



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

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA16/01295

Date and time of decision: 9 June 2017 14:54:00  
Scott MacKenzie, 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 Tamil from Batticaloa District, Eastern Province, Sri Lanka. The applicant arrived in Australia [in] October 2012 as an unauthorised maritime arrival. [In] May 2016 the applicant lodged a valid application for a Class XE Subclass 790 Safe Haven Enterprise visa (SHEV).
2. A delegate of the Minister of Immigration and Border Protection (the delegate) refused to grant the visa [in] November 2016, on the basis that the applicant did not face a real chance of serious harm or a real risk of significant harm upon return to 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).
4. On 23 November 2016 the IAA received an email submission from the applicant. The submission in part comprises argument that responds to issues arising from the delegate's assessment, which I consider does not constitute new information.
5. The applicant also submitted new information that was not before the delegate. The IAA must not consider any new information from an applicant unless satisfied exceptional circumstances justify considering the new information and the new information was not and could not have been provided to the Minister, or is credible personal information which was not previously known and had it been known may have affected the consideration of the applicant's claims.
6. The applicant provided a letter, dated [in] November 2016, from [a] General Practitioner, that states that the applicant suffers from [various medical conditions]. The applicant also provided a report, dated [in] November 2016, from [a social worker], that confirms he is receiving psychological counselling, The report discusses some of the experiences the applicant reported to have experienced in Sri Lanka, which is broadly consistent with information already provided in his SHEV application. I am satisfied this information post-dates the delegate's decision and therefore could not have been made available to the Minister. Given this new information provides updated information in relation to the current health of the applicant, which may be relevant to the review, I am satisfied there are exceptional circumstances for its consideration.
7. The applicant also provided an extract from an online article of the Colombo Telegraph<sup>1</sup>, which was published on 12 November 2016. I am satisfied this information post-dates the delegate's decision and therefore could not have been made available to the Minister. The article reports that a Buddhist monk from Batticaloa threatened a Tamil Grama Sevaka (village officer) with death because he filed several court cases against Sinhalese living in the district. The monk was subsequently detained by police who were present. The applicant submits that the article 'reflects a societal persecution of a Tamil man, and police inaction'. As the applicant has claimed to fear harm in Sri Lanka on account of his ethnicity, I am satisfied there are exceptional circumstances for consideration of this new information.

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<sup>1</sup> Colombo Telegraph, "'You Tamil dog, I will kill you' Buddhist Monk Tells Grama Sevaka in Batticaloa", 12 November 2016, <https://www.colombotelegraph.com/index.php/you-tamil-dog-i-will-kill-you-buddhist-monk-tells-grama-sevaka-in-batticaloa/>

8. I have obtained new information, specifically information on the treatment of Sri Lankans of Tamil ethnicity and citizens who have departed Sri Lanka illegally and sought asylum abroad (information not specifically about the applicants but about a class of persons of which the applicants are a member) from the most recent Department of Foreign Affairs and Trade (DFAT) country report for Sri Lanka which was published on 24 January 2017.<sup>2</sup> The delegate relied on the 18 December 2015 DFAT report for Sri Lanka which the 24 January 2017 report updates. I am satisfied that there are exceptional circumstances to justify considering this new information.

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

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9. The applicant's claims are contained in the information referred to the IAA. They can be summarised as follows:
- The applicant is a Tamil male from [Batticaloa] District , Eastern Province;
  - In 1985, the applicant sustained [an] injury [as] a result of the civil conflict;
  - In October 2007, the applicant's [Relative 1] was forcibly taken by the Liberation Tigers of Tamil Eelam (LTTE);
  - As a result of his [Relative 1's] involvement with the LTTE, the applicant was constantly interrogated and threatened by officers of the CID (Criminal Investigation Department);
  - In February 2008, the applicant went to [Country 1] and claimed asylum. He returned to Sri Lanka in March 2008;
  - Upon return to Sri Lanka, the CID continued to interrogate the applicant up until he departed Sri Lanka in September 2012;
  - In 2012, the applicant was approached by the Karuna Group to canvass votes for them in the upcoming provincial council elections to be held [in] September 2012. However, the applicant preferred to assist the Tamil National Alliance (TNA);
  - Following the TNA's election win, the applicant received a threatening phone call from the Karuna Group. He went into hiding;
  - After the applicant left Sri Lanka, the CID continued to go to the applicant's home in search of him. His children have also been threatened by unspecified persons;
  - If returned to Sri Lanka, the applicant fears he will be harmed or killed by the Sri Lankan Army (SLA), the CID, the Karuna Group, or the Sri Lankan government, on account of:
    - his Tamil ethnicity
    - his prior residence in an area controlled by the LTTE
    - his imputed LTTE links
    - his involvement with the TNA
    - his illegal departure from Sri Lanka
    - his asylum application in [Country 1]
    - his asylum application in Australia.

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<sup>2</sup> Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105

## Refugee assessment

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10. 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

11. 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.
12. The applicant claims to be from a village in Batticaloa District in the east of Sri Lanka. He has provided some evidence of his identity, and on the basis of his evidence, I accept that the applicant is a Tamil male from this part of Sri Lanka.
13. In support of his SHEV application, the applicant provided a statement, signed and dated [May] 2016, where he outlined his claims for protection (SHEV statement). In his SHEV statement, the applicant stated that he sustained [an] injury [in] 1985 as a result of the conflict.
14. In October 2007, the applicant was caring for his [Relative 1] because [of a family member’s circumstances]. At that time, his [Relative 1] was forcibly taken by the LTTE while he was out walking in the village.
15. From the time the applicant’s [Relative 1] was taken (October 2007), around six armed officers from the CID came to his home about once a week and interrogated him. Because his [Relative 1] was in his care at the time he went missing, the CID believed the applicant was hiding or working with his [Relative 1]. The CID threatened the applicant that he would face severe consequences, including death, if he did not reveal the whereabouts of his [Relative 1]. In February 2008, due to fear of the CID, the applicant went to [Country 1] on a [temporary] visa and claimed asylum. He was told by the UNHCR (United Nations High Commissioner for Refugees) that he could attend an interview in six months. However, at this time the [Country 1] government started to direct Tamils to ‘refugee prisons’ so he decided to return to Sri Lanka in March 2008.

16. In around March 2008, the [family member] approached [Relative 1] in Vanni and unsuccessfully encouraged him to return home. At this point he was indoctrinated in the LTTE and could not return.
17. In March 2008, within two weeks of his return to Sri Lanka, the CID continued to visit the applicant's home and interrogate him in relation to [Relative 1]. On one occasion (date unspecified) he was forced against a wall with a gun held to his head, the CID suspected that the applicant had gone to visit his [Relative 1]. He did not reveal to the CID that he had travelled to [Country 1] and instead said that he had been working in [a location] 15 kilometres from the village.
18. The interrogations and questioning from the CID continued intermittently until the applicant departed Sri Lanka in September 2012. Although he was never physically harmed, he suffered verbal abuse and received threats that he would be killed. The CID stopped coming to the applicant's home in February 2013, when the village officer informed the CID that he had travelled to Australia.
19. In his SHEV statement, the applicant described himself as an influential figure in his community. He stated that prior to leaving Sri Lanka in September 2012 he was a member of [a local society], a member of the sports club, and [an official] of the local Hindu Temple. As a result of his status in the community, he was approached by the Karuna Group (also known as the TMVP) to canvass votes for them in the upcoming provincial council elections to be held [in] September 2012. He was informed that if he did not support the Karuna Group he would be subjected to further physical harm. However, the applicant decided he wanted to support the TNA and he did so by speaking publically on its behalf and encouraged the support of others. When the TNA won the election, the applicant immediately went into hiding and decided two weeks later to flee Sri Lanka. He feared the Karuna Group would take revenge on account of the support he gave the TNA. At the time he also heard that two TNA supporters had disappeared.
20. [In] October 2016, the applicant was interviewed by the delegate in connection with his claims for protection (SHEV interview). I have listened to the recording of the SHEV interview. As well as information provided in support of his SHEV application, I have also had regard to information provided by the applicant in an earlier interview of [October] 2012 (entry interview).
21. I accept that the applicant sustained [an] injury [in] 1985 as claimed. Although this claim was not explored by the delegate in the SHEV interview, country information in the referred materials confirms that many civilians were injured as a result of the conflict that broke out in Sri Lanka in 1983. The applicant did not specifically indicate that he feared future harm in Sri Lanka on account of this incident and there is no evidence before me that indicates that he will come to the adverse attention of the Sri Lankan authorities, or any other group or person, in this regard. Accordingly, I am not satisfied that the applicant faces a real chance of serious harm in Sri Lanka on account of his [injury] sustained in 1985.
22. I accept the applicant's [Relative 1] was forcibly recruited by the LTTE in October 2007. The applicant's evidence in relation to this claim was consistent with information provided in his entry interview and throughout the SHEV application process. Country information confirms

that the LTTE supported its administration through the forced recruitment of Tamils at the relevant time.<sup>3</sup>

23. I find the applicant's evidence that he came to the adverse attention of the CID following his [Relative 1]'s forced recruitment by the LTTE to be unconvincing. In particular, I noted a number of inconsistencies in his evidence presented at different times that undermine the credibility of his claims.
24. Firstly, the applicant's claim in his SHEV statement that officers of the CID visited and interrogated him in his home from October 2007 until February 2008 (when he travelled to [Country 1]) was inconsistent with his oral evidence in the SHEV interview where he stated that the CID first came to his home seven or eight months after his [Relative 1] was taken (approximately May or June 2008).
25. Secondly, in his SHEV statement, the applicant initially stated the CID last came to his home looking for him in February 2013, after he departed Sri Lanka, and that the visits ceased after the village officer informed the CID that he had travelled to Australia. However, later in the SHEV statement, the applicant claimed that the CID came looking for him in his home in September 2013. According to a letter from the applicant's social worker, dated [in] June 2015, the applicant reported that the 'CID continue to visit his village and interrogate his family members'. I also note the applicant raised a new claim in the SHEV interview where he stated that his children had received threats by unspecified persons (date unknown). While this claim was not explored further by the delegate, I note this claim was not advanced in his SHEV statement. When asked why such a significant event was omitted from his SHEV statement, the applicant advised the delegate that when preparing his SHEV application he was not asked by his representative to go into that level of detail. Later in the SHEV interview, the applicant said he feared returning to Sri Lanka because the government 'may' find out he came to Australia, which contradicted his written claims that the CID were informed by the village officer of his travel to Australia in around February 2013.
26. Thirdly, the applicant claimed in his SHEV statement that it was CID officers that had interrogated him continuously for five years. However, in the SHEV interview, the delegate asked him how he knew it was the CID, to which he replied that he lived in an area controlled by the SLA and that he was 'pretty sure' that the persons interrogating him were affiliated with the government authorities. I note in his SHEV statement the applicant claimed that he feared harm on account of residing in an area controlled by the LTTE.
27. On the basis of documentary evidence provided I accept that the applicant made an application for protection in [Country 1] in February 2008. A letter from UNHCR dated [February] 2008 evidences his claim for asylum was under consideration. Other than the applicant's evidence that he fled to [Country 1] on account of harassment from the CID and his imputed LTTE connections, there is no documentary evidence provided, including from UNHCR, evidencing his claims for protection advanced to the [Country 1] authorities at that time. Significantly, the applicant submitted a letter, dated [in] March 2008, from [Mr A], Member of Parliament, that stated that he was seeking refugee status at that time due to an unidentified armed group seeking to recruit him to take part in unlawful activities. Another letter, dated [in] March 2008, from the [official of a charity], stated that at that time the applicant was seeking to 'conceal himself from the list of murdering people of the militant groups'. The applicant also provided a letter from [Mr B] Vicar, dated [January] 2006, that stated that the applicant

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<sup>3</sup> DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, 3.27.

had been threatened with death by an armed group. These letters all indicate that the applicant left Sri Lanka in 2008 for different reasons than claimed in his SHEV application.

28. I note the applicant was able to return to Sri Lanka on his own passport in March 2008 without difficulty, which indicates that he was not a person of adverse interest to the Sri Lankan authorities at that time. I also note that the applicant was issued a new passport in [2011] in Colombo, which indicates he was not a person of adverse interest to the Sri Lankan authorities at that time.
29. As noted above, the applicant provided conflicting accounts as to when he first (and last) came to the adverse attention of the CID (or persons who he believed to be from the CID). His written claims indicate it was prior to his travel to [Country 1] in February 2008 and again two weeks following his return to Sri Lanka; however, his oral evidence in the SHEV interview was that it was that he first came to the attention of the CID several months following his return from [Country 1]. There were also inconsistencies as to when the CID stopped coming to his home and whether the CID are aware that he was in Australia. These inconsistencies lead me to conclude that the applicant was not recalling a genuine personal experience. I also find the letters from [Mr A], the [official of a charity], and [Mr B] do not support the applicant's claim that he was a person of adverse interest to the CID in 2008. Further, I also consider the applicant's ability to travel freely in and out of Sri Lanka during the conflict at a time when he claimed to have a 'LTTE profile', and his ability obtain a new passport in [2011], to indicate he was not a person of adverse interest to the Sri Lankan authorities for the reasons claimed. I do not accept the applicant was of interest to the CID, the SLA, or any other arm of the Sri Lankan authorities on account of his [Relative 1]'s involvement with the LTTE, or for any other reason. I reject the applicant's associated claims that the CID continued to look for the applicant, or that his children received threats, after he departed Sri Lanka.
30. According to a letter written by the applicant [in] January 2007 to the '[official]', an armed militant group came to his home [in] August 2005 asking about him. The letter states that the group constantly came looking for him and as a result he was prevented from staying in his home. However, according to his SHEV application, the applicant was residing at his home address [between] 2005 and 2007. This letter, along with the other letters submitted from [Mr A], the [official of a charity], and [Mr B] indicate that the applicant was having problems with a militant group from 2005; however, aside from the provision of these documents in support of his SHEV application no such claim was advanced by the applicant in his entry interview, his SHEV statement or during the SHEV interview. While I have concerns in relation to the applicant's overall credibility as noted above (and below), on the evidence before me I cannot conclude, with any certainty, that the applicant did not come to the adverse attention of a militant group in 2005. I therefore accept it is plausible that an unknown militant group, for reasons unknown, attempted to approach the applicant in or around 2005. However, there is no evidence before me to indicate that the applicant is still a person of interest to this militant group. Accordingly, I am not satisfied that the applicant faces a real chance of serious harm on this basis, upon his return to Sri Lanka, now or in the foreseeable future.
31. Although not specifically raised as a claim for protection, I note during the SHEV interview it came to light that the applicant had [distant] [relatives] who were involved in the LTTE. The applicant did not know anything about their roles in the LTTE, only that he knew two of them had passed away. He advanced no claim that the Sri Lankan authorities were aware that he had distant family members involved with the LTTE. While I accept the applicant had [distant] relatives who were involved with the LTTE in some capacity, there is no evidence before me that indicates that the applicant will come to the adverse attention of the Sri Lankan authorities or is at risk of harm in Sri Lanka on account of these distant LTTE familial links.

32. On the basis of the documentary evidence provided, I accept the applicant's claim that he was involved in a number of societies and clubs, including the [local society] and the local Hindu Temple. I also accept that the applicant was well known due to his involvement in matters affecting the community. However, I find the applicant's claimed involvement with the TNA, and the associated threats received on account of that involvement, to be unconvincing. In particular, I noted a number of inconsistencies in his evidence presented at different times that undermine the credibility of his claims.
33. Firstly, the applicant claimed in this SHEV statement that when he was approached by the Karuna Group in 2012 he was threatened that if he did not support them he would be subjected to 'further physical harm'. However, the applicant did not claim to have ever experienced physical harm at the hands of the Karuna Group or any other party while living in Sri Lanka. In relation to the CID, the applicant's evidence was that he had never been physically harmed by CID officers.
34. Secondly, the applicant's claim in his SHEV statement that he was involved in public speaking for the TNA was inconsistent with his evidence in the SHEV interview where he stated that the assistance he provided purely consisted of organising meetings. He advised the delegate that he had no speaking role with the TNA.
35. Thirdly, the applicant's claim in the SHEV interview that he received a telephone call from the Karuna Group after the election threatening he would be killed was not advanced in his SHEV statement. I also note in the entry interview the applicant claimed he was threatened by unknown persons prior to the TNA coming into power; he stated that he was told if he continued to work for the TNA he would be killed. However, this claim was not advanced in his SHEV statement or in the SHEV interview.
36. Fourthly, the applicant's claim in his SHEV statement that he was a person of adverse interest to the Karuna Group following the election was not consistent with information provided in the entry interview where he stated that he did not know who had threatened him, only that they had weapons. Later in the entry interview the applicant was asked whether there were any armed or political groups operating in his area. His response was that there were 'government people' operating in his area during the election, but that he had no involvement with them.
37. Aside from the inconsistencies noted above, I also note a number of the supporting documents provided by the applicant do not support the claims advanced in his SHEV application. According to a letter, dated [in] December 2012, purportedly from [Mr C], [a council member], armed opposition party members went to the applicant's home and threatened him. The letter also states that when the applicant was in Colombo he received threatening phone calls from the same persons. However, the applicant has not at any time advanced a claim that armed persons came to his home in connection with his TNA involvement or that he had ever lived in Colombo. A letter dated [in] October 2012 from [Mr D, an official], stated that the applicant had received threats from 'unknown groups' and makes no reference to the Karuna Group. Another letter, dated [in] October 2012, from [Mr E, a council member], stated that the applicant had been threatened by 'unknown persons' and also makes no reference to the Karuna Group.
38. The above noted inconsistencies in the applicant's evidence and the content of the letters from [Mr C], [Mr D], and [Mr E] lead me to conclude that the applicant was not recalling a genuine personal experience in relation to his involvement with the TNA and the associated threats received from the Karuna Group. In the SHEV interview, the delegate asked the applicant why he supported the TNA given he claimed to have been threatened by the Karuna Group. His

response was that all Tamils supported the TNA and he didn't want to be the only one who didn't. While I accept it is plausible that, as a Tamil, the applicant was a low level supporter of the TNA, I am not satisfied he provided assistance to the party in the lead up to the September 2012 elections as claimed. I do not accept that the applicant was approached by the Karuna Group to canvass votes or that he was threatened by the Karuna Group in any way. I also do not accept that the applicant was anything more than a low level TNA supporter and find that he did not come to the attention of the Karuna Group, or any other group or person, on account of this support for the TNA. I also reject the applicant's associated claim that he went into hiding for two weeks following the [September] 2012 election and prior to his departure from Sri Lanka. Significantly, I note the applicant's evidence in the entry interview was that he started making arrangements to come to Australia about one month before he left Sri Lanka (approximately [in] August 2012), which was two weeks prior to the election, and prior to when he claimed to have first received threats from the Karuna Group.

39. At the end of the SHEV interview, the applicant advised the delegate that his application for protection was 'based on the problems happening in [Sri Lanka]'. He said there were a number of incidents where the Sri Lankan authorities are killing people and making it look like suicide. The applicant referred to a recent incident in Jaffna where two university students were killed and another incident where two police officers were injured. No sources were provided by the applicant or his representative subsequent to the SHEV interview.
40. I accept that the applicant is currently being treated in Australia for [various medical conditions]. I note that the applicant has not advanced any claim that he cannot obtain the necessary treatment for these conditions in Sri Lanka, nor has he advanced a claim that he came to Australia to receive medical treatment. On the information before me, I am not satisfied that the applicant has a well-founded fear of being unable to obtain medical treatment in Sri Lanka.
41. Country information indicates that the overall situation for Tamils in Sri Lanka has improved considerably since the end of the civil conflict in 2009.<sup>4</sup> Country information in the referred materials also indicates there are no official laws or policies that discriminate on the basis of race, language or social status. According to the applicant, he completed secondary education to 'Advanced Level', had ongoing employment, and was able to obtain a passport during the conflict, travel in and out of Sri Lanka, and obtained a further passport post-conflict. There is no evidence before me that indicates that the applicant has or will experience any barriers to accessing education, employment or any government services in Sri Lanka.
42. I have accepted that the applicant sustained [an] injury [in] 1985, had a [Relative 1] who was forcibly recruited by the LTTE in October 2007, and had distant family members who were involved with the LTTE. However, I have determined that the applicant is not of interest to the Sri Lankan authorities, or any other group, on this basis.
43. I have also accepted it is plausible that an unknown militant group attempted to contact the applicant in or around 2005, and that the applicant was a low level supporter of the TNA. However, I am not satisfied that the applicant is at risk of future harm in Sri Lanka on this basis.
44. Although the applicant claimed in his SHEV statement that he is at risk of harm for having resided in an LTTE controlled area for most of his life, I note the applicant's evidence in the SHEV interview was that he resided in an area controlled by the Sri Lankan government. The

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<sup>4</sup> DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105; UK Home Office, "Country Information and Guidance. Sri Lanka: Tamil separatism. Version 2.0", 19 May 2016, OGD7C848D17

applicant advised the delegate in the SHEV interview that he was never involved with the LTTE, but said that he did purchase goods for them on occasion. As noted in the delegate's decision, DFAT advise that populations of areas controlled by the LTTE were required to interact with LTTE military and civil administration as a matter of course. While I accept the applicant may have provided low level assistance to the LTTE as claimed, I am not satisfied as a result of this assistant he had an adverse profile with the Sri Lankan authorities. As already noted, the applicant had numerous interactions with the Sri Lankan authorities, including post conflict when he obtained a new passport, and there was no indication that he was a person with an adverse interest to the Sri Lankan authorities at that time.

45. While I accept the applicant, as a Tamil, may be at risk of facing societal discrimination, I am not satisfied that this would constitute serious harm. In respect of the Colombo Telegraph<sup>5</sup> article provided to the IAA demonstrating discrimination against a Tamil, which could be said, in part, to be due to their ethnicity, I note the applicant's own personal and professional circumstances are different to that of the village officer, a person in authority, who was being verbally abused due to the perception of a monk that he was filing numerous cases against the Sinhalese majority.
46. The UNHCR 2012 Guidelines 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.<sup>6</sup> The Guidelines state that persons suspected of certain links with the LTTE may be in need of international refugee protection, depending on the individual circumstances of their case. Given my findings about the profile of the applicant, and having regard to the country information before me, I conclude that he is not a person that faces a real chance of serious harm by virtue of his Tamil ethnicity, his former place of residence, his support for the TNA, or on account of any actual or imputed LTTE connections, including familial connections.

*Illegal departure / Returning asylum seeker*

47. I accept that if the applicant returned to Sri Lanka he would do so as a failed asylum seeker returned from Australia. I also accept that the applicant would be identified by the Sri Lankan authorities as someone who departed Sri Lanka illegally.
48. Having regard to the country information before me, I am not satisfied there is a real chance the applicant would be harmed by the Sri Lankan authorities by virtue of him being a Tamil asylum seeker. DFAT assess the risk of mistreatment for the majority of returning asylum seekers to be low.<sup>7</sup> The applicant's evidence was that he travelled to [Country 1] in 2008 on a [Country 1] [temporary] visa and returned prior to its expiry. The applicant had no difficulty upon his return to Sri Lanka at that time and there is no evidence before me that indicates that the Sri Lankan authorities are aware of the applicant's asylum application in [Country 1]. For these reasons I am not satisfied the applicant faces a real chance of serious harm due to being a failed asylum seeker from [Country 1] or Australia, now or in the reasonably foreseeable future, if he returns to Sri Lanka.

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<sup>5</sup> Colombo Telegraph, "'You Tamil dog, I will kill you' Buddhist Monk Tells Grama Sevaka in Batticaloa", 12 November 2016, <https://www.colombotelegraph.com/index.php/you-tamil-dog-i-will-kill-you-buddhist-monk-tells-grama-sevaka-in-batticaloa/>

<sup>6</sup> UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183EA8

<sup>7</sup> DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, 4.21-4.22

49. As noted in the delegate's decision, there are penalties under the Immigrants and Emigrants Act (IAEA) for departing Sri Lanka illegally.
50. DFAT reports as part of this process, most returnees will be fingerprinted and photographed, transported to the nearest Magistrates Court at the first available opportunity once investigations are completed, after which custody and responsibility for the individual shifts to the courts or prison services. The Court then makes a determination as to the next steps for each returnee. Returnees who are arrested can remain in police custody at the CID Airport Office for up to 24 hours after arrival. Should a Magistrate not be available before this time – for example, because of a weekend or public holiday – returnees who are charged may be held at a nearby prison.<sup>8</sup> Country information in the referred materials indicates that prison conditions in Sri Lanka are poor due to aging infrastructure, overcrowding, and shortage of sanitary and other basic facilities.
51. I accept that as the applicant departed Sri Lanka without a passport, he may be found to have committed an offence under the IAEA. Country information indicates that persons who have departed Sri Lanka illegally may face penalties that can include up to five years imprisonment and fines of up to SLR200,000; in practice, penalties are applied to such persons on a discretionary basis and usually in the form of a fine.<sup>9</sup>
52. DFAT indicate that returnees will be processed by the Department of Immigration and Emigration, the State Intelligence Service (SIS) and the CID based at the airport who check travel documents and identity information of returnees against the immigration database and intelligence databases, as well as determining whether a returnee has any outstanding criminal matters.<sup>10</sup> I am satisfied on the information before me that the applicant has no identification concerns and I am not satisfied the applicant is a person with a criminal or security record that would raise the concern of these authorities.
53. On return to Sri Lanka, I find the applicant would be charged and fined under the IAEA and then released. In the less likely event that the applicant elected to plead not guilty to the offence under the IAEA, he would either be granted bail on personal surety or have a family member act as guarantor.<sup>11</sup> There is no suggestion the applicant was anything other than an ordinary illegal departee from Sri Lanka. In that context, I find that he would not face any chance of imprisonment, but it is highly likely that he will be fined. As noted above, DFAT has assessed the risk of mistreatment for people suspected of an offence under the IAEA is low. While the applicant may be subjected to poor prison conditions during a short period of detention, I am not satisfied that the prison conditions to which the applicant may be subject of themselves constitute serious harm as defined by the Act. Further, I am not satisfied the applicant will face a real chance of serious harm during any brief time spent in detention, or that he has an elevated risk of harm due to his medical conditions. On the evidence before me, I find the imposition of any fine, surety or guarantee would not of itself constitute serious harm. I have considered the possibility of a custodial sentence, but there is no country information before me that indicates that custodial sentences are being levelled against illegal departees with a profile such as the applicant. In the context of a significant number of Sri Lankan nationals being returned to Sri Lanka, and the absence of any profile that would elevate the penalty the applicant would face, I find there is not a real chance that the applicant would face imprisonment.

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<sup>8</sup> Ibid 5.21

<sup>9</sup> Ibid 5.17, 5.22

<sup>10</sup> Ibid 5.19

<sup>11</sup> Ibid.

54. I am also satisfied that the provisions and penalties of the IAEA are laws of general application that apply to all Sri Lankans equally. The law is not discriminatory on its terms, nor is there country information before me that indicates that the law is applied in a discriminatory manner or that it is selectively enforced. Accordingly, I am satisfied that any process or penalty the applicant may face on return to Sri Lanka because of his illegal departure would not constitute persecution for the purpose of the Act. In light of this I find that the applicant does not face a real chance of serious harm from Sri Lankan authorities due to his illegal departure, travel to Australia or for any other reason.

55. After having regard to the applicant's claims individually and cumulatively, I find that he does not have a well-founded fear of persecution within the meaning of s.5J.

#### **Refugee: conclusion**

56. 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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57. 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**

58. 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.

59. I have concluded that the applicant is not of interest to the Karuna Group, the SLA, the CID, or the Sri Lankan government, on account of any actual or imputed LTTE links (including familial links), or his involvement with the TNA, and does not face a real chance of serious harm on this basis. I have also concluded that the applicant is not of interest any militant groups in connection with the events of 2005. I have further concluded that the applicant does not face a real chance of harm due to his medical conditions or for any other reason including him being a returning asylum seeker. The Full Federal Court held that the 'real risk' test imposes the same standard as the 'real chance' test applicable to the assessment of 'well-founded fear'.<sup>12</sup> Accordingly, for the same reasons set out above, I find that the applicant does not have a real risk of suffering significant harm on return to Sri Lanka.

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<sup>12</sup> *MIAC v SZQRB* (2013) 210 FCR 505

60. The country information in the referred materials confirms that the trend of monitoring Tamil civilians in day-to day life has eased since 2009. Having considered the applicant's own circumstances and evidence discussed above I am not satisfied that the treatment the applicant may face amounts to significant harm as defined in the Act. I am not otherwise satisfied he faces a real risk of significant harm as a Tamil from the east.
61. I have accepted that the applicant will be identified on arrival at the airport in Sri Lanka as having departed illegally and may be detained for several hours at the airport and potentially detained on remand for a number of days pending bail. I am satisfied that the risk of torture or mistreatment for returnees, including for those suspected of offences under the IAEA, is low. On the country information, I am not satisfied there is a real risk that the applicant will face significant harm during the investigation process or while being held at the airport or that his risk of harm is elevated on account of any medical condition.
62. I accept that returnees may be held for a short duration in prison while waiting to appear before a magistrate or while on remand awaiting bail. While I accept that that the applicant may be subjected to poor prison conditions during his detention, country information confirms this is due to overcrowding, poor sanitation and lack of resources. It does not amount to the death penalty; an arbitrary deprivation of life or torture. Further, there is no intention to inflict pain or suffering, severe pain or suffering, or extreme humiliation. In these circumstances, the poor prison conditions to which the applicant may be subject do not of themselves constitute significant harm as defined by the Act. For these reasons, I am not satisfied the applicant will face a real risk of significant harm during any brief time spent in detention.
63. While I accept the applicant may be subjected to questioning and may be required to pay a fine or provide a surety on return to Sri Lanka, I am not satisfied that this amounts to significant harm. I find that the questioning, imposition of a fine and the potential of being held in detention, individually or cumulatively not to amount to the death penalty, arbitrary deprivation of life, torture or that there is an intention to inflict pain or suffering, severe pain or suffering or cause extreme humiliation. I am not satisfied this amounts to significant harm as defined by the Act.
64. After having regard to the applicant's circumstances both individually and cumulatively, I find that he does not face a real risk of suffering significant harm.

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

65. 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.

#### **91W Evidence of identity and bogus documents**

- (1) The Minister or an officer may, either orally or in writing, request an applicant for a protection visa to produce, for inspection by the Minister or the officer, documentary evidence of the applicant's identity, nationality or citizenship.
- (2) The Minister must refuse to grant the protection visa to the applicant if:
- (a) the applicant has been given a request under subsection (1); and
  - (b) the applicant refuses or fails to comply with the request, or produces a bogus document in response to the request; and
  - (c) the applicant does not have a reasonable explanation for refusing or failing to comply with the request, or for producing the bogus document; and
  - (d) when the request was made, the applicant was given a warning, either orally or in writing, that the Minister cannot grant the protection visa to the applicant if the applicant:
    - (i) refuses or fails to comply with the request; or
    - (ii) produces a bogus document in response to the request.
- (3) Subsection (2) does not apply if the Minister is satisfied that the applicant:
- (a) has a reasonable explanation for refusing or failing to comply with the request or producing the bogus document; and
  - (b) either:
    - (i) produces documentary evidence of his or her identity, nationality or citizenship; or

- (ii) has taken reasonable steps to produce such evidence.
- (4) For the purposes of this section, a person produces a document if the person produces, gives, presents or provides the document or causes the document to be produced, given, presented or provided.

...

**91WA Providing bogus documents or destroying identity documents**

- (1) The Minister must refuse to grant a protection visa to an applicant for a protection visa if:
  - (a) the applicant provides a bogus document as evidence of the applicant's identity, nationality or citizenship; or
  - (b) the Minister is satisfied that the applicant:
    - (i) has destroyed or disposed of documentary evidence of the applicant's identity, nationality or citizenship; or
    - (ii) has caused such documentary evidence to be destroyed or disposed of.
- (2) Subsection (1) does not apply if the Minister is satisfied that the applicant:
  - (a) has a reasonable explanation for providing the bogus document or for the destruction or disposal of the documentary evidence; and
  - (b) either:
    - (i) provides documentary evidence of his or her identity, nationality or citizenship; or
    - (ii) has taken reasonable steps to provide such evidence.
- (3) For the purposes of this section, a person provides a document if the person provides, gives or presents the document or causes the document to be provided, given or presented.

...