



**Australian Government**  

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**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA17/02622

Date and time of decision: 22 December 2017 11:11:00  
Lorraine Hill, Reviewer

**Decision**

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

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

## Background to the review

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### Visa application

1. The referred applicant (the applicant) claims to be a citizen of Sri Lanka. He applied for a Safe Haven Enterprise Visa (protection visa) [in] July 2016. A delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa [in] May 2017.
2. The delegate accepted the applicant was a Tamil who was questioned on a number of occasions by the Criminal Investigation Department (CID) about two men and their connections to the LTTE in 2012. He also accepted that the applicant was arrested and questioned before being released on suspicion of his involvement in the Liberation Tigers of Tamil Eelam (LTTE) in 2007. The delegate found that there was not a real chance or real risk the applicant would be harmed on return to Sri Lanka for reasons of his ethnicity, his real or imputed political opinion, as a failed asylum seeker or because of his illegal departure from Sri Lanka.

### 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).

### Email

4. The applicant's representative emailed the IAA on 31 May 2017. The email contained a submission. The submission contains discussion on why the applicant does not agree with the delegate's decision. To that extent the submission may be described as argument rather than new information and I have noted it.
5. The submission also contains new information and contends that the new information contained in the submission should be considered as the sources have only recently been published after the delegate's decision. The sources refer to the difficulties which the Sirisena's administration is facing, the growing ethnic discontent and the culture of impunity and torture within the Sri Lankan authorities and security forces. It is contended that the information contradicts the conditions for Tamil as described in the DFAT reports and had this information been considered by the delegate it may have affected their assessment of the current situation for Tamils in Sri Lanka.
6. The submission referred to the following country information:
  - International Crisis Group, Sri Lanka's transition to nowhere, 16 May 2017
  - Amnesty International, Sri Lanka: The conflict's legacy of impunity endures, 18 May 2017
  - Human Rights Watch, Sri Lanka: Anti-terror bill revives concerns for abuse, 18 May 2017
7. The information was not before the delegate. It is new information. The information post-dates the delegate's decision, and represents a recent assessment of the situation in Sri Lanka by a number of credible sources I am satisfied that this information could not have been provided to the Minister before the delegate made his decision. Having regard to all the

circumstances, I am satisfied there are exceptional circumstances to justify the consideration of this new information.

8. The submission contends that “DFAT does not engage in post return monitoring of failed asylum seekers in Sri Lanka”. It refers to the document, Foreign Affairs, Defence and Trade Legislation Committee, Senate Estimates, 23 October 2014 in support. This 2014 reporting of the information was not before the delegate and itself is new information. The source of new information pre-dates the protection visa interview and delegate’s decision, and is somewhat dated. The applicant was represented by the same representative at the protection visa interview. The applicant has not satisfied me that this information could not have been provided to the Minister before the delegate made his decision. The information is general country information. I am not satisfied that the information is credible personal information. Having regard to all the circumstances, I am also not satisfied there are exceptional circumstances to justify the consideration of this new information. I note that the most recent DFAT report is part of the review materials and that report contains reporting of a similar nature. I have had regard to that document.

### **Applicant’s claims for protection**

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9. The applicant’s claims can be summarised as follows:

- The applicant is a Tamil male who was born [Town 1], Puttalam district, North Western province of Sri Lanka.
- [In] January 2007, the applicant was arrested, detained and questioned by the police in Colombo for one day on suspicion of his association or membership of the LTTE.
- [In] 2012, when working as [Occupation 1] for [Company 1], the applicant was visited by the CID. The CID asked the applicant about his knowledge of two men who had worked [for Company 1]. He was told the two men were linked to the LTTE. The applicant denied knowing or having involvement with the two men and told the CID they had worked casually for him. The CID told the applicant to attend for further enquiries.
- [Later in] 2012, the applicant attended [an army camp] for further enquiries. The CID officers questioned him about his knowledge and association with the two men. He told then he knew nothing about them. The CID officers threatened to shoot him and he was slapped. On release he was told that he was required to attend the camp every [particular day of the week] thereafter.
- Every [particular day of the week], the applicant attended the camp. He was questioned about the two men. He told the same information to the officers each time. He was threatened that he must provide the information that they wanted or he would face the consequences. He became unable to face the harassment anymore and was frightened he would be killed or “disappear” as other Tamils in the area had and so arrangements were made to travel to Australia.
- The applicant fears on return to Sri Lanka he will be harmed on the basis of his ethnicity, his imputed pro-LTTE or anti-Sri Lankan government political opinion because he is perceived to have knowledge or associated with two men who are linked with LTTE, he stopped reporting to the Sri Lankan authorities as requested, his illegal departure and because he will be returning to Sri Lanka after seeking asylum in Australia.

## Refugee assessment

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10. Section 5H(1) of the Act provides that a person is a refugee if, in a case where the person has a nationality, he or she is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

### Well-founded fear of persecution

11. Under s.5J of the Act ‘well-founded fear of persecution’ involves a number of components which include that:
- the person fears persecution and there is a real chance that the person would be persecuted
  - the real chance of persecution relates to all areas of the receiving country
  - the persecution involves serious harm and systematic and discriminatory conduct
  - the essential and significant reason (or reasons) for the persecution is race, religion, nationality, membership of a particular social group or political opinion
  - the person does not have a well-founded fear of persecution if effective protection measures are available to the person, and
  - the person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour, other than certain types of modification.
12. I accept the applicant’s identity as claimed. I accept the applicant is a Tamil male from the North Western province of Sri Lanka, and a Sri Lankan national. Sri Lanka is the receiving country for the purpose of this assessment.
13. I accept [in] 2007, the applicant was arrested, detained and questioned by the police in Colombo on suspicion of his association or membership of the LTTE. I accept the applicant was detained in the morning before being released that evening. The applicant’s evidence regarding this event has been consistent throughout his interactions with the Department and supported by the country information reporting that many Tamils, particularly in the north and east, reported being monitored, harassed, arrested and/or detained by security forces during the civil conflict and the Rajapaksa Government.<sup>1</sup>
14. The applicant made did not claim that on his release he required to report to the Sri Lankan authorities. At the protection visa interview, when the applicant was asked whether his arrest in 2007 was relevant to his departure to Australia, he stated that there was no connection between that event and the event in 2012. He stated the event in 2012 was the main reason he had departed for Australia. The applicant has also provided a copy of the biographical details page of his Sri Lanka passport. It states that it was issued [in] 2007, approximately [a number of] months after his release by the police. He stated that the passport was genuine and he applied for it himself in Colombo.

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<sup>1</sup> DFAT, “DFAT Country Information Report: Sri Lanka”, 24 January 2017, CISED50AD105.

15. Having regard to all the evidence, including the absence of any reporting requirements on his release, the more than five years that passed between his arrest and release and his next claimed interactions with the Sri Lankan authorities in 2012 and his ability to apply for and be granted a Sri Lankan passport by the Sri Lankan government, I am satisfied the applicant was released by the police [in] 2007 because it was determined that he did not have any involvement or association with the LTTE and nor was he a person of interest for any other reason.
16. I accept [in] 2012, when working as [Occupation 1] for [Company 1], the applicant was visited by the CID. I accept the CID asked the applicant about his knowledge of two men who had worked [for Company 1]. I accept the CID told the applicant that these two men were linked to the LTTE. I accept the CID accused the applicant of knowing the two men and their whereabouts. I accept the applicant denied knowing or having involvement with the two men and told the CID that they had worked casually for him. I accept the CID told the applicant to attend for further enquiries to be conducted. I accept [later in] 2012, the applicant attended as requested by the CID. I accept he was questioned by CID officers about his knowledge and association with the two men. I accept he told the CID he knew nothing about them. I accept he was threatened and beaten before being released.
17. The applicant's core claims regarding the two initial enquiries by the CID about the two men in [2012] have been generally consistent, and I accept that the above events occurred, however other aspects of his evidence have evolved over time.
18. At the entry interview, when describing what happened when he attended the CID for further enquiries the applicant stated; "I told them that I don't know about them [the two men]. How can I tell you about their identity? They said if I don't tell them I would be shot. I cried and asked them to leave me alone. I have to pass through the sentry point (checkpoint) to go to work. Every week when I go past that checkpoint they ask me for enquiries". In the protection visa application and interview, the applicant appeared to develop this aspect of his claims when he stated that the enquiries by the CID which he had been requested to attend took place in a cell in [an army camp] not at a checkpoint and that on release he was told to attend and report every [particular day of the week] thereafter, rather than the checkpoint enquiries being ancillary to his need to pass the checkpoint to attend his [workplace] each week.
19. At the protection visa interview, the applicant was asked to provide further details of the reporting requirements that he claimed he had on release. He stated that he went every week on a [particular day of the week] until he came to Australia and the enquiries lasted half an hour to an hour. He stated for the first two weeks they asked more questions but that the questions asked reduced after that.
20. Having regard to all the evidence, including the evolution of the applicant's evidence regarding the location of the further enquiries and absence of any claims regarding any reporting requirements on his release at his entry interview, I am not satisfied the applicant has been a truthful witness in regards to these aspects of the events in 2012. I do not accept the further enquiries which the applicant attended by the CID were conducted in a cell in [an army camp]. I do not accept that on release the applicant was told to attend the camp and report every [particular day of the week] thereafter. Nor do not accept after his release the applicant was continuously harassed, threatened or questioned by the Sri Lankan authorities about the two men again including when he went through checkpoints. I find these claims have been included to enhance the applicant's claims for protection.

21. I am satisfied that after the further enquiries and questioning [in] 2012, the applicant was released as it was determined by the CID as not being associated or connected to the two men or the LTTE. If he had been, the country information before me suggests he would have been at a real and serious risk of being detained for further detention, more in depth interrogation, rehabilitation processes, or subject to harsher treatment, including indefinite detention and torture, as was the case for many Tamils who were seriously suspected of LTTE involvement or support during and after the civil war.<sup>2</sup>
22. I have accepted the applicant was last detained, questioned and released by the Sri Lankan authorities approximately [a number of] months before his departure from Sri Lanka. There is no other credible information before me to indicate the applicant was of ongoing interest to the Sri Lankan authorities for any other reason at this time. I do not accept the applicant's reasons for his departure were on the basis of any continued interest in him by the Sri Lankan authorities and I am satisfied that at the time of the applicant's departure from Sri Lanka he was not of interest to the Sri Lankan authorities for any reason.
23. The applicant claimed that since his arrival in Australia the CID has visited his family on two occasions. In [2013], the CID questioned his wife and asked why he had failed to report as requested. His wife told them the applicant had travelled overseas to avoid further questioning. In [later in] 2013, the CID returned to confirm the applicant was not there.
24. I have found that the applicant's claims that he had reporting requirement and continued to be of interest to the Sri Lankan authorities because of his association or connection to the two men after this release [in] 2012 have no credible basis. I have also found that the applicant was not of interest to the Sri Lankan authorities for any other reason at the time of his departure; and it follows that I do not accept that since the applicant's arrival in Australia, the CID has gone to the applicant's family home and questioned his wife about his failure to report and his whereabouts nor do I accept his wife has told the CID he is overseas.
25. The applicant claimed that on return he will be harmed by the Sri Lankan authorities because of his ethnicity as a Tamil, his past circumstances when he was arrested, detained and questioned on the basis of his involvement in or association with the LTTE and his knowledge of or involvement with the two men linked to the LTTE, his illegal departure from Sri Lanka and his return as a failed asylum seeker and other matters which I have not found to be credible above.
26. Country information before me indicates that the overall situation for Tamils in Sri Lanka has improved considerably since the end of the civil conflict in 2009. Tamils have a substantial level of political influence and their inclusion in political dialogue has increased since the Sirisena government came to power in 2015.<sup>3</sup>
27. Under the Sirisena government, the monitoring and harassment of Tamils in day-to-day life has significantly decreased.<sup>4</sup> The US Department of State (US DOS) refers to a number of positive developments for Tamils in the country politically and socially, as well as government initiatives to address these concerns. Positive developments for Tamils are evidenced by indicators such as decreases in monitoring and harassment of Tamil civilians, removal of checkpoints, the release of land occupied by the military, increased Tamil participation in the police forces,

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<sup>2</sup> UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183EA8; US Department of State, "Sri Lanka – Country Report on Human Rights Practices 2015", 13 April 2016; DFAT, "DFAT Country Information Report: Sri Lanka", 24 January 2017, CISED50AD105.

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

<sup>4</sup> DFAT, "DFAT Country Information Report: Sri Lanka", 24 January 2017, CISED50AD105.

greater representation for Tamils in all levels of government, and a commitment to human rights and reconciliation.<sup>5</sup>

28. As a consequence of the improving situation, in January 2017, DFAT assessed that Sri Lankans of all backgrounds generally have a low risk of experiencing official discrimination as there are currently no official laws or policies that discriminate on the basis of ethnicity, including in relation to access to education, employment or access to housing. Nevertheless, DFAT also assessed that in the case of monolingual Tamils they can have difficulty communicating with the police, military and other government authorities. DFAT assesses that these practical difficulties faced by Tamils 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.<sup>6</sup> I accept that the applicant is a monolingual Tamil who may face some difficulties in communicating on return; however I am not satisfied that any such difficulties will give rise to a real chance of harm.
29. Country information indicates that the focus of the current Sri Lankan government is the prevention of the resurgence of the LTTE and any actions towards Tamil separatism. In its last (2012) report the UNHCR stated that at that time, being Tamil and coming from the North or the East is not, of itself, sufficient to warrant international protection, although it did identify persons who it considered at that time, may require protection. More recently, the UK Home Office in 2106 identified that it is persons suspected of certain links with the LTTE who may be in need of international refugee protection, depending on the individual circumstances of their case.
30. I accept there is credible evidence of serious harm being perpetrated against certain Tamils associated with, or perceived to be associated with, the LTTE by the Sri Lankan authorities in pre and post-war Sri Lanka.<sup>7</sup> However, I am not satisfied the applicant's past or present circumstances would lead to a real chance of any adverse interest or consequences for the applicant.
31. I have considered the article the applicant has provided regarding the abduction and torture of a Tamil man. The article states that the Tamil man was allegedly abducted by Sri Lankan security forces. The reasons for the abduction and death are not disclosed in the article. I am not persuaded that the details of this article are commensurate with the applicant's past or current circumstances before me.
32. I have accepted that the applicant is a Tamil male, who has resided in areas in the Northern province. Country information supports that a person being of Tamil ethnicity from the North or the East would not in itself warrant international protection; and I am satisfied that the applicant will not be imputed with any type of profile arising from being Tamil male who resided in areas in the Northern province.
33. The applicant has never claimed that he or any of his family was members of the LTTE. I have accepted that the applicant was arrested, detained and questioned before being released on suspicion of his involvement or association with the LTTE in 2007 and on two occasions the applicant was questioned by the CID about his involvement and association with two men who had connections with the LTTE in [2012]. However, I have found that the applicant was not of

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<sup>5</sup> US Department of State, "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320 and DFAT, "DFAT Country Information Report: Sri Lanka", 24 January 2017, CISED50AD105.

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

<sup>7</sup> DFAT, "DFAT Country Information Report: Sri Lanka", 24 January 2017, CISED50AD105 and UK Home Office, "Country Information and Guidance. Sri Lanka: Tamil separatism. Version 2.0", 19 May 2016, OGD7C848D17.

interest to the Sri Lankan authorities for any reason on his departure from Sri Lanka in 2012. I have also found that the applicant's evidence that he was required to report and that he continued to be questioned after his release by the CID in [2012] and that his family has been visited on two occasions by the CID since his arrival in Australia have no credible basis. There is no other credible evidence before me that the applicant or his family members or friends have had any involvement with LTTE, political organisations or Tamil separatism activities.

34. Having regard to all the evidence before me, I am not satisfied that the applicant will be imputed with any type of profile arising from his past circumstances on return to Sri Lanka. I am not satisfied that as a Tamil male who resided in areas the Northern province he will be perceived to have an pro-LTTE or pro-Tamil or anti-Sri Lankan government political opinion, on his return to Sri Lanka now or in the reasonably foreseeable future. I am not satisfied the applicant faces a real chance of harm as a Tamil, or because of any actual or imputed pro-LTTE or anti-Sri Lankan government political opinion, on his return to Sri Lanka now or in the reasonably foreseeable future.
35. I accept the applicant left Sri Lanka illegally. DFAT advice is that returnees to Sri Lanka are issued temporary travel documents and are subject to police investigations to confirm the person's identity.<sup>8</sup> I accept, as a person returning on a temporary travel document, the applicant may be detained en masse with other returnees for processing on return. I accept as part of the processing the Sri Lankan authorities will acquire a history of the applicant's past. I have found the applicant will not be imputed with any type of profile arising from his past circumstances on his return to Sri Lanka. The applicant has no outstanding court orders, arrest warrants or a criminal or terrorist background. I am satisfied that it would be quickly determined that the applicant has no adverse profile or other profile of interest.
36. DFAT and other sources considered by the delegate advise that returnees are treated according to the standard airport procedures, regardless of their ethnicity and religion and that they are not subject to mistreatment during processing. Although it does not routinely monitor the situation of returnees, DFAT assesses that the risk of torture or mistreatment for the majority of returnees is low and continues to reduce.<sup>9</sup>
37. The information before me indicates that the Sri Lankan authorities do not perceive former asylum seekers, even those that are Tamil, as being involved with the LTTE or opposed to the Sri Lankan authorities on return, and I am not satisfied that having lived outside Sri Lanka for a period, or seeking asylum in Australia there is a real chance that on return the Sri Lankan authorities would perceive the applicant to have such a profile. Reports indicate that the Sri Lankan government's objective has shifted to identifying activists in the Tamil diaspora who are working for Tamil separatism and to destabilise the Sri Lankan state.<sup>10</sup> On the evidence before me, I do not accept anyone including the Sri Lankan authorities have sought the applicant's whereabouts since his arrival in Australia and nor is there any evidence before me that the applicant or his family members or friends have had any involvement with LTTE, political organisations or Tamil separatism activities. I am not satisfied he faces a real chance of harm as an asylum seeker.
38. I accept that as the applicant left illegally by boat he may be charged under the Immigrants and Emigrants Act (I&E Act) for departing Sri Lanka other than via an approved port of departure.

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

<sup>9</sup> DFAT, "DFAT Country Information Report: Sri Lanka", 24 January 2017, CISED50AD105, 4.22

<sup>10</sup> UK Home Office, "Country Information and Guidance. Sri Lanka: Tamil separatism. Version 2.0", 19 May 2016, OGD7C848D17.

39. According to DFAT, returnees who have been charged under the I&E Act can remain in police custody at the airport for up to 24 hours after arrival 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. Information from DFAT does not indicate that detention is selectively applied to returnees, that returnees are processed in any discriminatory manner or that those who committed an offence under I&E Act, such as the applicant, face a real risk of torture or other mistreatment.<sup>11</sup>
40. I accept while being questioned and processed at the airport the applicant may face a brief period of detention. The information before me indicates there is a possibility he may be detained for more than a day while awaiting an opportunity to appear before a magistrate. While I am satisfied that this would depend on the timing of his arrival, I find the chance of the applicant being detained for more than a brief period is remote, however I accept that if the applicant's detention did extend to more than a day that it may occur in a Sri Lankan prison.
41. Information before me indicates that conditions in Sri Lankan prisons are poor due to economic and resourcing conditions and old infrastructure.<sup>12</sup> The information indicates that any such detention would only continue until the applicant was given an opportunity to appear before a magistrate and I am satisfied this period of time would likely be brief.
42. Penalties for persons who depart illegally can include imprisonment and a fine. According to the Sri Lankan Attorney-General's Department, returnees who were merely passengers on a people smuggling venture are fined on a discretionary basis, with fines payable by instalment.<sup>13</sup> There is nothing before me to indicate that the applicant would be perceived and treated as anything other than a mere passenger on the people smuggling vessel, who DFAT assesses, the Sri Lankan authorities tend to view as victims.
43. Country information indicates if the applicant pleads guilty to departing illegally, he will be required to pay a fine (which he can do by instalment) and will subsequently be released. In most cases if a person pleads not guilty, they will be granted bail on their own personal surety immediately by the magistrate, or may be required to have a family member act as guarantor and wait for their family member to collect them. On the information before me, the applicant has been working in Australia and has family members remaining in Sri Lanka. The applicant has not claimed and there is no evidence before me to indicate he would not be granted bail on his own personal surety or that he would not have a family member to act as guarantor if required. If bailed, there are rarely any conditions, and if there are, they are imposed on a discretionary basis. An accused will only need to return to court when the case against them is being heard, or if summonsed as a witness in a case against the organiser/facilitator of a boat venture. There is no general requirement to report to police or police stations between hearings.
44. I am not satisfied that the payment of a fine in this case amounts to serious harm, or that being held in detention for a short period at the airport, or possibly a nearby prison, cumulatively amounts to serious harm.
45. In addition, the information before me does not indicate that I&E Act is discriminatory on its terms, that it is applied in a discriminatory manner or that it is selectively enforced. Accordingly, I am satisfied that any investigation, prosecution and punishment of the applicant

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

<sup>12</sup> US Department of State, "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320.

<sup>13</sup> DFAT, "DFAT Country Information Report: Sri Lanka", 24 January 2017, CISED50AD105.

under the I&E Act would be a law of general application and would not amount to persecution for the purpose of ss.5H(1) and 5J(1) of the Act.

46. I am not satisfied the applicant faces a real chance of serious harm in Sri Lanka as a Tamil asylum seeker, who departed illegally and is returning from Australia, on his return to Sri Lanka now or in the reasonably foreseeable future.

#### **Refugee: conclusion**

47. The applicant does not meet the requirements of the definition of refugee in s.5H(1) of the Act. The applicant does not meet s.36(2)(a) of the Act.

#### **Complementary protection assessment**

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48. A criterion for a protection visa is that the applicant is a non-citizen in Australia (other than a person who is a refugee) in respect of whom the Minister (or Reviewer) is satisfied Australia has protection obligations because there are substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm.

#### **Real risk of significant harm**

49. Under s.36(2A), a person will suffer 'significant harm' if:

- the person will be arbitrarily deprived of his or her life
- the death penalty will be carried out on the person
- the person will be subjected to torture
- the person will be subjected to cruel or inhuman treatment or punishment, or
- the person will be subjected to degrading treatment or punishment.

50. As the applicant would be travelling to Sri Lanka (whether involuntarily or otherwise) as a person on a temporary travel document, I have accepted he may be detained en masse at the airport with other returnees for processing on return, questioned and fined. He may be detained briefly in a prison. I am not satisfied these measures constitute significant harm. I do not accept it would amount to the death penalty, constitute or result in an arbitrary deprivation of life, or torture. Nor does the evidence before the delegate indicate that these processes, or the penalties implemented as a result involve any intention to inflict pain or suffering that could be considered cruel or inhuman in nature, severe pain or suffering or to cause extreme humiliation. I am not satisfied that it amounts to cruel or inhuman treatment or punishment or degrading treatment or punishment.

51. I have otherwise found there is not a real chance of any harm on the basis of his ethnicity, as a Tamil male who resided in areas in the Northern provinces, his past circumstances or his status as an asylum seeker and returnee from Australia. Based on the same information, and for the reasons set out above, I am also not satisfied that there is a real risk the applicant would face significant harm for these reasons on his return to Sri Lanka.

**Complementary protection: conclusion**

52. 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) of the Act.

**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:
- the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
  - 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
  - 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:

- conflict with a characteristic that is fundamental to the person's identity or conscience; or
- conceal an innate or immutable characteristic of the person; or
- without limiting paragraph (a) or (b), require the person to do any of the following:
  - 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;
  - conceal his or her true race, ethnicity, nationality or country of origin;
  - alter his or her political beliefs or conceal his or her true political beliefs;
  - conceal a physical, psychological or intellectual disability;
  - enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
  - 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):

- that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and
- the persecution must involve serious harm to the person; and
- 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 threat to the person's life or liberty;
- significant physical harassment of the person;
- significant physical ill-treatment of the person;
- significant economic hardship that threatens the person's capacity to subsist;
- denial of access to basic services, where the denial threatens the person's capacity to subsist;
- 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:

- 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
- disregard any fear of persecution, or any persecution, that:
  - 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.