



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

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA17/01678

Date and time of decision: 9 February 2017 12:55:00  
Kanwal Josan, 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 473ED(2) of the Migration Act 1958 and replaced with generic information which does not allow the identification of a referred applicant, or their relative or other dependant.*

## Background to the review

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### Visa application

1. The referred applicant (the applicant) claims to be a Tamil from Sri Lanka who fears harm from Sri Lankan authorities because of his links to the Liberation Tigers of Tamil Eelam (LTTE) and imputed pro-LTTE political profile. [In] October 2015 the applicant applied for a Protection visa (PV).
2. [In] December 2016 a delegate of the Minister for Immigration and Border Protection (the delegate) refused the visa. The delegate did not accept that Sri Lankan authorities had any interest in the applicant because of actual or imputed LTTE links or for any other reason. The delegate found the applicant was not a refugee as defined by s.5H(1) of the *Migration Act 1958* (the Act) and was not a person in respect of whom Australia has protection obligations under s.36(2)(aa) of the Act.

### Information before the IAA

3. I have had regard to the material referred by the Secretary under s.473CB of the Act.
4. On 1 February 2017 the IAA received a submission from the applicant. The submission in part responds to issues arising from the delegate's decision. I do not consider this to be new information and have considered these aspects of the submission.
5. The submission also includes new information the applicant states he received from his wife after his PV interview, regarding his [family member] and [relatives] being arrested, detained for [number] days, questioned and mistreated by Terrorist Investigation Division (TID) personnel. No details were provided, apart from 'after the interview with the Department', as to when the applicant was notified this incident occurred or when the incident itself occurred. This information was not before the delegate and I consider it to be new information. No explanation was provided as to why this new information was not and could not have been provided to the delegate before the PV decision was taken [in] December 2016, or why it may be regarded as credible personal information that was not known, and had it been known may have affected the consideration of the applicant's claims. I am not satisfied in relation to the matters set out in s.473DD(b) of the Act and have not considered this new information.
6. Attached to the submission were four articles from the TamilNet web site. None of these articles were before the delegate and I consider them to be new information. The articles indicate that they were written in January 2017 and I accept that they could not have been provided to the delegate before the PV decision was taken [in] December 2016. I note that the articles are general in nature and do not suggest any material change in the applicant's circumstances or a significant change of conditions in the applicant's country of origin. In light of this I am not satisfied that there are exceptional circumstances to justify considering the new information. I am not satisfied in relation to s.473DD(a) of the Act and have not considered the new information in my assessment.
7. In making the PV decision the delegate relied on the 18 December 2015 Department of Foreign Affairs and Trade (DFAT) Country Information Report for Sri Lanka. DFAT issued a new Country Information Report for Sri Lanka on 24 January 2017.<sup>1</sup> From the 2017 report I have obtained

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

new information regarding Tamils, persons with links to the LTTE and Sri Lankan citizens who departed the country illegally and sought asylum overseas. This information is not specifically about the applicant and is just about a class of persons of which the applicant is a member. The 2017 report was issued after the delegate's decision [in] December 2016. I consider DFAT to be an authoritative source of country information and as its January 2017 report supersedes its December 2015 one, I am satisfied that there are exceptional circumstances to justify considering the new information.

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

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8. The applicant's claims are contained in the information referred and subsequently given to the IAA. They can be summarised as follows:

- He lived in the Vanni area and when he was young, performed tasks for the LTTE such as delivering food and supplies.
- He fears serious harm in Sri Lanka because of his connection to his [relatives], who were both detained after the civil war because of their established links with the LTTE. They were both involved with the LTTE for over [number] years. One of his [relatives] was only released around May 2015. After his release he was detained twice and then released again after being interrogated and badly beaten.
- Sri Lankan Army (SLA) personnel often come to the applicant's house because his [sibling], the [parent] of his [relatives], lives with him. As the male of the household, he is targeted by the LTTE as he shares the name '[name]' with his [relatives].
- Whenever there was an incident, such as an explosion in the village, the SLA would arrest the applicant because of his association with his [relatives]. He was detained up to [number] times a year, every year since 2009. He has scars from when he was young. When the army saw these marks they assumed he had them as a result of fighting and would beat him. Around nine months before he departed Sri Lanka, pro-LTTE posters were put up near his house. He and [number] of his neighbours were detained by the SLA, had their hands tied and were beaten and questioned. They were released the following morning.
- Two months before he left for Australia, [number] people were abducted in a white van and have disappeared. One of their bodies was found in a paddy field. The people were abducted because they have connections to the LTTE and the SLA is afraid more people will be recruited to revive the LTTE.
- The SLA has come to his house since he has been in Australia and asked his wife where he was. She told them he was in [country], because the SLA knew he was in Australia, they would detain his children and harm them.
- He fears for his life because he travelled to Australia. He knows of someone who sought asylum in Australia and disappeared three days after he returned to Sri Lanka.
- The applicant fears Sri Lankan authorities because of own links to the LTTE and his family links to the LTTE. As a person perceived to be connected to the LTTE, the applicant would be subjected to serious harm on return to Sri Lanka.
- In a post-interview submission to the delegate, the applicant's then-representative claims there is a real risk that the applicant will suffer significant harm on return to Sri Lanka as he left the country while on bail, having been charged for previously attempting to flee by boat.

- His emotional connection for the cause of the Tamil homeland and Tamil people in Sri Lanka is likely to continue and this has the character of a political opinion. Former membership of the LTTE or family members' membership is considered a risk factor in determining whether a person is attempting to revive the Tamil separatist movement.
- Tamils in the diaspora are of interest because many of them played a central role in the conflict as a source of funding and weapons and as political advocates. Given the considerable amount of time the applicant has spent in Australia, it will be imputed to him that he has engaged with the Tamil diaspora here and could be suspected of separatist activities.
- The applicant fears harm if he returns to Sri Lanka as he will be returning as a failed asylum seeker who departed illegally.

### **Refugee assessment**

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9. 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**

10. 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.
11. In the submission to the IAA, the applicant claims that in the PV application process before the department, there were instances where the information he provided to his then-representative was dismissed as not relevant, which adversely affected the outcome of his PV application. He also claims that had he been given access to a Tamil-speaking legal advisor, he could have presented his case clearly and without any mistakes or legal errors. The applicant has not articulated any details regarding errors or omissions on the part of his then-representative, who I note is a solicitor and registered migration agent with the [agency]. There is no evidence the applicant lodged a complaint with the relevant authority regarding any perceived shortcoming in the quality or competence of immigration advice he received. The applicant attended a PV interview with the delegate where an accredited Tamil interpreter

was used. The delegate asked the applicant a series of open questions in that interview and I note that the applicant did not raise any issues regarding the accuracy or completeness of the information provided as part of the PV application. I am satisfied that the applicant was given an opportunity to present his case for protection and place no weight on these claims on my assessment.

12. I accept that the applicant is a Sri Lankan citizen of Tamil ethnicity. He has consistently claimed this since his arrival in Australia, gave evidence at the PV interview in the Tamil language and his citizenship is supported by copies of documents including his birth certificate and national identity card. I find that Sri Lanka is the receiving country for the purposes of the Act.
13. I accept that the applicant may fear harm on return to Sri Lanka on account of his Tamil race, however for the following reasons, I am not satisfied the applicant will face a real chance of harm on the basis of being a Tamil. DFAT assesses<sup>2</sup> that Tamils have a substantial level of political influence and their inclusion in political dialogue has increased since Sirisena came to power in 2015. Information before the delegate is that Sri Lanka's August 2015 parliamentary election was deemed credible by international and domestic observers, with the Tamil National Alliance (TNA), gaining sixteen seats and TNA leader, Rajavathian Sampanthan appointed opposition leader. Monolingual Tamil speakers, including in the Northern Province, can have difficulty communicating with the police, military and other government authorities. DFAT assesses that these practical difficulties are the result of a lack of qualified language teachers, the disruption to civilian life caused by the conflict and the legacy of earlier discriminatory language policies rather than official discrimination.
14. Many Tamils, particularly in the north and east, reported being monitored, harassed, arrested and/or detained by security forces under the former Rajapaksa government. For example, during the civil conflict, more Tamils were detained under emergency regulations and the *Prevention of Terrorism Act* (PTA) than any other ethnic group. While this was primarily due to LTTE members and supporters being almost entirely Tamil, there were also likely instances of discrimination in the application of these laws, with LTTE support at times imputed on the basis of ethnicity. Information before the delegate is that since taking power in 2015, the Sirisena government has, established a new reconciliation taskforce mandated with 'healing the wounds of mistrust and social and cultural stress generated from extended conflicts between different communities in Sri Lanka', replaced military governors with civilians governors in the Northern and Eastern Provinces, reduced high security zones, released land formerly held by the military and engaged constructively with the TNA. In addition, some individuals held under the *Prevention of Terrorism Act 1979* (PTA) have been released. DFAT assesses that monitoring and harassment of Tamils in day-to-day life has decreased significantly under the Sirisena Government. While some cases of monitoring of Tamils continue to be reported, such as the military or police observing public gatherings or NGO forums, the overall prevalence of monitoring has greatly reduced. Members of the Tamil community have also described a positive shift in the nature of interactions with authorities; they feel able to question the motives of, or object to, monitoring or observation activities.<sup>3</sup>
15. I accept that the applicant originates from an area previously controlled by the LTTE, was displaced from his home area during Sri Lanka's civil conflict and that he experienced personal upheaval. I accept that from 1983 to 1993 when he was aged between [ages], because of his residence in an LTTE-controlled area, the applicant performed occasional basic tasks for the LTTE in return for food or other necessities. At the height of its influence, the LTTE controlled

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<sup>2</sup> DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105, 3.4 – 3.7

<sup>3</sup> DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105, 3.8 – 3.9

and administered around three quarters of what are now the Northern and Eastern provinces of Sri Lanka. As a result, all persons residing in these areas necessarily encountered the organisation and its administration in their daily lives.<sup>4</sup>

16. At the PV interview the applicant stated that he himself was never a member of the LTTE, but may be imputed with LTTE links due to the tasks he performed for the LTTE, his connection to his [relatives], who were members of the LTTE for around [number] years and his presence in Australia. In its current guidelines, the United Nations High Commissioner for Refugees (UNHCR) states that certain links to the LTTE may give rise to a need for protection. The guidelines relevantly state that LTTE supporters or persons with family links to former LTTE combatants may be at risk.<sup>5</sup>
17. During the years of civil conflict in Sri Lanka, Tamils were routinely rounded up and detained on suspicion of LTTE involvement. I accept that on occasion and in response to anonymous incidents of dissent such as the appearance of pro-LTTE posters, the applicant and some neighbours were detained by the SLA, interrogated and mistreated. I find from the account provided by the applicant of his detention that this was part of the general harassment of Tamils by Sri Lankan authorities in the aftermath of the conflict. The applicant was at no time subjected to any reporting or monitoring conditions, indicating strongly that despite his occasional work for the LTTE between 1983 and 1993, Sri Lanka authorities had no ongoing interest in him. Further supporting this is the applicant's ability, at the height of the civil conflict in 2007, to travel openly to Colombo through several official checkpoints, to apply for and be issued with a passport from Sri Lankan authorities.
18. I accept that the applicant has [relatives] with whom he shares a name who were in the LTTE and that this connection may bring him within the UNHCR risk profile. I note however that the applicant's [relatives] have other family members in Sri Lanka – [siblings] and their mother - none of whom has reported any issues with Sri Lankan authorities, despite having a similar familial link as the applicant to former members of the LTTE. I accept that the applicant has a family connection to former members of the LTTE with whom he shares a name, however there is no evidence to indicate that while the applicant lived in Sri Lanka, he or other members of his immediate family faced harm from Sri Lankan authorities due to these connections and there is no evidence that he would do so on return to Sri Lanka now.
19. I have found that Sri Lankan authorities have no ongoing interest in the applicant due either to his occasional work for the LTTE more than twenty years ago or his connection with his [relatives]. I do not accept as credible the applicant's claim that since he departed Sri Lanka, SLA personnel once visited his house seeking his whereabouts.
20. I accept that the applicant may feel an ongoing emotional connection for the cause of a Tamil homeland, however there is no evidence he engaged in any Tamil separatist activity in Sri Lanka or while overseas, or has engaged with the Tamil diaspora while in Australia such that he would be imputed with a pro-separatist profile. The available evidence gives no indication that the applicant has any other links to the LTTE and I am not satisfied he has any imputed LTTE links through his [relatives] or through performing occasional tasks for the LTTE, over twenty years ago, to the extent that his profile would fall within any of the categories that the country information suggests would be potential persons of interest. Nor am I satisfied that the applicant's his own history indicates any ongoing interest from Sri Lanka authorities. For these

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<sup>4</sup> UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka", 21 December 2012, UNB0183EA8, p.26

<sup>5</sup> UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka", 21 December 2012, UNB0183EA8, p.27

reasons I consider the applicant does not face a real chance of harm from Sri Lankan authorities, on account of his familial link to his [relatives], due to any imputed links to the LTTE or any imputed links to the Tamil diaspora.

21. I accept that Sri Lankan authorities may remain sensitive to the re-emergence of the LTTE and do monitor former members and supporters.<sup>6</sup> I note that while the applicant was detained for a short period, he was not arrested, charged or interned in any sort of rehabilitation camp. I am satisfied from this that Sri Lankan authorities considered that his assistance to the LTTE and family connection to his [relatives] were not significant enough to impute him with a profile of interest.
22. The applicant claims that shortly before he departed Sri Lanka, six or seven people with connections to the LTTE were abducted and one of their bodies was found in a paddy field. He fears something similar happening to him if he now returns to Sri Lanka. I accept that instances of enforced disappearances and persons going missing escalated rapidly after Mahinda Rajapaksa became President of Sri Lanka in 2005 and the war effort against the LTTE began intensifying. The Sirisena government has stated repeatedly it does not want the “white van culture” of its predecessors to return. The Prime Minister, Ranil Wickremesinghe, stated in a speech to the Sri Lankan parliament on 3 June 2015 that these abductions were a thing of the past: “Today there are no white vans and as such we are happy that most people can express their views freely”.<sup>7</sup> The available evidence indicates that the applicant is not of ongoing interest to Sri Lankan authorities or any paramilitary or other groups in Sri Lanka and country information is that white van abductions are now seldom reported.<sup>8</sup> I do not consider that the applicant faces a real chance of harm from a white van abduction or any other enforced disappearance on return to Sri Lanka.
23. I accept that the applicant has some scarring received as the result of a tree fall when he was young. UNHCR and other authoritative sources no longer indicate that individuals with scarring are more prone to adverse treatment upon return to Sri Lanka.<sup>9</sup> I have found that the applicant does not face a real chance of harm on the basis of any imputed LTTE support or links and do not consider that the applicant’s scars elevate his risk profile such that he would face a real chance of harm upon return.
24. The applicant’s then-representative provided the delegate with a post-interview submission dated 13 December 2016. In this submission the representative claimed the applicant departed Sri Lanka while on bail, having been charged for previously attempting to depart the country by boat and has outstanding criminal charges pending under Sri Lanka’s *Immigrants and Emigrants Act 1949* (the I & E Act). In the PV decision the delegate found this not to be credible, noting that the applicant had not raised any claim regarding outstanding criminal charges in Sri Lanka or being released on bail in any interactions with the departmental officers, including at the entry interview, in the written statement of claims accompanying the PV application or at the PV interview. As the applicant’s submission to the IAA has not disputed the delegate’s finding in this regard, I do not accept that the applicant departed Sri

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<sup>6</sup> DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105, 3.29

<sup>7</sup> D.B.S. Jeyaraj, “White-Vanning Culture” and the Lucrative Industry of Abducting Tamils”, Daily Mirror (Sri Lanka), 13 August 2016, CX6A26A6E7800

<sup>8</sup> UK Home Office, "Country Information and Guidance. Sri Lanka: Tamil separatism. Version 2.0", 19 May 2016, OGD7C848D17, 6.6.6

<sup>9</sup> UNHCR, “UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka”, 21 December 2012, UNB0I83EA8; US Department of State, "Human Rights Report 2014 Sri Lanka", 25 June 2015, OG2B06FAF8,

Lanka while on bail, has been charged for previously attempting to depart the country by boat or has outstanding criminal charges pending under the I & E Act.

25. I accept that the applicant would be considered a returning asylum seeker who left Sri Lanka illegally. As a result of his illegal departure, the applicant may be subjected to arrest and interrogation by the authorities upon his return. According to country information before the delegate, under the I & E Act it is an offence to depart the country other than via an approved port of departure. DFAT reports that returnees are generally considered to have committed an offence under the I & E Act if they departed Sri Lanka irregularly by boat, and are liable for penalties including imprisonment of up to five years and a fine of up to 200,000 Sri Lankan rupees, however in practice, they are applied to returnees on a discretionary basis and are almost always a fine.<sup>10</sup>
26. Most returnees are questioned by police on return at Colombo's International Airport and are charged under the I & E Act where an illegal departure from Sri Lanka is suspected.<sup>11</sup> As part of this process, most returnees will have their fingerprints taken and be photographed. They are transported by police to the closest Magistrates Court at the first available opportunity after 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 individual. Arrested detainees can remain in police custody at the CID Airport Office for up to 24 hours, and should a magistrate not be available before this time – for example, because of a weekend or public holiday – those charged may be held at a nearby prison.
27. DFAT has assessed that returnees are treated according to standard procedures, regardless of their ethnicity or religion and that detainees are not subject to mistreatment during their processing at the airport.<sup>12</sup> Country information indicates that in general, prisons in Sri Lanka do not meet international standards due to overcrowding, poor sanitary conditions and a lack of resources.<sup>13</sup>
28. According to the Sri Lankan Attorney-General's Department, which is responsible for the conduct of prosecutions, no returnee who was merely a passenger on a people smuggling venture had been given a custodial sentence for departing Sri Lanka illegally. However, fines had been issued to act as a deterrent towards Sri Lankans departing illegally in the future.<sup>14</sup> If a person pleads guilty, they will be fined (which they can pay by instalment) and are then free to go. In most cases where a returnee pleads not guilty, returnees are immediately granted bail by the magistrate on the basis of personal surety or they may be required to have a family member act as guarantor.
29. As the applicant departed Sri Lanka illegally, I accept he may be charged under the I & E Act and there is a chance he may be held in detention for a short period. In *MIBP v WZAPN*<sup>15</sup> the High Court endorsed the position taken in *SZTEQ v MIBP*<sup>16</sup> finding that whether a loss of liberty constituted serious harm required a qualitative judgement, including an evaluation of the nature and gravity of the loss of liberty. In this case, I find that the brief period of detention does not rise to the level of threat to his life or liberty, or to significant physical harassment or ill treatment or any other form of serious harm for the applicant.

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<sup>10</sup> DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105, 5.17-5.18

<sup>11</sup> DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105, 5.21

<sup>12</sup> DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105, 5.20

<sup>13</sup> US Department of State, "Human Rights Report 2014 Sri Lanka", 25 June 2015, OG2B06FAF8, pp.17-18

<sup>14</sup> DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105, 5.223

<sup>15</sup> *MIBP v WZAPN; WZARV v MIBP* [2015] HCA 22

<sup>16</sup> *SZTEQ v MIBP* [2015] FCAFC 39



30. I find that if the applicant pleads guilty, he will be required to pay a fine and will subsequently be released and if he pleads not guilty, will be released on his own personal surety. The applicant was a passenger on a people smuggling venture and will not on the evidence, be subject to a custodial sentence. As he departed illegally, I accept he will be required to pay a fine but I am not satisfied this or the provision of a surety amounts to serious harm, nor am I satisfied that the payment of a fine, being held in detention for a short period and questioning cumulatively amounts to serious harm.
31. Furthermore, country information cited above indicates that the process and the treatment to which the applicant will be subject under the I & E Act is not discriminatory on its face nor is it applied in a discriminatory manner. Rather it is a law which applies to all Sri Lankans. A generally applicable law will not ordinarily constitute persecution because the application of the law does not amount to discrimination.<sup>17</sup> As such I find the treatment the applicant will face as a consequence of the application of the I & E Act is not persecution within the meaning of the Act.
32. DFAT has reported that it is not aware of any specific post-arrival monitoring of recently returned failed asylum seekers, monitoring and fears about mistreatment have reduced under the current Sirisena government and the risk of harm for the majority of returnees is low.<sup>18</sup> On the available evidence, I am not satisfied the applicant has any real or perceived connection to the LTTE. I do not accept that the applicant will be imputed with separatist or anti-government dissident beliefs by the authorities because of the manner of his departure from Sri Lanka, his extended residence in a western country, imputed asylum seeking there or his connection to his [relatives], either individually or cumulatively. In light of this I find that the applicant does not face a real chance of persecution from Sri Lankan authorities either as a failed asylum seeker or as returnee from the west or for any other reason.

#### **Refugee: conclusion**

33. 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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34. 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**

35. 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

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<sup>17</sup> *Chen Shi Hai v MIMA* (2000) 201 CLR 293

<sup>18</sup> DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105, 4.21-4.22

- the person will be subjected to cruel or inhuman treatment or punishment, or
- the person will be subjected to degrading treatment or punishment.

36. 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. As noted above, DFAT<sup>19</sup> has advised that detainees are not subject to mistreatment during processing at the airport and that the risk of torture or mistreatment for returnees, including for those suspected of offences under the I & E Act is low. 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.

37. As noted previously, DFAT has confirmed that returnees may be held for a short duration in prison while waiting to appear before a magistrate or while on remand awaiting bail. However, DFAT has assessed the risk of torture or mistreatment for people suspected of an offence under the I & E Act is low. I note that the applicant may be subjected to poor prison conditions during his detention, but country information<sup>20</sup> indicates 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 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 satisfied the applicant will not face a real risk of significant harm during any brief time spent in detention.

38. 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 severe pain or suffering, or cause extreme humiliation. I am not satisfied this amounts to significant harm as defined by the Act.

39. I have not accepted the applicant's claims to have been imputed with links to the LTTE through his occasional work for them more than twenty years ago or through his family connection with his [relatives] and do not accept that his method of departure from Sri Lanka or period of residence overseas will impute him with any such links. DFAT and the UNHCR<sup>21</sup> do not indicate in their recent reporting that Tamils are at risk of harm in Sri Lanka purely on account of their race. I have found that there is not a real chance that the applicant faces harm in Sri Lanka on the basis of being imputed with LTTE links, due to his Tamil race, or as a failed asylum seeker. The Full Federal Court<sup>22</sup> has held that the 'real risk' test imposes the same standard as the 'real chance' test applicable to the assessment of 'well-founded fear'. For the reasons set out above, I find that the applicant does not face a real risk of significant harm on return to Sri Lanka.

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<sup>19</sup> DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105, 4.22, 5.20

<sup>20</sup> US Department of State, "Human Rights Report 2014 Sri Lanka", 25 June 2015, OG2B06FAF8, pp.17-18

<sup>21</sup> DFAT, "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105; UN High Commissioner for Refugees, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183EA8

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

**Complementary protection: conclusion**

40. 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**

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***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.