



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

**Decision and Reasons**

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**Referred application**

SRI LANKA

IAA reference: IAA17/02293

Date and time of decision: 23 November 2017 09:50:00

Katrina Fairburn, Reviewer

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**Decision**

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 male Hindu Tamil from the [District 1] in the Northern Province of Sri Lanka. He fears returning to Sri Lanka because he would be at risk of being harmed by the Sri Lankan authorities, including the CID and the army for actual and imputed association with the Liberation Tigers of Tamil Eelam (LTTE), due to working for the LTTE the conflict, his connection to his wife's relatives who have sustained injuries during the conflict, his ethnicity and area of origin, and for having been living abroad for a significant period of time in a Western country as an asylum seeker. [In] May 2016, he lodged an application for a Safe Haven Enterprise (subclass 790) visa.
2. [In] March 2017, a delegate of the Minister for Immigration and Border Protection refused to grant the visa.

### **Information before the IAA**

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. On 13 April 2017, the applicant's representative forwarded to the IAA a submission on behalf of the applicant. The submission contains argument about the findings and the basis of the delegate's decision. Much of the information referred to in the submission is already before me in the materials given by the Secretary. To the extent the submission contains argument and material which is already before me, I do not consider this to be new information.
5. As part of the submission, the applicant claimed that the Department intentionally avoided questioning him in respect of incidents occurring between him and the CID to restrict his evidence about the harassment he experienced. On this basis, he provided greater detail in support of his claim that while he was living at his [relative]'s house in [Town 1], the CID would frequently visit the house to check on him. In particular, he stated that the CID would enter the house and question his wife, his [relative] and himself separately to assess if they were involved in the LTTE during the war. He also stated that CID visits to neighbours and family members was a common practice for the authorities to collect information and to threaten and intimidate the person suspected of LTTE involvement. I accept that this information constitutes new information and was not before the delegate to this level of detail.
6. I have listened to the audio recording of the applicant's visa interview with the delegate which occurred [in] July 2017 over a period of more than two hours. During the interview, the applicant was assisted by an interpreter in the Tamil language and a person from his migration agent's firm standing in for his normal representative. I note that at the beginning of the interview, the applicant acknowledged he had read and understood an information sheet written in the Tamil language provided to him prior to the interview which outlined his responsibility to provide accurate and complete information to the department in support of his claims as early as possible. This was reiterated by the delegate during the interview, and I note the applicant furnished the delegate with an additional statement of claims, signed by him on the same day. I consider this demonstrates that the applicant understood the basis on which his claims would be considered. Throughout the interview, the applicant appeared to engage with the interpreter and the delegate when responding to questions. At the beginning of the interview, the delegate afforded the applicant a lengthy and uninterrupted opportunity

to state why he left Sri Lanka. The applicant was also given opportunities to add further information during the course of the interview, including after a break to discuss his case with his representative. I do not accept that the delegate was intentionally trying to mislead the applicant or avoid topics so that relevant information would not be presented. Furthermore, the applicant's representative made submissions on the applicant's behalf at the conclusion of the interview and in the form of post interview written submissions to the delegate, dated [in] August 2016. The applicant has not satisfied me that information about CID visits to him, his family and neighbours (which were details known to the applicant prior to his arrival in Australia) could not have been provided to the delegate prior to decision or that had it been known it may have affected the consideration of his claims. I am not satisfied that s.473DD(b) is met. Given the applicant was able to access the assistance of a legally qualified migration agent and provided additional information in the form of verbal and written submissions following the interview, I consider he has had adequate opportunity to present his claims. I am not satisfied that there are exceptional circumstances to justify considering this new information.

7. The applicant also claimed that the possibility of being identified by former LTTE militants who function as paramilitaries means he is unable to lead a normal life in Sri Lanka, and he is a person well known among the LTTE militants who has deserted the LTTE in the past. He also claimed that the delegate had attempted to confuse him by asking irrelevant questions to divert him from his original claims and the order of events. He stated that his mental state and psychological condition at the time of the interview with the delegate made him confused. For reasons stated in the preceding paragraph, I do not accept that the applicant was denied opportunities to present information in support of his claims by the delegate. Noting that more than seven month elapsed between the date of the visa interview and the delegate's decision, the applicant has not provided any explanation about why this material could not have been provided to the delegate before they made their decision.
8. I note that the applicant's claim that he deserted the LTTE in the past is inconsistent with his evidence to the delegate that the LTTE released him from duties when he suffered a [medical] problem. I regard the inconsistency as significant and he has not satisfied me that this claim is credible. With respect to his claim that his mental state left him confused during his visa interview, the applicant has not furnished any independent credible material to support his claim of impaired mental health. My impression of the applicant from the visa interview recording is that his evidence was clear and coherent and he appeared to engage well with the interpreter and the delegate, including to correct evidence that was misunderstood about the sequencing of claimed CID visits to his neighbour, mother and wife in 2011. The applicant has not satisfied me that his claimed reputation with paramilitary groups, his mental state during his visa interview or that the delegate attempted to confuse and divert him during the interview constitutes credible information that may have affected consideration of his claims. I am not satisfied that s.473DD(b) is met. Furthermore, given the applicant had a lengthy period of time in which to raise this information with the delegate prior to their decision, he was in receipt of assistance from a registered migration agent, and this information was known to the applicant and within his capacity to provide prior to the delegate's decision, I am also not satisfied that there are exceptional circumstances to justify considering this new information.
9. In support of the applicant's new information and claims, he included extracted information from the following reports and articles which do not appear to have been before the delegate:
  - a. Committee Against Torture's concluding observations, held on 30 November 2016
  - b. Human Rights Watch World Report 2017

- c. Amnesty International Report on Sri Lanka 2016/2017
  - d. Sri Lanka Guardian article, "UK Guidance on Sri Lanka: Significantly Downplays Ongoing HR Violations", 4 April 2017, and
  - e. Tamilnet article, "Sophisticated white-van abductions continue unabated in Jaffna", dated 12 April 2017.
10. The reports and articles contain general country information about circumstances in Sri Lanka and the position of Tamils and people suspected of having a link with the LTTE. I note that the content of the reports from the Committee Against Torture, Human Rights Watch and Amnesty International relate to events current as at the end of 2016. As the applicant's submissions to the IAA were provided within a few weeks of the delegate's decision, I am satisfied that the content of the reports was in existence prior to the delegate's decision of 16 March 2017. The applicant has provided no explanation about why these reports could not have been provided to the delegate prior to decision. The applicant has also not provided an explanation about how the findings of these reports constitute credible personal information which may have affected the consideration of his claims. The applicant has not satisfied me that s.473DD(b) is met in respect of the extracted materials from these reports. I note that the applicant was represented by a legally qualified registered migration agent during his visa application and his representative provided detailed submissions, including additional country information, to the delegate following the applicant's visa interview. A period of more than seven months passed between the conclusion of the visa interview and the delegate's decision. Given the extracted material was in existence prior to the delegate's decision, there was a lengthy period of time during which the applicant could have provided additional information, and that he had previously done so, I am not satisfied that there are exceptional circumstances to justify considering this new information.
11. I note that the articles referred to by the applicant from the Sri Lankan Guardian and Tamilnet are dated 4 April 2017 and 12 April 2017 respectively, and I accept that the articles post-date the delegate's decision and could not have been provided to the delegate by the applicant before the decision was made. The article from the Sri Lankan Guardian refers to risks attributed to a new policy advice produced by the UK Home Office downplaying reports of torture and ill-treatment in Sri Lanka. The Tamilnet article refers to an abduction of a construction worker who was involved in court proceedings in Jaffna. The applicant has not provided an explanation about how the material in either article is credible personal information which may have affected the consideration of his claims. Accordingly, the applicant has not satisfied me that s.473DD(b)(ii) is met. I note that the applicant has previously, through his representative, provided the delegate with detailed submissions including additional country information in support of his claims for protection following the visa interview. In the circumstances and as the articles pertain to information which is not specific to the applicant's circumstances, I am not satisfied that there are exceptional circumstances to justify considering this new information.
12. I have obtained new information. On 24 January 2017, the Department of Foreign Affairs and Trade published an updated Country Information report on Sri Lanka.<sup>1</sup> Relevantly to this decision, the report provides information about the position of Tamils, persons perceived to have connections to the LTTE, persons who departed Sri Lanka illegally and returning asylum seekers. I consider this report may be relevant to assessing the application, was not before the

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<sup>1</sup> Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISEDB50AD105

delegate and constitutes new information. As the report updates an earlier DFAT report on Sri Lanka published on 18 December 2015 which was relied on by the delegate, I am satisfied there are exceptional circumstances to justify considering the new information.

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

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13. The applicant's claims can be summarised as follows:

- He is a Hindu Tamil male from [District 1] in the Northern Province of Sri Lanka.
- His family were displaced during the conflict and returned to [District 1] in 2000. During the conflict [District 1] was an LTTE-controlled area and was subject to hostile attacks between LTTE members and the Sri Lankan army.
- In 2006/2007, the LTTE forced the applicant to [work for them]. He undertook this work as well as trained [others] in [his work] for approximately 3-4 months. The applicant developed a [medical] problem and the LTTE released. People in his village came to know of the work he was doing for the LTTE and assumed he was a member.
- From 2008 until March 2009, he experienced further displacement from [District 1].
- In March 2009, he and his family were forced to live in [Camp 1] in [location]. The applicant was interrogated about the LTTE and slapped about his face. While the applicant was in the camp he was questioned about being a member of the LTTE on numerous occasions.
- He and his wife were released from the camp in November 2009 on condition they lived with the applicant's [relative] in [Town 1]. While they were living with his [relative], the applicant was visited frequently by the CID, who checked on the applicant. After ten months the applicant and his family were allowed to return to [District 1] and received assistance from the UNHCR to relocate.
- In [June] 2011, a neighbour [told] the applicant's wife that people in civilian clothes, who did not identify themselves, questioned her about the applicant.
- One week later the applicant's mother was visited by unidentified people who were asking about the applicant and whether he had any links to the LTTE.
- Approximately 20 days later, two people came to the applicant's house and spoke with his wife while he was at work. They told his wife that he had to report to the [CID] office at 9am the next day.
- The applicant attended the [CID] office and was questioned about his involvement with the LTTE for approximately 2-3 hours, including about his work for the [LTTE]. He was told he needed to face an inquiry and was not allowed to leave. He was detained at the office for a week during which time he was questioned every day and mistreated, including being hit with a plank. During the course of questioning, the applicant was asked about his [relative] who had [sustained injuries] during the conflict. When he was released he was told that he could not tell anyone about what had happened and they would come for him again.
- Approximately three months later in about October 2011, his mother-in-law was visited by unidentified people and questioned about the applicant and his [relative].
- In May 2012, he was taken by a group of people to the [CID] office where he was questioned for two hours and released.

- [In] July 2012, he departed Sri Lanka illegally and travelled by boat to Australia.
- Since his departure from Sri Lanka, his wife has been visited on three occasions by unidentified men who have asked about the applicant. His wife believes the men are from the CID.

## **Refugee assessment**

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14. 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**

15. 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.

16. The applicant provided detailed information about his background and family connections in his application and during his entry and visa interviews. As part of his visa application and in the course of his visa interview, he provided documents to support his identity, including the biodata page from an expired passport and a copy of his birth certificate. Based on the documentation provided by the applicant and his personal information, I accept the applicant’s identity is as claimed and that he is a male Hindu Tamil from [District 1] in the Northern Province of Sri Lanka, who is aged [age] years.

17. I accept that the applicant is a national of Sri Lanka and of no other country.

18. As part of the applicant’s background, he disclosed information about his family’s displacement and injuries sustained by members of his family as a result of the fighting. Country information before the delegate outlines the impact of the conflict on civilians in the north and east of Sri Lanka, including that [District 1] remained under LTTE control for most of the duration of

the conflict<sup>2</sup> and is consistent with the applicant's narrative. I accept the applicant and members of his family were impacted by the conflict as he has described.

19. The applicant claimed that on the family's return to [District 1] in 2001 he soon joined the family business and worked with his father at his [business]. In his statement of [July] 2016, he stated that he was [details of work]. The applicant claimed that following a visit to his father's [business] by the LTTE sometime in 2006, he was compelled to work for them [during] the night time otherwise he would be conscripted for fighting. He described the [description of work undertaken]. He stated during his visa interview that his father attempted to secure his release from working for the LTTE by stating he was needed at his father's [business] but was unsuccessful. Instead, the applicant worked at his father's [business] during the day and he worked [for the LTTE] during the night. After about 3-4 months he developed a [medical problem] and, on the advice of his doctor, was released by the LTTE from continuing to work for them. He did not engage in any other work for the LTTE nor did he fight for them during the conflict.
20. I found the applicant's evidence about his assistance to the LTTE to be detailed and convincing. I accept that he was compelled to assist the LTTE [by] working [and] training others, [details deleted], during the night time and for a period of approximately 3-4 months. I accept that it is possible his activities with the LTTE became known to other people in his village, but do not agree with the applicant's assumption that his neighbours subsequently believed him to be a member of the LTTE. Having regard to the short duration of his assistance, the nature of his work occurring in the night time and in the company of other workers, and his father's attempts to have him released from this work, I am not satisfied that he was regarded as being a member of the LTTE by his village or perceived to be assisting the LTTE in a high-profile or prominent way.
21. The applicant indicated during his visa interview that he returned to work with his father and married his spouse. He described further displacement from [District 1] following resurgence in fighting in [2008]. In March 2009, he stated that he and his family were taken by the army into the government-controlled area for processing. He described that while they were being checked he drew the attention of soldiers for not standing straight and for this reason he was separated from his family and questioned by the officers for approximately two hours about whether he was an LTTE cadre or if he recognised any cadres in the group. He stated that he was mistreated by the officers slapping him on both sides of his face. The applicant's claims are consistent with country information about the intensification of fighting between the LTTE and the Sri Lankan army during this time and processes faced by people who were detained in Internally Displaced Persons camp such as [Camp 1].<sup>3</sup> I accept that the applicant and his wife were detained by the Sri Lankan army and the applicant was questioned and mistreated by army officers prior to their interment at [Camp 1].
22. Following the questioning, the applicant and his family were transferred to [Camp 1] and accommodated in tents. He stated that he was often taken by the army officers for questioning because they suspected him as being an LTTE supporter due to being a young man from an LTTE-controlled area. In November 2009, the applicant and his wife were released from the camp following confirmation from the applicant's [relative] that they would reside with her in [Town 1]. I found the applicant's description of his experiences of displacement and detention in the camp to be credible and consistent with the country information. I accept that the

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<sup>2</sup> "Report of the OHCHR Investigation on Sri Lanka (OISL) (A/HRC/30/CRP.2)", *Office of the United Nations High Commissioner for Human Rights*, 16 September 2015, CISEC96CF13358

<sup>3</sup> Ibid, p.211

applicant faced regular scrutiny and interrogation as part of his entry into the camp and during the time he spent there. However, despite being questioned on a number of occasions, mistreated and subjected to conditions that he resided with his [relative] who lived in [Town 1], the applicant was not charged with any offence, transferred to a detention centre or otherwise forced to undertake rehabilitation. Instead he was released from the camp. I consider that the applicant's release to his [relative]'s residence indicates that while he may have been initially suspected by the army officers of having LTTE links and questioned regularly on this basis, at the time he was released from the camp, he did not hold a profile with them for LTTE membership or high-level support of the LTTE.

23. The applicant claimed that during the ten months he and his wife were living with his [relative] and working in [Town 1], the CID would visit regularly to check that he was still resident there. During this time, [District 1] came under government-control and once the area was cleared of explosives, the applicant and his wife were repatriated to [District 1] in 2010 with assistance being provided by the UNHCR. In support the applicant provided an untranslated copy of a UNHCR card that appears to be dated [August] 2010. I note that country information before the delegate confirms that after September 2009, persons at IDPs were released to reside with relatives and returned to their communities while still experiencing surveillance.<sup>4</sup> I accept it is plausible that the local CID would check on the applicant from time-to-time to ensure his compliance with the conditions of his release from [Camp 1]. I also note that the applicant has not claimed that he or his wife were harmed as a result or that the visits otherwise interfered with his ability to work. I consider that the applicant's repatriation to [District 1], when it was safe to do so, indicates that the authorities, including the army and the CID, did not regard the applicant as an LTTE member/ high-level supporter or otherwise as a security risk.
24. The applicant noted that when his parents joined him in [District 1], he resumed working in his father's [business]. The applicant appeared to reside and work peacefully in [District 1] until 2011 when he claimed that unidentified people visited his neighbour, his mother and his wife within the period of a few weeks, and made enquiries about him and possible links with the LTTE. When visiting his wife, the visitors told her that the applicant needed to attend for an appointment at the [CID] office at 9am the next day. The applicant then described his attendance at the CID office which lasted for approximately one week and during which time he was detained, interrogated about his involvement with the LTTE, questioned about his [relative] who had [been injured] during the conflict, and mistreated on a daily basis by being beaten and hit with a plank.
25. Having regard to the fact that the applicant was frequently questioned by the army and CID at [Camp 1] and subsequently during the period he lived with his [relative] in [Town 1], I hold serious concerns about the veracity of the applicant's claims to have been targeted by the CID in 2011. Given he was able to resettle in [District 1] and resume work without any apparent incident, on the evidence before me there does not appear to have been any event or activity to prompt the CID's interest in the applicant at this later time.
26. During the visa interview, the delegate raised concerns about the applicant's chronology of visits by the unidentified people to his neighbour, mother and wife. The applicant stated they were doing this in order to gain more information about him. Given the extensive questioning the applicant had already undergone while in the camp and living with his [relative], I find it implausible that the Sri Lankan authorities, including the CID, would approach the applicant's neighbours and relatives for information about him at this point in time. Further, I find it

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<sup>4</sup> "Report of the OHCHR Investigation on Sri Lanka (OISL) (A/HRC/30/CRP.2)", *Office of the United Nations High Commissioner for Human Rights*, 16 September 2015, CISEC96CF13358, pp.217-218

implausible that, given the CID's powers to detain people under suspicion of offences under Prevention of Terrorism legislation, if they had intended to question the applicant or suspected him of LTTE activity, that they would not have attended his home while he was there and arrested him.

27. During the interview, the delegate expressed concern to the applicant about the duration of time he claimed to have been held by the CID at their office and what he could have been questioned about for this long. I share this concern. The applicant responded by saying that they were making sure he was not a member of the LTTE as they had received some information he had assisted [a particular section of the LTTE] and they were trying to confirm this. Given the applicant's role with the LTTE had occurred nearly six years previously, was of a limited duration and as a [minor role] rather than a role of prominence or seniority, I do not accept the applicant's explanation of why he was of such interest to the CID that he was detained and mistreated by them for a period of one week. He stated that on release from the CID Office he was warned not to tell anyone of what had occurred and that they would come for him again.
28. When asked by the delegate whether he had received any medical attention following his release, the applicant stated that although he sustained pain, he was not injured seriously enough to go to hospital and was instead administered to by his wife. I find the applicant's claimed lack of serious injury incongruous with the length of time and mistreatment he described as having occurred. Rather, the circumstances presented by the applicant of his encounters with the Sri Lankan army and CID, up until his repatriation to [District 1], do not indicate that he was treated differently than other Tamil males from his area of origin. Accordingly, I am not satisfied that he came to the adverse attention of the CID in 2011, either through enquiries of him being made to neighbours and relatives or by being detained at the [CID] office in about June 2011.
29. The applicant claimed that approximately two months after having been detained at [the] CID office, in about October 2011, his mother-in-law was visited by unidentified people and questioned about the applicant and his [relative]. He also claimed that he was forcibly taken by a group of men to attend for an interview at [the] CID office more than six months later in May 2012, where he was questioned for two hours before he was released. I do not accept the applicant's implication that these two events were linked and that he continued to be a person of adverse interest to the authorities due to his connection with his wife's relatives. I find it implausible that if the CID had considered the applicant to have been of interest to them for these reasons, they would have waited for more than six months before taking action to arrest the applicant. I note that on his own evidence, he was released after two hours. Having regard to amount of time that passed between the two incidents, the applicant's profile with the authorities, including the CID, and my findings above in respect of his claims that people were inquiring about him and he was detained by the CID for one week earlier in 2011, I do not accept the applicant's mother-in-law was questioned about the applicant in October 2011, nor was he forcibly taken for questioning to the CID Office in May 2012. It follows that I also do not accept that the applicant was at any time suspected by the authorities, including the CID, of being involved with the LTTE due to his connection to his [relative] or his mother-in-law who had sustained significant injuries during the course of the conflict.
30. I note that the applicant did not depart Sri Lanka until [July] 2012 and did not claim to experience any further adverse encounters with the CID following the interview in May 2012. The applicant stated during his visa interview that at this time he was in hiding and depressed, however, I note there is no mention of alternative residential arrangements or being in hiding in his visa application. Given the timing at which his claim to have been in hiding was made and

the absence of any other material in support, I do not find this claim to be credible. Rather, I consider it to be a recent invention by the applicant to bolster his claims for protection. I do not accept that he was in hiding during the months before he departed Sri Lanka. In sum, I am satisfied that the applicant was not a person of adverse interest to the Sri Lankan authorities, including the army and the CID, at the time of his departure from the country.

31. The applicant has claimed that since his departure from Sri Lanka unknown people have visited his wife on three occasions and have asked about the applicant. He stated that his wife believes the people are from the CID but no other details have been provided on the material before me to indicate why his wife has made this assumption or when the visits occurred. I note that during the visa interview, the applicant indicated that his family continue to live in [District 1], including his parents and a number of siblings. He confirmed that since his departure, nothing has happened to his relatives apart from his wife being visited. In the circumstances of the applicant's departure, I am willing to accept that the applicant leaving Sri Lanka may have triggered some initial interest in the applicant's whereabouts. However, on the evidence before me, I am not satisfied that the visits to the wife were necessarily from members of the CID or indicated an adverse interest in the applicant on his return.
32. I accept that given the applicant's prior experience of being detained at the IDC camp, questioned by the Sri Lankan authorities, including the army and the CID on suspicion of being involved with the LTTE prior to being resettled in [District 1] in 2010, he may be concerned about his future treatment by the authorities including the army and CID, should he return to Sri Lanka. Country information before me indicates that the security situation in Sri Lanka has improved with a decrease in militarisation and monitoring trends. Recent reports of country information do not support a conclusion that Tamils, including Tamil men from the Eastern and Northern Province, are being systematically targeted and subjected to serious harm because of their race and/or area of origin.<sup>5</sup> Given the country information, I am satisfied there is not a real chance of serious harm to the applicant on return to Sri Lanka on these bases.
33. For reasons already stated, I do not consider the applicant has a profile with the Sri Lankan authorities for high-level or prominent involvement with the LTTE due to his work for them in 2006, having been detained and questioned about LTTE assistance when interred at [Camp 1] in 2009, his connection to relatives who sustained injuries during the conflict and may have been suspected for LTTE involvement, having resided in LTTE-controlled areas and his area of origin or any combination of these matters. Given the applicant's profile, the country information about the change in Sri Lanka's political and security landscape, I am not satisfied there is a real chance that the applicant would be targeted by the Sri Lankan authorities, including the army or CID, on return to Sri Lanka.
34. The applicant has claimed he will face harm on return to Sri Lanka as a returned asylum seeker who departed Sri Lanka illegally and has resided in a Western country. He did not particularise the basis for his concern about being identified with a Western country and my consideration of this aspect is limited in this aspect. I accept that the applicant departed Sri Lanka illegally in 2012 and has resided abroad since that time. I also accept that he will return to Sri Lanka as a returned asylum seeker from a Western country and is likely to be identified as such on the basis of returning on travel documents from Australia. The country information in the referred material indicates that Sri Lanka's Constitution entitles any Sri Lankan citizen the freedom to return to Sri Lanka.

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<sup>5</sup> Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISEDB50AD105, pp.28-29

35. Recent country information in the review material does not suggest that Tamils who have lived abroad are facing harm at Colombo airport or in their home villages on return simply due to their time spent out of Sri Lanka or for being a returned asylum seeker. Given the applicant did not hold a profile of interest to the authorities for LTTE involvement or any other reason at the time of his departure, I do not accept that he would be targeted on return for reason of having sought asylum abroad or for having resided in a Western country.
36. DFAT reports that persons who depart other than via an approved port of departure (illegal departees), may be liable for imprisonment and a fine,<sup>6</sup> although penalties for such persons are discretionary and are almost always a fine. As the applicant does not have a profile for high-level connections with the LTTE or would otherwise be considered a security or political risk by the Sri Lankan authorities, I do not consider that the applicant would be targeted or subjected to processes on re-entry to Sri Lanka that would be different from the usual procedures outlined below.
37. I note that persons who departed Sri Lanka irregularly by boat (such as the applicant) may be considered to have committed an offence under the *Immigrants and Emigrants Act 1949* (the I&E Act). Upon arrival in Sri Lanka such persons are processed by a number of agencies who check travel documents and identity information. Processing of illegal departees may take several hours primarily due to the administrative practices, interview lengths and staffing constraints. As these persons are processed en masse, individuals are unable to leave the airport until all returnees have been processed. DFAT assesses that such persons are processed in accordance with standard procedures regardless of ethnicity and are not subjected to mistreatment during processing at the airport.<sup>7</sup>
38. Persons who have departed illegally who have been arrested can remain in custody at the CID's Airport Office for up to 24 hours after arrival and if a Magistrate is not available within this time, for example because of a weekend or public holiday, may be held at a nearby prison.<sup>8</sup>
39. I accept the applicant departed Sri Lanka illegally as a passenger on a boat. I accept that should he plead guilty he would be fined and would then be free to go. Having regard to the discretion about the quantum of a fine coupled with the country information in the review material that indicates the ability to pay the fine by instalment, I am not satisfied that a financial penalty would amount to economic hardship to the applicant amounting to serious harm.
40. Returnees who plead not guilty, will, in most cases, be immediately granted bail by a Magistrate and released on the basis of a surety (personal or guaranteed by a family member) and will rarely be subject to any conditions in relation to the bail or any general requirement to report to police or police stations between court attendances.<sup>9</sup> Having regard to country information that indicates a surety rather than immediate payment of money is required for bail, that the quantum of a fine is discretionary and may be paid by instalment, and the applicant's personal circumstances and capacity to provide a surety, I am not satisfied that the applicant would face a longer than usual period of detention on this basis.
41. I accept that the conditions of detention in Sri Lanka are poor.<sup>10</sup> I note that the period of detention at a prison awaiting a Magistrate's decision would be short and on the information

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<sup>6</sup> DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISEDB50AD105, p.33

<sup>7</sup> Ibid, p.34

<sup>8</sup> Ibid, p.34

<sup>9</sup> Ibid, p.34

<sup>10</sup> US Department of State, "Sri Lanka – Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320, p.9

before me, I am not satisfied that in the applicant's circumstances referred to above, a short period in custody, together with a short period of questioning would amount to serious harm. For these reasons and as he would have the opportunity to pay a fine by instalment, I am satisfied that the totality of the circumstances he would face on return would not amount to serious harm.

42. Furthermore, there is no evidence before me that suggests the operating procedures under the I&E Act are discriminatory on their face, or that they are applied in a discriminatory manner. Accordingly, I am not satisfied on the evidence that detention arrangements for the purpose of being charged under the I&E Act and financial penalties imposed upon a plea of guilty involve discriminatory conduct.
43. DFAT notes that thousands of asylum seekers have returned to Sri Lanka since 2009, including from Australia, and assesses the risk of torture or mistreatment for the majority of returnees is low and continues to reduce, including for those suspected of offences under the I&E Act.<sup>11</sup> The evidence before me does not support a conclusion that returning Tamil asylum seekers face a real chance of harm.
44. For the reasons stated above, I am not satisfied the applicant will face a real chance of serious harm on the basis of being a returned asylum seeker and/or for illegal departure.
45. In sum, the applicant is a male Hindu Tamil from [District 1] District in the Northern Province of Sri Lanka, aged [age] years. During the conflict he was compelled to work for the [LTTE] at night [details of work] for a period of 3-4 months before he was released due to experiencing [medical] problems. Towards the end of the conflict, he and his family experienced displacement and in March 2009 were interred at [Camp 1] until November 2009, where the applicant was questioned on multiple occasions about being linked with the LTTE. He and his wife were released on condition they resided with his [relative] in [Town 1]. During the next ten months, CID officers frequently visited his [relative]'s house to check on the applicant before he and his wife were resettled to their home village in [District 1]. [In] July 2012 he travelled illegally as a passenger of a people smuggling venture to Australia, sought asylum and is likely to be identified as such on return. The applicant's relatives, who have remained in [District 1] have not experienced any difficulties, including his [relative] who [sustained injuries] during the conflict. Noting the applicant's history and profile, and having regard to the country information about the political and security situation in Sri Lanka, I am not satisfied that he faces a real chance of serious harm now or in the reasonably foreseeable future.

#### **Refugee: conclusion**

46. 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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47. 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.

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<sup>11</sup> DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISEDB50AD105, p.29

## **Real risk of significant harm**

48. 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.

49. For the reasons already stated, I have found that there is not a real chance the applicant will face harm from the Sri Lankan authorities, including the CID or army, on return to Sri Lanka due to his limited assistance to the LTTE during the conflict, his connection to relatives who sustained injuries during the conflict and may have been suspected for LTTE involvement, his Tamil ethnicity, because he originates from the Northern Province and resided in formerly LTTE-controlled areas, or due to having been abroad in Australia as an asylum seeker.

50. As ‘real chance’ and ‘real risk’ involve the same standard,<sup>12</sup> it follows that based on the same information, and for the reasons stated above, I am also satisfied there is no real risk of significant harm within the meaning of s.36(2A) and 5(1) on these bases if returned to Sri Lanka.

51. There is no suggestion the applicant faces the death penalty on return for any reason.

52. As to his treatment under the criminal justice system for illegal departure, on the basis the applicant was a passenger on a people smuggling venture and not otherwise holding a profile of interest to the authorities, country information indicates that he would only be detained for a short time and if pleading guilty, the most likely punishment would be a fine. Country information indicates that the amount of a fine imposed on returnees who plead guilty to an offence under the I&E Act is discretionary and may be paid by instalment.

53. I accept that conditions in prison and on remand for detainees are poor due to overcrowding and poor sanitation, but note this is due to limited resources rather than an intention by the state to inflict pain and suffering or degrading treatment.<sup>13</sup> I am not satisfied on the evidence that in questioning, imposing a fine and possible brief detention in these conditions there is an intention to inflict pain and suffering, severe pain or suffering or cause extreme humiliation.

54. Furthermore having regard to the applicant’s circumstances, on the information before me I am not satisfied that a short period in custody, the short duration of any questioning and penalty such as payment of a fine, given the ability to pay a fine by instalment, would amount to significant harm.

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

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

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

### **Complementary protection: conclusion**

56. 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.