



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

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA17/02781

Date and time of decision: 23 February 2018 18:03:00  
Dione Dimitriadis, 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. [In] March 2017 he lodged an application for a Safe Haven Enterprise visa (SHEV) claiming to fear harm because of his political opinion, his imputed political opinion, his membership of a particular social group and his Tamil ethnicity.
2. A delegate of the Minister for Immigration and Border Protection (the delegate) refused the visa [in] May 2017 and found that the applicant did not have a well-founded fear of persecution and there was not a real risk of significant harm upon his return to 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).
4. The IAA received a submission on 19 June 2017 on behalf of the applicant. The submission restates a number of the claims made before the delegate, and presents arguments in relation to those matters.
5. In the submission, the applicant made claims that were not in the written statements or made at the arrival interview. However, it is not known if the claims were made at the protection visa interview because there is no available recording of the interview and there are no notes from the interview. It is possible that, at the protection visa interview, the applicant made claims that were not in the written statements or made at the arrival interview.
6. Because the protection visa interview recording was not available, the IAA invited the applicant to an interview on 16 February 2018. As I am unable to be satisfied that information provided in the submission about the applicant's claims and the statements of the applicant provided at interview were not previously provided, with the exception of the new information referred to in the following three paragraphs, I have proceeded on the basis that that information is not new information.
7. The applicant made reference to country information in his submission on 19 June 2017 and at the IAA interview. In the submission he provided a report from 'Athavan' news dated 4 October 2016. He also referred to other country information that was dated before the delegate made her decision and provided links to reports (the Human Rights Watch annual report 2016, article in 2010 from the Ceylon News, UK Home Office report on Tamil separatism in Sri Lanka dated 19 May 2016, version 3, and International Truth and Justice Project, July 2015). It appears that all these reports were available before the delegate made her decision. The applicant did not suggest that they had been given to the delegate. These reports or articles were not previously provided to the Department and are new information. The applicant has not satisfied me that, in relation to the new information, the new information could not have been provided to the Minister before the Minister made the decision under s.65 or that it is credible personal information which was not previously known, and had it been known, may have affected the consideration of the applicant's claims (s.437DD(b)). Furthermore I am not satisfied that there are exceptional circumstances to justify considering the new information (s.473DD(a)). I note the delegate considered and referred to the Department of Foreign Affairs and Trade report

dated 24 January 2017<sup>1</sup> on Sri Lanka and the UK Home Office report<sup>2</sup> on Tamil separatism in Sri Lanka dated 19 May 2016, version 2, and I will consider these reports.

8. The applicant provided a reference dated 19 June 2017 from a supervisor at the applicant's employment. This reference was not provided to the Minister before the Minister made the decision under s.65 of the Act. The reference is from the applicant's supervisor and I am satisfied that it has no real bearing on the applicant's claims for protection. The applicant has not satisfied me that, in relation to this new information, the new information could not have been provided to the Minister before the Minister made the decision under s.65 or that it is credible personal information which was not previously known, and had it been known, may have affected the consideration of the applicant's claims (s.437DD(b)). I am also not satisfied that there are exceptional circumstances to justify considering the new information (s.473DD(a)).
9. The applicant stated at the IAA interview that there were reports of the chief of the Sri Lankan army speaking in London and threatening Tamils. The applicant did not provide the relevant article or even a link to this new information. The applicant has not satisfied me that, in relation to this new information, the new information could not have been provided to the Minister before the Minister made the decision under s.65 or that it is credible personal information which was not previously known, and had it been known, may have affected the consideration of the applicant's claims (s.437DD(b)). Furthermore I am not satisfied that there are exceptional circumstances to justify considering the new information (s.473DD(a)).

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

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

- The applicant was born in [Town 1], Eastern Province, Sri Lanka. He is a Tamil and his religion is Hindu.
- Although he was not involved with the LTTE (Liberation Tigers of Tamil Eelam) and did not receive any training, his village was under the control of the LTTE before 1995 so his family had some contact with them.
- He fears harm from the Grease Men.
- He was threatened by unidentified groups because he is Tamil and he believes these unidentified groups were part of the Sinhalese Armed Forces, CID, TMVP (Tamil Makkal Viduthalai Pulikal), and/or other groups who supported the government and the army.
- [In] October 2011, on his way home, he was approached by unknown masked men who forced him into a van. He was beaten and threatened. He suspects these men were from the TMVP.
- After this incident he went into hiding and arranged his departure from Sri Lanka.
- The applicant will be harmed by the TMVP because he assisted the TNA (Tamil National Alliance) during the 2011 election. The TMVP approached him to join the campaign and provide assistance. He refused and assisted the TNA instead.

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<sup>1</sup> Department of Foreign Affairs and Trade (DFAT), "Sri Lanka - Country Information Report", 24 January 2017, CISED850AD105.

<sup>2</sup> UK Home Office, "Sri Lanka: Tamil separatism. Version 2.0", 19 May 2016, Section 3. OGD7C848D17.

- Since his departure from Sri Lanka, the authorities have come to his house and questioned his family about his whereabouts, and they have approached his sister and questioned her.
- If he is forced to return to Sri Lanka he is scared that he will be detained, tortured or killed by the Sri Lankan authorities or other groups.
- The applicant would be targeted by the authorities wherever he goes because he is a Tamil from [Town 1].
- He fears that if he returns to Sri Lanka he will be detained, fined and harmed by the authorities because he departed the country illegally. He is at further risk of harm because he claimed asylum in Australia.

## **Refugee assessment**

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11. 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**

12. 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.

13. The applicant’s identity is not in issue and I accept on the basis of the various identity documents the applicant submitted to the Department of Immigration and Border Protection (now part of the Department of Home Affairs) (the Department) that he is a national of Sri Lanka and that his identity is as claimed. I find Sri Lanka to be the receiving country for the purpose of this application. There is nothing before me to suggest that the applicant has a right to enter and reside in any country other than Sri Lanka, and I find for the purpose of s.36(3) of the Act that he does not.

14. At the arrival interview [in] January 2013 the applicant stated that there was the issue of the Grease Man in 2011, so families stayed in one house to keep females safe. Because the applicant’s family had a big house, people stayed there. [In] October 2011, a Grease Man

jumped through their house and ran from the house to the army camp 100 metres away. The applicant claimed that the crowd that gathered went to tell the army but were not believed and someone from the crowd threw a rock at the army, so the army started beating them and chased them away.

15. In the Statutory Declaration declared by the applicant [in] February 2017, the applicant stated that there was an increase in the number and severity of Grease Man incidents in his village in late 2011. The applicant claimed that the Grease Men were sponsored by the government and their actions were done to instil terror in the village. The applicant believed that it was done to bring problems to Tamil people in their village and cause tension between the government and them. The applicant stated that a few people from the village threw rocks at the army camp because they were angry that the soldiers did not assist in catching the Grease Man and the soldiers shot warning shots in the air to scare the crowd and encourage them to return home.
16. The delegate stated in the decision that she did not accept the applicant's claim that the government authorities sponsored the Grease Men to instil terror in the applicant's village to harm the applicant or Tamils in the area to cause tension between the Tamil residents and the Sri Lankan authorities as claimed. The delegate did not accept that the applicant was harmed or targeted for harm by Grease Men.
17. As stated previously, I do not have before me the protection visa interview recording so I invited the applicant to attend an interview at the IAA on 16 February 2017. The applicant stated at the interview that his first problem started with the Grease Men. He claimed that they went to the army camp and protested about the Grease Man and those at the camp chased the people away and started shooting at them. The applicant stated that he is currently not scared of the Grease Man. He claimed that he was identified because of the Grease Man and he is currently fearful of the Sri Lankan government, the authorities and the CID.
18. The information<sup>3</sup> before me is that there was widespread fear and panic over media reports of 'Grease Yakkas' (or Grease devils) carrying out night-time assaults on women in rural areas of Sri Lanka in July and August 2011. The report states that in some areas, local communities carried out vigilante attacks on suspected 'Grease Yakkas' and protested over their alleged links to local military forces.
19. The applicant claimed that his village in [Town 1] was targeted by the Grease Men. The delegate accepted the widespread fear of 'Grease Devils' in Sri Lanka during the conflict but noted that, at interview, the applicant stated that he was never targeted specifically by the Grease Men and never had any confrontations with them apart from chasing some unknown people in the dark along with other [a number of] Tamils from his neighbourhood. Further, the applicant also stated that this issue no longer existed. The applicant stated at the IAA interview that he is not currently scared of the Grease Men.
20. I have had regard to a DFAT<sup>4</sup> response to questions about Grease Men. The response was that the media widely reported the sighting of Grease 'Yakkas' in rural areas from early 2011 until about September 2011. DFAT stated that several 'Yakkas' were caught by villagers and handed to the police, but no action was taken and the men were released. DFAT further stated that

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<sup>3</sup> 'Sri Lanka March 2012', UK Home Office, 07 March 2012, 3523, 4.04.

<sup>4</sup> Department of Foreign Affairs and Trade (DFAT), SRI LANKA: CIS Request Sri Lanka: Questions arising from recent applications, Australia: 29 November 2012, CX299951.

allegations that 'Yakkas' were associated with the army have not been substantiated. DFAT also stated that there had been no reports of Grease 'Yakka' sightings in 2012.

21. The applicant stated at the IAA interview that he does not fear the Grease Men. I am not satisfied that the applicant suffered harm in Sri Lanka from the Grease Man. I am satisfied that the applicant does not face a real chance of harm from people known as Grease Men or those who may have supported them. There have been no sightings since 2012 according to the information before me.
22. The applicant also claimed that the day after the applicant and others chased the Grease Man, [objects] were burnt on the street. The applicant claimed that it was after these two events that he was taken, beaten and questioned. I have considered these claims later in the decision.
23. The applicant claimed that he was not involved with the LTTE and did not receive any training, but his village was under the control of the LTTE before 1995 so his family had some contact with them.
24. The applicant stated that he is a Tamil male from a former LTTE controlled area and he is single. The applicant stated that the Sri Lankan government and the authorities are sensitive about the re-emergence of the LTTE or a similar group and they do not like to see anyone opposing them and immediately persecute the person behind such actions. The applicant stated that his family and he had some contact with the LTTE in the past and therefore he was targeted.
25. At the interview at the IAA, the applicant stated that they were not with the LTTE but they helped them. He stated that one time they were under the control of the LTTE and the army and they were helping the LTTE.
26. I have carefully considered the applicant's evidence but do not accept that he was targeted because he and/or his family had some contact with the LTTE in the past. His own evidence is that his village was under the control of the LTTE before 1995, more than 22 years ago. The applicant did not claim that he helped the LTTE at the time of the arrival interview and only claimed that he had had contact with them. There is no credible evidence before me that the applicant had any involvement (other than incidental contact) with the LTTE or that the Sri Lankan authorities targeted the applicant because he or his family had incidental contact with the LTTE in the past.
27. The applicant stated at the interview with the IAA that his [Relative A] was in the LTTE and because of that, the government looked at the applicant as being involved with the LTTE.
28. The delegate considered whether the applicant was questioned and harmed by the authorities in 2009 as a result of his Tamil race and involvement of [Relative A] with the LTTE. The delegate stated that the applicant was not arrested, charged with a crime, held under the Prevention of Terrorism Act (PTA) or sent to rehabilitation for those with more substantive links of involvement with the LTTE. The delegate was satisfied that the applicant was not a person of interest to the Sri Lankan authorities or suspected of having personal links to the LTTE at the time.
29. I have considered the UK Home Office report<sup>5</sup> on Tamil separatism in Sri Lanka dated 19 May 2016. The report<sup>6</sup> states: 'A person being of Tamil ethnicity would not in itself warrant international protection. Neither in general would a person who evidences past membership or

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<sup>5</sup> UK Home Office, "Sri Lanka: Tamil separatism. Version 2.0", 19 May 2016, Section 3, OGD7C848D17.

<sup>6</sup> Ibid, 3.1.2.

connection to the LTTE unless they have or are perceived to have a significant role in relation to post-conflict Tamil separatism or appear on a 'stop' list at the airport.'

30. I have considered whether the applicant suffered any harm because of the involvement of [Relative A] with the LTTE. The applicant's own evidence is that he, himself, was not involved with the LTTE and he did not receive any training from the LTTE. He lived very close to a Sri Lankan army base so, if he were of adverse interest, including as a consequence of any family relationship, it is reasonable to assume that he would have been at the very least questioned by them regarding LTTE involvement. I am satisfied that the applicant was not questioned, detained, arrested or harmed by the Sri Lankan authorities because of any connection to the LTTE.
31. The applicant lived in the Eastern Province of Sri Lanka for many years until he departed Sri Lanka in 2012, except for two years from 2000 to 2002 when he worked in [Country 1]. There is no credible evidence that the applicant was targeted by the Sri Lankan authorities because of any involvement with the LTTE before he departed Sri Lanka in 2012. I do not accept that he was questioned or harmed by the Sri Lankan authorities in 2009 because [Relative A] was involved with the LTTE or because the applicant was suspected of being involved with the LTTE. He made no mention of this at the arrival interview and only said that he had some contact with the LTTE as he lived in a former LTTE controlled area prior to 1995.
32. I have also considered the applicant's claims that he was targeted and is in fear of persecution because he is a Tamil single male. I am satisfied that the applicant has embellished his claims to enhance his claims for protection. I am satisfied that the applicant has not suffered any harm because of any connection with the LTTE or because he is a single Tamil male from the Eastern province. I am satisfied that the applicant did not have a profile as a political activist with the LTTE or even that he was perceived as being a supporter of the LTTE.
33. The war in Sri Lanka ended in 2009 and I am satisfied, based on country information, that there is not a real chance of harm to the applicant on the basis of his being a Tamil. I have had regard to the report of the Department of Foreign Affairs and Trade (DFAT)<sup>7</sup> which assesses that monitoring and harassment of Tamils in day-to-day life has decreased significantly under the Sirisena Government. DFAT reports that members of the Tamil community have also described a positive shift in the nature of interactions with authorities and they feel able to question the motives of, or object to, monitoring or observation activities. DFAT reports that 'Tamils have a substantial level of political influence and their inclusion in political dialogue has increased since Sirisena came to power in 2015. There are a number of Tamil political parties, with the largest coalition of parties operating under the umbrella of the Tamil National Alliance (TNA). The TNA currently has 16 members of parliament and holds the majority of seats in the Northern Provincial Council. The TNA leader, Rajavaroatham Sampanthan, is leader of the National Opposition.'
34. DFAT reports that '[s]ymbolic changes have also contributed [to a more positive outlook for reconciliation. The 2015 Independence Day ceremony was attended by Tamil National Alliance (TNA) leaders for the first time since 1972 and President Sirisena delivered a trilingual Declaration for Peace in Sinhala, Tamil and English, paying respect to all victims who had lost their lives during the civil conflict (a significant step toward acknowledging losses on both sides). At the 2016 Independence Day ceremony the national anthem was sung in Tamil, as well as Sinhala. In 2015, the Government changed the name of the day commemorating the end of

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<sup>7</sup> Department of Foreign Affairs and Trade (DFAT), "Sri Lanka - Country Information Report", 24 January 2017, CISED50AD105.

the conflict (held in May) from 'Victory Day' to 'War Heroes Remembrance Day' and for the first time gave official approval for memorial events to take place in the north and east.'<sup>8</sup>

35. DFAT reports<sup>9</sup> that the military conflict in Sri Lanka ended in 2009 after a long civil conflict. The report states that the Sirisena Government has prioritised human rights and reconciliation and has made significant progress, including: replacing military governors in the Northern and Eastern Provinces with civilians; returning some of the land held by the military since the conflict-era back to its former owners; releasing some individuals detained under the *Prevention of Terrorism Act* (PTA) and committing to reform the PTA; and engaging constructively with the United Nations. The Government also established an Office of National Unity and Reconciliation (ONUR) to develop a national policy on reconciliation.
36. The applicant claimed that he was kidnapped, questioned and tortured by an unknown group in October 2011 to obtain information from him. I have carefully considered the evidence and I accept that the applicant was questioned following the incident with the burning [objects] on the street and the chasing of the Grease Man into the army base. However, I am satisfied that the applicant has exaggerated the incident for the purpose of obtaining a protection visa. Although I am prepared to accept that he was injured whilst being questioned, I am not satisfied that he was seriously injured. Although he went to hospital for [a number of] days, and he provided a 'diagnosis ticket' from the hospital, his evidence was that he did not have any broken bones and he was not operated on. The applicant stated at the interview at the IAA that he had scans. I consider that there were precautionary scans taken but the applicant was not seriously injured.
37. I have significant concerns about the evidence that he was tied up, beaten, his body placed upside down, he lost consciousness and then he was dumped near his home and that the perpetrators thought he was dead. It is difficult to believe that the people, he claimed had beaten him, would not have known if he was dead or not. If he was close to death, it is not credible that he would have only remained in hospital for [a small number of] days. The applicant's evidence was that he had no broken bones and he had no operations while he was in the hospital, although he had a scan. I do not accept the applicant's evidence at the IAA interview that he was too scared to stay at the hospital for a longer period because he feared that he would be arrested.
38. Although I have accepted that the applicant did suffer some injury in October 2011 and he was questioned by an unknown group, the circumstances in Sri Lanka have changed significantly and I am not satisfied that if he returns to Sri Lanka, he would be harmed for the reasons that he claims. The incident in October 2011 took place before the current government of President Maithripala Sirisena. DFAT states in its report<sup>10</sup> that President Sirisena was democratically elected in January 2015 and the Sri Lankan Government is focused on post-conflict reconciliation, transitional justice, and governance and economic reform. The security situation in the north and east has improved dramatically since the end of the conflict, with greater freedom of movement and a reduction in the military's involvement in civilian life. Tamils have a substantial level of political influence and their inclusion in political dialogue has increased since President Sirisena came to power in 2015. There are a number of Tamil political parties. The report states that the Tamil National Alliance (the TNA) has 16 members of parliament and holds the majority of seats in the Northern Provincial Council. The TNA leader, Rajavarthiam Sampanthan, is leader of the National Opposition. DFAT assesses that monitoring and

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<sup>8</sup> Ibid.

<sup>9</sup> Ibid 2.2, 2.29, 2.39, 3.6, 3.9.

<sup>10</sup> Ibid, 2.3.

harassment of Tamils in day-to-day life has decreased significantly under the Sirisena Government.

39. I do not accept that the applicant was harmed on the basis of being Tamil, young, male and single from the Eastern Province. I do not accept that he was in hiding in Sri Lanka.
40. Prior to departing Sri Lanka to come to Australia, the applicant lived in the Eastern Province for most of his life other than a period of two years when he went to [Country 1] to work. He held a Sri Lankan passport and had a visa to work in [Country 1] where he worked from 2000 to 2002. His Sri Lankan passport was valid until [2018] and it appears that he renewed it in [2008]. The applicant stated that he started looking to leave Sri Lanka shortly before he departed in 2012 yet he could have made attempts before that if he were truly in fear in Sri Lanka. I am satisfied that he did not depart earlier because he was not in fear of the Sri Lankan authorities or other groups or people.
41. The applicant also claimed in his statement to the IAA that the Prevention of Terrorism Act (PTA) means that as a Tamil, he can be detained and gaoled at any time with no reason given and no access to a lawyer. The applicant claimed that the PTA has been used since the end of the war, including under the present government to detain and torture people suspected of links to the LTTE. I am not satisfied that the applicant is suspected or will be suspected of links to the LTTE based on his evidence and his past conduct. I am satisfied that there is not a real chance of the applicant's being detained or gaoled under the PTA.
42. If the applicant were tortured in the way described and he was in such fear, that he left the hospital as he claimed and went into hiding for several months, it is not credible that he would then return to his home town or village [in] April 2012. The applicant claimed that he did not return home after he left the hospital because he was scared. When asked at the IAA interview why he returned in April 2012 when he feared for his life, the applicant stated that [a particular event was occurring]. When questioned about this, the applicant stated that a long time had passed and he thought there might be changes. I have carefully considered his evidence but I do not accept that the applicant would have returned to his home village or town if he were truly in fear.
43. I am prepared to accept that he was questioned after the incident with the Grease Man and the burning [objects] but I do not accept that he was accused of being the leader of the group who protested. I do not accept that he was identified as the leader. I accept that the applicant went to hospital and had scans done. However, he only stayed for [a small number of] days, he did not have broken bones and he did not undergo any surgery. I am not satisfied that the applicant went into hiding. I note that in the SHEV application he stated that from 2010 to 2012 he was doing farming duties on the family farm. I am satisfied that if he were truly in fear and if those events had taken place, being kidnapped, beaten, and tortured, he would not have returned home because [an event was underway].
44. The applicant claimed that his whole family was threatened following his brother's involvement with the TNA. The applicant claimed that his brother continues to support the TNA and people still approach their family looking for him.
45. The applicant is not sure if it is the TMVP who is threatening his family. The applicant fears returning to Sri Lanka because he claimed that the authorities identified him and the government has the applicant's details and his name and they will arrest and torture him. The applicant claimed that those pursuing him were the CID, Sri Lankan army, the Sri Lankan government, the TMVP or possibly other groups.

46. However, I am not satisfied that the applicant has an adverse profile in Sri Lanka. He was not a political activist. He has given little information about supporting the TNA because his brother was involved in it. The applicant stated at the interview at the IAA that he was not a member of a political party. He claimed that he assisted the TNA during the election but there is no credible evidence that he was a high profile supporter of the TNA at that time. I accept that he assisted the TNA for a short period during the election campaigns in 2011 or 2012 but I do not accept that he was a high profile supporter. I do not accept that the Sri Lankan authorities have any adverse interest in him because of his low level support for the TNA.
47. I do not accept that the Sri Lankan authorities have any adverse interest in him because he went to the army camp with [a number of] others to seek help to catch a Grease Man in 2011. I am not satisfied that the applicant was pursued, questioned and harmed by the TMVP although I accept that he was questioned and suffered some injury. It also appears that the applicant's family members who live in Sri Lanka have not been harmed since he departed Sri Lanka in 2012.
48. I am not satisfied that the applicant will be harmed if he returns to Sri Lanka because his brother was involved with the TNA or because the applicant was a low level supporter of the TNA for a limited period.
49. I also do not accept that people came looking for him at his house or that since he left Sri Lanka, people have gone to his home asking about his whereabouts, or that the CID has telephoned his family asking about him, or that they asked his sister about him. I have considered the letter from a church in Sri Lanka but because I do not accept that the applicant was in fear or was in hiding, I do not accept that he went to the church to be safe.
50. I do not accept that the applicant was identified by the Sri Lankan authorities as being a high profile activist protesting against the militias, the military or against any other body or group.
51. I do not accept that there is a real chance that the applicant will be harmed on the basis of being Tamil, young, male and single from the Eastern Province or for having been questioned and mistreated by an unknown group in the past. I am satisfied that the applicant does not face a real chance of harm on these bases if he were to return to Sri Lanka.
52. I have considered whether the Sri Lankan authorities will harm the applicant because he applied for asylum in Australia.
53. The applicant stated in his Statutory Declaration declared [in] February 2017, that if he arrives back in Sri Lanka as a failed asylum seeker, the authorities will be able to obtain a report and find out who he is. The applicant has heard that in Sri Lanka people have been murdered because the Government thinks that they are against the Government or the military. The applicant is scared that they will come to know that he made complaints about the government and military forces. He is scared that the authorities will interrogate him and kill him and no one will be able to assist him.
54. I accept that if the applicant returns or is returned to Sri Lanka, he would do so as a failed asylum seeker. However, I do not accept that he faces a real chance of any harm as a failed asylum seeker upon his return.

55. Sri Lanka's Constitution entitles any citizen to the freedom to return to Sri Lanka<sup>11</sup>. I have had regard to the Department of Foreign Affairs and Trade (DFAT) report in the review material and the applicant's statement dated [in] June 2017 provided to the IAA and I am not satisfied there is a real chance the applicant would be harmed by the Sri Lankan authorities because he has applied for asylum in Australia. DFAT states in its report that thousands of asylum seekers have returned to Sri Lanka since 2009, including from Australia, the US, Canada, the UK and other European countries, with relatively few allegations of torture or mistreatment. 'DFAT assesses that 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 *Immigrants and Emigrants Act*. Overall monitoring has reduced under the Sirisena Government and community fear of mistreatment has also decreased.'<sup>12</sup>
56. I am not satisfied that the applicant would face a real chance of harm from the Sri Lankan authorities, police, Criminal Investigation Department, the army, members of the TMVP, or others due to being a failed asylum seeker.
57. I have considered whether the Sri Lankan authorities will harm the applicant because he departed Sri Lanka illegally. The applicant stated in his Statutory Declaration declared [in] February 2017, that if he is forced to return to Sri Lanka, he is scared when the authorities find out where he has come from, they will know that he left Sri Lanka illegally and will find out why he left Sri Lanka. He is scared that the authorities will interrogate him and kill him.
58. I accept that the applicant departed Sri Lanka without a passport. For that reason, it appears that he has committed an offence under the Immigrants and Emigrants Act 1949 (I&E Act). The DFAT reports<sup>13</sup> states that returnees who departed Sri Lanka irregularly by boat are generally considered to have committed an offence under the I&E Act. The DFAT report states that upon arrival in Sri Lanka, involuntary returnees are processed by different agencies, including the Department of Immigration and Emigration, the State Intelligence Service and the Criminal Investigation Department. These agencies check travel documents and identity information against the immigration databases, intelligence databases and the records of outstanding criminal matters.
59. The DFAT report<sup>14</sup> states that for returnees travelling on temporary travel documents, police undertake an investigative process to confirm identity. DFAT assesses that returnees are treated according to the standard procedures, regardless of their ethnicity and religion. DFAT further assesses that detainees are not subject to mistreatment during processing at the airport.
60. I accept on the basis of the country information<sup>15</sup> that the applicant may be questioned, arrested and charged on his return to Sri Lanka under the I&E Act. The applicant did not travel to Australia using a Sri Lankan passport. He may have to return to Sri Lanka on a temporary travel document. DFAT assesses that ordinary passengers on a people smuggling venture are generally viewed as victims. Penalties are more likely to be pursued against those suspected of being facilitators or organisers of people smuggling ventures. According to the Sri Lankan Attorney-General's Department, no returnee who was merely a passenger on a people smuggling venture had been given a custodial sentence for departing Sri Lanka illegally. The

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<sup>11</sup> Department of Foreign Affairs and Trade (DFAT), "DFAT - Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, 5.17.

<sup>12</sup> Ibid, 4.22.

<sup>13</sup> Ibid, 5.18, 5.19.

<sup>14</sup> Ibid, 5.20.

<sup>15</sup> Ibid, 5.21, 5.25, 5.26, 5.22.

applicant's evidence is that he was a passenger. Fines have been issued as a deterrent towards departing illegally in the future.

61. I have considered the applicant's circumstances and am not satisfied that he would be unable to pay a fine. The applicant was able to pay money to travel by boat to Australia. He stated at the arrival interview that he paid [a particular amount]. His brother who travelled on [a] boat also paid [the same amount]. The money was paid in cash by the applicant's [other relatives] after the applicant arrived here. There is no amount outstanding.
62. The information<sup>16</sup> before me is that fines can be paid by instalments. There is no evidence that the applicant or his family would be unable to pay a fine or provide a surety. According to the SHEV application, the applicant has worked in Sri Lanka, he worked for two years in [Country 1] earning money and he has worked in Australia. The applicant may be briefly detained, including in a Sri Lankan prison if a magistrate is unavailable because of a weekend or public holiday, but I am not satisfied that this or the payment of a fine constitutes serious harm in this case or that there is a real chance that he will be subject to a custodial sentence.
63. Furthermore, the treatment the applicant may face as a result of his unlawful departure - questioning, brief detention and a fine are a consequence of the I&E Act. That Act does not appear discriminatory on its face, nor does the evidence indicate that it is applied or enforced in a discriminatory manner. I am not satisfied that this constitutes systematic and discriminatory conduct for the purposes of s.5J(4) of the Act.
64. For these reasons I am not satisfied the applicant faces a real chance of persecution due to his having departed Sri Lanka illegally, now or in the reasonably foreseeable future, if he returns to Sri Lanka.
65. I am not satisfied that there is a real chance that the applicant will be harmed for reasons of his political opinion, his imputed political opinion, his membership of a particular social group or because he will be a failed asylum seeker or because he departed illegally, if he returns to Sri Lanka.

#### **Refugee: conclusion**

66. 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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67. 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**

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

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<sup>16</sup> Ibid, 5.22.

- 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.

69. I have found that there is not a real chance that the applicant will be harmed for reasons of his political opinion, his imputed political opinion, his membership of a particular social group or because he will be a failed asylum seeker. I am also satisfied that there is not a real chance that the applicant will suffer serious harm because he departed illegally. The threshold for the 'real risk' element in the complementary protection criterion in s.36(2)(aa) is the same as that for the 'real chance' test in the refugee criterion in s.36(2)(a)<sup>17</sup>. Considering the factual findings and country information set out above, I am not satisfied that there is a real risk of the applicant being subjected to significant harm in the nature of the death penalty, arbitrary deprivation of life, torture, cruel or inhuman treatment or punishment, or degrading treatment or punishment, whether at the hands of the Sri Lankan authorities, SLA, the CID, TMVP or any other groups or persons.

70. I am satisfied that there is not a real risk that the applicant will suffer significant harm if he returns to Sri Lanka.

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

71. 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.

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<sup>17</sup> *MIAC v SZQRB* (2013) 210 FCR 505

## 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.