to place himself in a position of potential conflict with Karuna Group members so soon after he had sustained a severe beating from them, to be at odds with the level of fear he has claimed.
30. The applicant stated that during the 2012 election campaign, the [sports club] was supporting the TNA. Club members were distributing information about the TNA and organising public meetings to be held in the Club's headquarters at [a building]. He was approached by men from the Karuna Group who demanded to use the building for their candidate and the assistance of the Club members for their campaign. Although the applicant put the proposition to Club members, a decision was delayed. The applicant claims that in the absence of a decision, the Karuna men approached him at the club, grabbed his shirt and lifted him from the ground, threatened his life and to burn down the building and harm all the club committee members. There is no information before me, and the applicant has not expressly claimed, that these men were the same Karuna members who had threatened and assaulted him in relation to the [workplace] disputes. Credible country information before the delegate indicates that pro-government paramilitary groups were involved in intimidating and harming political opponents and citizens during the 2012 Provincial Council elections. Having regard to the applicant's position as [Office bearer] of the Sports Club and his access to resources (meeting places and volunteer assistance) and country information, I consider it highly plausible that members of the Karuna Group would intimate the applicant in order to promote their own candidate's campaign.
31. The applicant also claimed that in about August 2012, four Karuna men went to his family home and beat his father very badly. They asked for the applicant's whereabouts and said they would harm him and his father if they continued to support the TNA. The applicant did not return home after this incident. For reasons already stated and given the timing of this incident to the Karuna Group's dissatisfaction with the applicant over use of the Sports Club's resources, and his father's longstanding support of the TNA, I accept that the Karuna members targeted not only the applicant but also his father.
32. The applicant stated in his application that the tipping point for his decision to leave Sri Lanka occurred when he and his fellow campaigners were handing out leaflets in [location]. They were approached by four armed men in civilian clothing who made them empty the van of its promotional material and drive to a lonely place. The men took the cash donations they had received and threatened them by saying they would shoot them to stop them campaigning. The men departed when a police motorcycle group came along the road. There is no information before me, and the applicant has not claimed, that he recognised the identity of the men who robbed them or that they were affiliated with the Karuna Group. I accept that he was robbed and threatened at gunpoint by four unknown men while campaigning. While I am satisfied they may have been supporters of an opposing party, I am not satisfied on the evidence before me that the attackers were necessarily members of the Karuna Group.

33. The applicant confirmed at his visa interview that since his departure from Sri Lanka, he has not engaged in any political activity and had reduced his profile while in Australia. Although, he made no express statement about his intention to resume political activities on return to Sri Lanka, I accept that given his family background and personal circumstances, this could occur. The applicant confirmed to the delegate that while his family continued to be politically engaged, they had not encountered any problems since his departure. It was put to the applicant by the delegate that the security and political circumstances in Sri Lanka had significantly changed since 2012. The Centre for Monitoring Election Violence (CMEV) identified that, compared with elections day in 2010, instances of election-related violence on election day in the parliamentary and presidential elections in 2015 had reduced. CMEV also stated that polling in the 2015 General election had been largely peaceful and without hindrance.<sup>3</sup> In the August 2015 parliamentary elections, the TNA secured sixteen seats and also currently leads the Opposition in Parliament.<sup>4</sup> The delegate also put to the applicant country information that indicates the Karuna Group and the TVMP have been demilitarised with no indication that the Karuna Group has been active as paramilitary group since 2014.
34. Should the applicant continue to be politically active on return to Sri Lanka, country information before the delegate and the absence of further problems experienced by his family, indicate there is not a real chance he would be at risk of violence or intimidation. Given the country information, his family's experience since he departed Sri Lanka and the applicant's lack of profile with the authorities for either LTTE association or anti-government sentiment (arising from either his political activities or his work with NGOs), I am satisfied that there is no real chance the applicant would attract the adverse attention of Sri Lankan authorities on return to Sri Lanka. Noting that almost five years have passed since the Provincial Council elections occurred in 2012 and the unknown people who threatened, harassed and slapped the applicant while he was campaigning did so specifically in the context of that election, I am also not satisfied that applicant is at risk from these people on return to Sri Lanka.
35. At the conclusion of his visa interview, the applicant raised a separate concern that during his term as [Office bearer] of the [sports club], he had instigated a recommendation that the [building] be used as a tafe. He understands that the building was taken over by the army in 2013 and suggested that he did not know whether action might be taken against him as he had instigated this recommendation. There is no other information before me to indicate the circumstances of any dispute over the use of the Club. I consider the applicant's concern to be remote and speculative. I am not satisfied that the applicant's involvement in a proposal to use the Club building as a tafe gives rise to a real chance he would be subjected to harm.
36. While there are issues over which the applicant has come into conflict with members of the Karuna Group ([workplace], TNA involvement), I note these disputes are contextual to the roles held by the applicant, the status of the Karuna Group at the time, and the dynamics of the 2012 Provincial Council election. Given the changed political landscape in Sri Lanka, the non-active status of the Karuna Group in the Eastern Province, the passage of time since the 2012 election occurred, the passage of time since the [workplace] dispute occurred and the applicant's subsequent disassociation with his [role], I am not satisfied that the members of the Karuna Group who previously targeted the applicant due to his role as a [occupation]at [Agency 1] [workplace] and as [Office bearer] of the [sports club] and TNA campaigner, would continue to have any interest in him on return to Sri Lanka. I am not satisfied there is a real

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<sup>3</sup> Centre for Monitoring Election Violence, "Parliamentary General Election 2015 – Final Report on Election Related Violence", 11 February 2016, CIS38A8012508, p.57

<sup>4</sup> Ibid, p.7

chance the applicant would face serious harm from former members of the Karuna Group on this basis.

37. I accept that given the applicant's observation of the treatment of his friend and the stories he has heard about the treatment and abduction of Tamils, he is concerned that he would be targeted and arrested on the basis of his ethnicity. However, country information indicates the situation for Tamils has improved since the applicant left Sri Lanka. DFAT assesses that monitoring and harassment of Tamils in day-to-day life has decreased significantly under the Siresena Government.<sup>5</sup> The United Nations High Commissioner for Refugees Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka issued in 2012, states that in its opinion, originating from an area previously controlled by the LTTE does not of itself result in the need for international refugee protection.<sup>6</sup>
38. The law in Sri Lanka prohibits discrimination based on race, sex, gender, disability, language or social status. The Constitution also has provisions that prohibit discrimination regarding religion, caste, political opinion and place of birth.<sup>7</sup> I note that the applicant has completed schooling in Batticaloa and attained his 'A' levels. He successfully enrolled in further study including securing a university place, and sustained relatively continuous employment in [the industry], including holding [positions] from 2005 until March 2012.
39. For reasons already stated, I am satisfied that the applicant does not hold a profile that would attract the adverse attention of the authorities on return to Sri Lanka. Based on the country information and the personal circumstances of the applicant, I am not satisfied he will face a real chance of serious harm from authorities on the basis of his Tamil ethnicity and/or because he originates from the Eastern Province, for imputed involvement with the LTTE or anti-government opinion arising from his political activities or work with NGOs. I am also not satisfied he will face a real chance of serious harm arising from disputes he has had relating to his role as [occupation] on the [Agency 1] [workplace] or as the [Office bearer] of the [sports club], or as a result of his campaigning for a TNA candidate in the 2012 Provincial Council election.
40. I accept that the applicant departed Sri Lanka illegally, that he will return to Sri Lanka as a returned asylum seeker and is likely to be identified as such. The country information in the referred material indicates that Sri Lanka's Constitution entitles any Sri Lankan citizen the freedom to return to Sri Lanka.
41. DFAT reports that persons who depart other than via an approved port of departure (illegal departees), may be liable for imprisonment up to five years and a fine of up to 200,000 Sri Lankan rupees,<sup>8</sup> although as noted by the delegate penalties for such persons are usually a fine. As the applicant does not have a profile for LTTE involvement or would otherwise be considered a security or political risk by the Sri Lankan authorities, I do not consider that the applicant would be targeted or subjected to processes on re-entry to Sri Lanka that would be different from the usual procedures outlined below.
42. Processing of illegal departees may take several hours primarily due to the administrative practices, interview lengths and staffing constraints. DFAT assesses that such persons are

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<sup>5</sup> DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105, p.12

<sup>6</sup> United Nations High Commissioner for Refugees (UNHCR), "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012, UNB0183EA8, p.26

<sup>7</sup> US Department of State, "Sri Lanka – Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320, p.28

<sup>8</sup> DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105, p.33

processed in accordance with standard procedures regardless of ethnicity and are not subjected to mistreatment during processing at the airport.<sup>9</sup>

43. Persons who have departed illegally who have been arrested can remain in custody at the CID's Airport Office for up to 24 hours after arrival and if a Magistrate is not available within this time, for example because of a weekend or public holiday, may be held at a nearby prison.<sup>10</sup>
44. I accept the applicant departed Sri Lanka illegally as a passenger on a boat. I accept that should he plead guilty he would be fined and would then be free to go. I am not satisfied that, such a financial penalty in this case would amount to serious harm.
45. Returnees who plead not guilty, will, in most cases, be immediately granted bail by a Magistrate and released on the basis of a surety (personal or guaranteed by a family member) and will rarely be subject to any conditions in relation to the bail or any general requirement to report to police or police stations between court attendances.<sup>11</sup>
46. There is no evidence before me that suggests the operating procedures and penalties under the *Immigration and Emigrants Act 1949* (I&E Act) are discriminatory on their face, nor does the country evidence suggest it is applied in a discriminatory manner. Accordingly, I am not satisfied on the evidence that detention arrangements for the purpose of being charged under the I&E Act and financial penalties imposed upon a plea of guilty are applied in a discriminatory manner.
47. Alternatively, I have considered whether detention of the applicant for a short period and/or receipt of a financial penalty upon a plea of guilty would amount to serious harm. In the absence of information about any specific vulnerability attaching to the applicant, including the nature and extent of the injury he sustained to his back, and that he would have the opportunity to pay a fine by instalment I consider this treatment, both separately and taken together, would not amount to serious harm.
48. DFAT assesses the risk of torture or mistreatment for the majority of returnees is low and continues to reduce.<sup>12</sup> For the reasons stated above, I am not satisfied the applicant will face a real chance of serious harm on the basis of being a returned asylum seeker and/or for illegal departure.
49. I have also assessed the applicant's claims cumulatively in respect of his profile as a male Hindu Tamil from the Eastern Province who may be imputed with being involved with the LTTE, who worked for a number of NGOs, had encounters with the Karuna group, and was a supporter of, and campaigner for, the TNA, and that he will be a returned asylum seeker who departed the country illegally. Assessing his claims cumulatively, I find they do not give rise to a real chance of serious harm.

#### **Refugee: conclusion**

50. 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).

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<sup>9</sup> DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105, p.34

<sup>10</sup> Ibid, p.34

<sup>11</sup> Ibid, p.34

<sup>12</sup> Ibid, p.29

## Complementary protection assessment

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51. 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

52. 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.

53. The applicant has not made specific claims for complementary protection separate from those put forward in relation to refugee criteria.

54. For the reasons already stated, I have found that there is not a real chance the applicant will face serious harm from the Sri Lankan authorities on return to Sri Lanka on the basis of his Tamil ethnicity and/or because he originates from the Eastern Province, for imputed involvement with the LTTE or anti-government opinion arising from his political activities or work with NGOs. I have also found he will not face a real chance of serious harm arising from disputes he has had relating to his role as [occupation at the Agency 1] [workplace] or as the [Office bearer] of the [sports club], or as a result of his campaigning for a TNA candidate. As 'real chance' and 'real risk' involve the same standard,<sup>13</sup> it follows that based on the same information, and for the reasons stated above, I am also satisfied there is no real risk of significant harm on these bases if returned to Sri Lanka.

55. There is no suggestion the applicant faces the death penalty for any reason.

56. As to his treatment under the criminal justice system for illegal departure, in the absence of criminal convictions or outstanding warrants, and on the basis the applicant was a passenger on a people smuggling venture and not otherwise holding a profile of interest to the authorities, country information indicates that he would only be detained for a short time and if pleading guilty, the most likely punishment would be a fine.

57. I accept that conditions in prison and on remand for detainees are poor due to overcrowding and poor sanitation, but note this is due to limited resources rather than an intention by the state to inflict pain and suffering or degrading treatment.<sup>14</sup> There is no evidence before me to indicate that the applicant would face a real risk of significant harm or that the applicant suffers a particular vulnerability that would be exacerbated by even a short time in detention.

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<sup>13</sup> *MIAC v SZQRB* (2013) 210 FCR 505

<sup>14</sup> US Department of State, "Sri Lanka – Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320, p.9

Country information indicates that the amount of a fine imposed on returnees who plead guilty to an offence under the I&E Act is discretionary and may be paid by instalment. Evidence does not indicate that financial penalties are imposed in a manner intended to inflict pain and suffering or cause extreme humiliation.

58. Accordingly, I am not satisfied that there is a real risk the applicant will face the death penalty, arbitrary deprivation of life, torture, cruel or inhuman treatment or punishment, or degrading treatment or punishment, including as a result of conditions he may face as a necessary and foreseeable consequence of being returned to Sri Lanka as an illegal departee.

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

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

#### **Decision**

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

## Applicable law

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### ***Migration Act 1958***

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

...

***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.