



**Australian Government**  

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**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA17/03030

Date and time of decision: 1 March 2018 10:19:00  
Jane Bishop, 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) is [age] man that claims to be a national of Sri Lanka and identifies himself as a Hindu Tamil. He arrived in Australia by boat [in] October 2012. [In] July 2016 the applicant applied for a Safe Haven Enterprise Visa (SHEV).
2. [In] June 2017 a delegate of the Minister for Immigration and Border Protection (the delegate) refused the applicant's visa. The delegate accepted that the applicant faced harassment, threats and extortion from paramilitary groups such as Karuna in and around 2006/2007 and in and around 2012. The delegate accepted that the applicant's family was threatened twice in 2012 after the applicant left Sri Lanka. The delegate accepted that the applicant would be returning to Sri Lanka as a failed asylum seeker that left Sri Lanka illegally. However, the delegate did not accept that the applicant's brother is still in hiding in Sri Lanka.
3. The delegate determined that the applicant does not have a profile of interest with the Sri Lankan authorities or any paramilitary group or any person with a past association with the paramilitary groups and that he does not face a real chance of serious harm or a real risk of significant harm now and in the foreseeable future in Sri Lanka. Likewise, the delegate determined that the applicant does not have a criminal background and was not of interest to the authorities when he left Sri Lanka. The delegate was satisfied that the applicant does not hold a well-founded fear of persecution on account of being a failed Tamil asylum seeker from an area controlled by the Liberation Tigers of Tamil Eelam (LTTE) in the past who departed Sri Lanka without the knowledge of the Sri Lankan authorities.

### Information before the IAA

4. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
5. On 21 July 2017 the applicant's representative provided written submissions and the UNHCR guidelines for assessing international protection.
6. Under s.473DC of the Act I am not required to accept new information. New information is information that was not before the delegate and I consider may be relevant. However, even if I accept new information provided by the applicant, I must not, pursuant to s.473DD of the Act, consider that new information unless I am satisfied there are:
  - exceptional circumstances to justify its consideration; and
  - the new information was not, and could not have been provided before the delegate's decision was made; or
  - the new information is credible personal information which was not previously known and had it been known may have affected the consideration of the applicant's claims.
7. The UNHCR guidelines were before the delegate and I have had regard to them.
8. To the extent that the submissions provided on 21 July 2017 argue errors and/or omissions in the delegate's decision based on the information that was before the delegate, I have had regard to it. The submissions contained generalised country information that did not contain personal information and appeared to predate the delegate's decision. The source, or sources,

of the country information were not included. In the context of unsourced, general country information that does not contain personal information and appears to predate the delegate's decision, I am not satisfied that the new country information could not have been provided to the delegate before he made his decision. The new information about the applicant's circumstances does not meet the requirements of s.473DD(b)(i) or (ii). I am also not satisfied that there are exceptional circumstances to justify considering the information. I am therefore not able to consider the new information.

9. The representative's submissions contained the following new claims:

- The applicant has been arrested and detained and he has been persecuted by way of sexual abuse by the Sri Lankan army (SLA). His brother who was arrested with him has successfully sought asylum in [Country 1].
- The applicant is perceived to belong to the LTTE and, having sought asylum in Australia, will be suspected of a crime and seen as a traitor.
- The applicant is a traitor of the Sri Lankan government and will be denied the capacity to earn a living and subsist.

10. The new information was that the applicant was arrested, detained and sexually abused by the SLA, that his brother was arrested at the same time and that his brother has been granted asylum in [Country 1]. However, the applicant's evidence is that all his brothers live in Sri Lanka and he has never claimed to have been arrested, detained and sexually abused by the SLA. At the beginning of the SHEV interview, the delegate advised the applicant that it was his responsibility to raise all his claims and that, if his application was refused, he may not be able to raise additional claims or change the details of his claims at a later date. Given the applicant was put on notice that he needed to raise all his claims and may not have another opportunity to do so, I find it incredible that, if the information contained in the representative's submission about the applicant's and his brother's interaction with the SLA were true, that he would fail to mention them or provide evidence inconsistent with those claims. I find that the information contained in the new claims is not credible. Likewise, there is no suggestion, based on the scant information before me, that the claims of the applicant's brother being arrested and successfully seeking asylum in [Country 1] are events that have taken place since the delegate made his decision 23 days previously. The applicant has not satisfied me that the new information about the applicant's circumstances meets the requirements of s.473DD(b)(i) or (ii). I am also not satisfied that there are exceptional circumstances to justify considering the information. I am therefore not able to consider the new information.

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

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

- He is a national of Sri Lanka and a Hindu Tamil. He was born in [Batticaloa] District, Eastern Province in [year].
- In 2000 there was fighting between the SLA and the LTTE in his area. He fled Sri Lanka and went to [Country 2] using a passport with his brother's details and the applicant's photograph. He could not get his own passport because he was not 18 years old and his mother bribed someone.
- In 2001 the applicant's sister was killed during crossfire between the SLA and the LTTE.

- In 2005 the applicant returned to Sri Lanka and purchased a truck for work. He started being harassed by the Karuna group and the LTTE for money. He would be stopped while driving. If he gave money he was asked for more. If he gave money to one group and not the other he would be in trouble.
- He was targeted because he had his own business and they thought he had money. He couldn't tell which groups were harassing him but they were all paramilitary groups.
- In late 2006/early 2007 a paramilitary group or groups demanded money from the applicant but he did not give them any. They went to the applicant's mother's home and demanded money from her.
- The applicant's mother feared for the applicant's safety. The applicant left Sri Lanka and went to [Country 2] on a passport in his own name. However, because his fingerprints matched a passport in another person's name (his brother) he was removed from [Country 2] and sent back to Sri Lanka.
- When the applicant returned to Sri Lanka he moved around from area to area hiding from the groups for about 12 months.
- In June 2008 he left Sri Lanka and went to [Country 3] for work. He stayed in [Country 3] for two and a half years before returning to Sri Lanka.
- When he returned to Sri Lanka he worked for another person and then bought a truck and started his own business. The paramilitary groups started harassing the applicant again for money. He paid two or three times and then could not pay anymore. They came to his home and threatened him and his mother at gun point. His mother became scared and organised for the applicant to leave Sri Lanka via a boat going to Australia.
- After the applicant left Sri Lanka the paramilitary groups came to his mother's home once in 2012 and once in February 2013 and threatened his mother. His mother was told that they would find the applicant and kill him.
- After the applicant left Sri Lanka the paramilitary groups came to his [brother] and threatened to kill/retain him. His parents sent the applicant's [brother] to [Country 4] where he stayed for six months until his visa expired. His [brother] returned to Sri Lanka and the paramilitary groups came to him again. His parents sent him to [Country 2] for about 12 months. When the applicant's [brother] returned to Sri Lanka in 2016 he went into hiding and started moving from place to place. He remains in hiding and his parents want to send him overseas again.
- He cannot return to Sri Lanka because he will not be able to live freely and he can't start or run a business. He will be unable to sustain himself.
- He cannot return to Sri Lanka because the paramilitary groups are working with the Sri Lankan government and will kill him.
- He cannot return to Sri Lanka because he will be returning as a failed asylum seeker from Australia and imputed with speaking against the Sri Lankan government.
- He cannot return to Sri Lanka because he is a Tamil and the Sri Lankan authorities will impute him to be a supporter of the LTTE and harm him.
- He cannot relocate to another part of Sri Lanka because he is a monolingual Tamil. Sinhalese and Tamils do not mingle. It would be hard for him to move and he would be killed.

## Factual findings

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12. I accept that the applicant is a national of Sri Lanka and a Hindu Tamil. He was born in [Batticaloa] District, Eastern Province in [year]. I accept the applicant departed Sri Lanka illegally and he would be returning as a failed asylum seeker. I accept that his is monolingual.
13. I accept that the applicant's sister was killed during crossfire between the SLA and the LTTE.
14. I accept the applicant's evidence about his overseas work and travel. I accept that the applicant left and returned to Sri Lanka via the airport without incident. I accept that, when the applicant returned to Sri Lanka in 2010, he was employed as a driver transporting construction material and then became a self-employed driver in 2011. However, it is implausible and I do not accept that the applicant could not obtain a Sri Lankan passport because he wasn't 18 years old. It is more plausible, and I so find, that the applicant obtained a passport using his [brother's] details to enable him to work in [Country 2].
15. The applicant has given consistent evidence about his business and subsequent harassment. I accept that the applicant had a business and was perceived as wealthy. I accept that the applicant was threatened with harm and harassed for money by paramilitary groups in 2006/2007 and again in 2012. I accept that, after the applicant left Sri Lanka, those paramilitary groups visited his mother once in 2012 and once in February 2013.
16. During the SHEV interview the delegate asked the applicant what his father did when a paramilitary group came to his home. The applicant responded that sometimes his father was at home and sometimes he wasn't. His father is an old quiet man whereas his mother would cry and get upset. His mother saw his sister being shot and panics when she sees people with weapons. His father would say things to them like "*leave my son alone*" or "*take me in his place*". He said it was in 2007 when the paramilitary groups put a gun to his head in front of his mother. However, in the applicant's statutory declaration dated 5 July 2016 he said that he and his mother were threatened at gun point in 2012. I am prepared to accept that, when the paramilitary groups went to the applicant's home, they were armed and that the applicant's mother would have panicked. However, the applicant has given inconsistent evidence about when he was threatened at gun point and his evidence regarding his father's behaviour seemed contrived in response to the delegate's questions. I do not accept that the applicant, the applicant's mother or any of the applicant's family were ever threatened at gun point or that his father asked the paramilitary groups to leave his son alone or take him instead.
17. During the SHEV interview the applicant confirmed that his [family] continue to live in the Batticaloa District. The applicant said that, after he left Sri Lanka, the same people that harassed and threatened him turned their attention to his brother [Mr A]. His evidence was that [Mr A] would be kidnapped until the applicant returned to Sri Lanka. To avoid the paramilitary groups the applicant's parents sent [Mr A] to [Country 4] and then to [Country 2]. However, since [Mr A] returned to Sri Lanka in early 2016, he has gone into hiding and has to keep moving around. He said [Mr A] doesn't have a permanent job or undertake studies because that would establish a routine and he would be found. [Mr A] does some [work] from time to time and his parents are attempting to send him overseas again. When the delegate asked the applicant if his [brother M] had problems he responded that his brother M lives in a different house and has not been noticed. M is [an occupation] and on a fixed income. However, the applicant was a business man. When the delegate asked the applicant where [Mr A] was living he responded in vague and general terms. When the delegate asked the applicant if his brother [Mr A] was of interest to the paramilitary group before the applicant left Sri Lanka he responded that he was a much younger smaller person and then grew up. The applicant left

Sri Lanka in late 2012 and stated that the paramilitary groups visited [Mr A] in 2013. [Mr A] turned 16 in December 2012 soon after the applicant left Sri Lanka. It is implausible, and I do not accept, that the applicant's brother [Mr A] became a person of interest with the paramilitary groups in less than a year because he grew up. On the applicant's own evidence, the paramilitary group threatened to kill or retain [Mr A] until the applicant returned to Sri Lanka. If [Mr A] was going to be used as a pawn to force the applicant to return, it would be irrelevant if he was 16 years old or 17 years old. I do not accept that [Mr A] goes from place to place and hides because he fears for his safety. I do not accept that paramilitary groups have threatened to kill [Mr A]. I do not accept that the paramilitary groups have threatened to retain [Mr A] until the applicant returns to Sri Lanka. This is consistent with the applicant telling the delegate that his other brother S, who was [age] at the time of the SHEV interview, is undertaking studies at boarding school. I am prepared to accept that the applicant's [brother] M was of no interest to the paramilitary groups because he was on a fixed government income.

18. The delegate put to the applicant that his issue is a law and order issue that can be reported and addressed by the Sri Lankan police (SLP). The applicant said that if he reported his problems to the SLP the next day his body would be in the street. There is no law and order in Sri Lanka. He would be in the same situation as his brother [Mr A] if he went back to Sri Lanka moving from place to place. He cannot go to the SLP because the people harassing him work with, and are part of, the Sri Lankan government. The delegate put to the applicant that there have been changes in Sri Lanka and it is now 2016. The applicant responded that, in the past, the money was being collected to give to the 'leaders' but now they are collecting the money for themselves. He said that, in the past, only the LTTE and the SLA had weapons but a lot of people in the community have weapons now. These people appear normal during the day but move around at night with their weapons. The problem has not been resolved with the new Sri Lankan government. I am prepared to accept that people in the community not associated with the LTTE or SLA would have access to weapons. DFAT reports that there is no law or Government policy in Sri Lanka which hinders access to state protection on the basis of religion or ethnicity. All citizens have access to avenues of redress through the police, judiciary and the Human Rights Commission of Sri Lanka. The SLP also offers to members of the public a tell the Inspector-General of police service and the National Police Commission to lodge complaints or concerns about individual police officers or the police in general.<sup>1</sup> I do not accept that, if the applicant returned to Sri Lanka, he would be killed if he complained to the police about individuals or groups threatening and harassing him for money.
19. The applicant said he and his family had no connections to the LTTE and avoided getting involved by going overseas. He said, because he is a Tamil from an Eastern province, he would be suspected as being connected with the LTTE. I accept that the applicant and his family had no connections to the LTTE.

### **Refugee assessment**

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20. 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.

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<sup>1</sup> DFAT, "Country Information Report Sri Lanka", 24 January 2017, CISED50AD105 at 5.

## Well-founded fear of persecution

21. 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.

### *Tamil and/or real or perceived links to the LTTE*

22. I accept that the applicant is a Hindu Tamil from an Eastern Province of Sri Lanka and that the area had been under the control of the LTTE during the civil war. The most recent DFAT report<sup>2</sup> states at paragraph 3.8 that:

...During the civil conflict more Tamils were detained under emergency regulations and the Prevention of Terrorism Act (PTA) than any other ethnic group. Many Tamils, particularly in the north and east, reported being monitored, harassed, arrested and/or detained by security forces during the conflict and the Rajapaksa Government. While this was primarily due to LTTE members and supporters being almost entirely Tamil, there were also likely instances of discrimination in the application of these laws, with LTTE support at times imputed on the basis of ethnicity (see ‘Political Opinion’ below). Since 2015 the Sirisena Government has reviewed and released some PTA detainees, including Tamils. DFAT assesses that there are currently fewer individuals detained under the PTA than there were during the conflict.

DFAT assesses that monitoring and harassment of Tamils in day-to-day life has decreased significantly under the Sirisena Government. The Sri Lankan police are now responsible for civil affairs across Sri Lanka. While a sizeable (and largely idle) military presence remains in the north and east, armed forces personnel are generally restricted to their barracks. While some cases of monitoring continue to be reported, such as the military or police observing public gatherings or NGO forums, the overall prevalence of monitoring has greatly reduced. Members of the Tamil community have also described a positive shift in the nature of interactions with authorities; they feel able to question the motives of, or object to, monitoring or observation activities...

23. The UK Home Office Report<sup>3</sup> on Tamil separatism states at paragraphs 3.1.2 and 3.1.3 that:

- A person being of Tamil ethnicity would not in itself warrant international protection.
- Neither, in general, would a person who evidences past membership or connection to the LTTE, unless they have or are perceived to have had a significant role in it; or if they

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<sup>2</sup> DFAT, “Country Information Report Sri Lanka”, 24 January 2017, CISED50AD105

<sup>3</sup> UK Home Office, “Sri Lanka: Tamil separatism v 4”, 31 March 2017, CISED50AD3779 at 12.

are, or are perceived to be, active in post-conflict Tamil separatism and thus a threat to the state.

24. I have accepted that the applicant's sister was killed during crossfire between the SLA and the LTTE and that the applicant and his family had no involvement with the LTTE. Country information indicates that there is a centralised Department on Immigration and Emigration database that maintains up to date stop and watch lists. Stop lists includes names of people that have extant court orders, arrest warrants or an order to impound their Sri Lankan passports. Watch lists includes names of people that the Sri Lankan authorities consider to be persons of interest; including separatists or criminal activities. It is implausible that if, as the applicant asserts, he is of interest to the Sri Lankan authorities because he is a Tamil from the Eastern province that he would have been able to travel in and out of Sri Lanka via the airport without incident. Based on the evidence before me, I find that the applicant's profile as a Hindu Tamil from an Eastern Province of Sri Lanka would not give rise to any adverse interest in him by the Sri Lankan authorities.
25. The applicant claimed that, because he sought asylum in Australia, he will be perceived as speaking against the Sri Lankan government. I accept that the Sri Lankan authorities remain sensitive to the potential re-emergence of the LTTE in Sri Lanka<sup>4</sup>. In this regard, the UK Home Office report<sup>5</sup> identified four categories of people at risk of persecution or serious harm in a 2013 Upper Tribunal (Immigration and Asylum Chamber) decision. Those included individual who have, or are perceived to have, a significant role in post-conflict Tamil separatism within the diaspora and/or a renewal of hostilities within Sri Lanka, journalists or human rights activities who have criticised the Sri Lankan government about its human rights record or are associated with publications that are critical of the Sri Lankan government, individuals that have given evidence to the Lessons Learned and Reconciliation Commission implicating the Sri Lankan security forces or Sri Lankan authorities in alleged war crimes and persons whose name appears on a computerised "stop" lists of those against whom there is an extant court order or arrest warrant. I do not accept that the applicant would be imputed with anti-government sentiments merely for seeking asylum in Australia and there is no credible evidence before me to indicate that the applicant would have a profile of interest. I am therefore satisfied that the applicant can return to Sri Lanka and would not face a real chance of any harm by the Sri Lankan authorities for reasons of being a Tamil person from the Eastern province that has sought asylum in Australia.

#### *Monolingual Tamil*

26. I have accepted that the applicant is a monolingual Tamil. DFAT assesses that monolingual Tamil speakers can have difficulties communicating with the SLP and other government authorities. However, these practical difficulties are not a result of official discrimination and I am satisfied that they would not give rise to any harm. The practical difficulties are a result of a lack of qualified language teachers, the legacy of earlier discriminatory language policies and the disruption to civilian life caused by the conflict.<sup>6</sup> I am satisfied that the applicant can return to Sri Lanka and would not face a real chance of any harm for being a monolingual Tamil person.

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<sup>4</sup> DFAT, "Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, at 3.29.

<sup>5</sup> UK Home Office, "Sri Lanka: Tamil separatism. Version 2", 19 May 2016, OGD7C848D17, see 2.3.

<sup>6</sup> DFAT, "Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, at 3.7.

## Wealthy Tamil

27. I have accepted that the applicant had a business and was perceived as wealthy. I have accepted that the applicant was threatened with harm and harassed for money by paramilitary groups in 2006/2007 and again in 2012. I have accepted that, after the applicant left Sri Lanka, those paramilitary groups visited his mother once in 2012 and in February 2013.
28. In DFAT's previous report<sup>7</sup> it stated that it was aware of credible reports that paramilitary groups continue to be active in Sri Lanka, including criminal activities. In DFAT's current report it states that incidents of extra-judicial killings, disappearances and kidnappings for ransom occurred frequently during the civil conflict and were attributed to Sri Lankan security forces, the LTTE and paramilitary groups. Some people were also killed or abducted in relation to business or personal disputes. However, the number of incidents of extra-judicial killing, disappearances and abductions for ransom has significantly reduced since the end of the conflict.<sup>8</sup> Likewise the UK Home Office "*Sri Lanka: Tamil separatism Version 2*"<sup>9</sup> referred to Tamil paramilitary groups in the past tense. On the applicant's own evidence he stated that in the past, paramilitary groups extorted money for their leaders and now they extort money for themselves. I accept that, although rare, cases of extortion continue in Sri Lanka. However, the applicant's home has not been visited since 2013 and I did not accept that [Mr A] goes from place to place and hides because he fears for his safety. I did not accept that the applicant's brother [Mr A] became a person of interest with the paramilitary groups in less than a year because he grew up. I did not accept that [Mr A] goes from place to place and hides because he fears for his safety. I did not accept that paramilitary groups have threatened to kill [Mr A]. I did not accept that the paramilitary groups have threatened to retain [Mr A] until the applicant returns to Sri Lanka. Likewise, the applicant has not claimed that his other brothers living in Sri Lanka have been harassed or threatened by paramilitary groups or people that were once associated with those groups. Based on all the information before me, I find that, even if the applicant returned to Sri Lanka and recommenced his business, the chances of him being threatened, harmed or harassed by paramilitary groups, or people previously associated with those groups, would be remote.
29. The delegate put to the applicant that his problems could be resolved if he changed occupations and the applicant responded that he won't get another job. He was unable to study like his brother M and his only skill is driving. I have found that if the applicant recommenced his business the chances of him being threatened, harmed or harassed by paramilitary groups or people associated with paramilitary groups in the past are remote. I do not accept that the applicant would not be able to work as an employee driver or recommence his business if he returned to Sri Lanka. I am satisfied that the applicant would be able to financially support himself upon his return without a real chance of harm.
30. Having regard to all the country information before me and given my findings I am not satisfied that the applicant's profile as a monolingual wealthy Hindu Tamil businessman from an Eastern Province that lived in an area once controlled by the LTTE would give rise to any adverse interest in him upon his return to Sri Lanka. I am satisfied that the applicant can return to Sri Lanka and would not face a real chance of any harm by the Sri Lankan authorities or any paramilitary groups or people once associated with paramilitary groups. There is no credible information to indicate that the applicant would be detained for any other reason. I am therefore satisfied that the applicant can return to Sri Lanka and would not face a real chance

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<sup>7</sup> DFAT, "Country Information Report Sri Lanka", 18 December 2015, CISEC96CF14143 at 2.35.

<sup>8</sup> DFAT, "Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, at 4.1.

<sup>9</sup> 19 May 2016.

of any harm by the Sri Lankan authorities or any paramilitary groups or people once associated with paramilitary groups for these reasons.

*Returning as a failed asylum seeker and/or a person who departed illegally*

31. I accept that the applicant left Sri Lanka illegally in September 2012. I also accept that by the manner of his return, the Sri Lankan authorities may know or infer that he made a claim for protection in Australia, and that he will be subject to background checks on arrival. DFAT advises that a returnee like the applicant will be processed at the airport by the Department of Immigration and Emigration, (DOIE), the State Intelligence Service (SIS) and the Sri Lankan CID who check for identity and any outstanding criminal matters. DFAT is aware of a small number of allegations of torture or mistreatment raised by asylum seekers who have been returned to Sri Lanka but cannot verify these reports given that many allegations are made anonymously, often to third parties and sometimes long after the torture is alleged to have occurred. DFAT also reports that thousands of asylum seekers have returned to Sri Lanka since 2009, including from Australia, with relatively few allegations of torture or mistreatment. 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. In his SHEV application the applicant stated that he had never been charged, convicted or wanted for an offence in Sri Lanka. I am satisfied that the applicant has no identity concerns, or criminal or security records that would raise the concern of the authorities. I am satisfied that the applicant would not be at risk of serious harm during, or as a consequence of this routine investigation. The evidence before me does not suggest that asylum seekers, including monolingual wealthy Hindu Tamil businessman from an Eastern Province that lived in an area once controlled by the LTTE asylum seekers, face a real chance of harm for that reason. I am not satisfied, having regard to the applicant's profile, that he faces a real chance of any harm as a returning asylum seeker.
32. Information in the DFAT report states that after processing at the airport, persons who departed illegally are charged under the Sri Lanka's Immigrants and Emigrants Act (I&E Act), fingerprinted and photographed, and then transported to the closest Magistrate's Court at the first available opportunity once investigations are completed, at which point responsibility shifts to court or prison services.<sup>10</sup> Because the applicant departed illegally he may be arrested and charged under the I&E Act. When brought before a court, a person who pleads guilty will most likely be fined and discharged. While penalties can include imprisonment for up to five years and a fine of up to 200,000 Sri Lankan Rupees (SLR), DFAT advises that no returnee who was merely a passenger on a people smuggling venture has ever been given a custodial sentence for departing Sri Lanka illegally. Fines are imposed on a discretionary basis, are generally between 5 and 50 thousand SLR, and may be paid by instalment. As the applicant was not involved in organising or facilitating people smuggling, I find that there is no real chance that the applicant will be given a custodial sentence.
33. Based on DFAT's advice I find that if the applicant were to plead not guilty, he would either be immediately granted bail on personal surety, or wait to be collected by a family member if required to have a family member act as guarantor. DFAT advises that if bail is granted there are rarely any conditions. 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. I am not satisfied that the imposition of any fine, surety or guarantee would of itself constitute serious harm in this case. As DFAT advises that there are usually no reporting

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<sup>10</sup> DFAT, "Country Information Report Sri Lanka", 24 January 2017, CISED50AD105., 5.21

requirements attached to the grant of bail, I do not consider that there is a real chance the applicant would be required to report regularly to local police. There is no information before me to indicate that the applicant would be unable to post bail.

34. On the basis of DFAT's advice, I accept that on return the applicant may be detained for a short period during investigation and while waiting to be taken before a court. I find that the treatment of the applicant under the I&E Act is not discriminatory conduct but rather, the application of a law which applies to all Sri Lankans. A generally applicable law will not ordinarily constitute persecution. In this case, the evidence does not suggest that the I&E Act is selectively enforced or applied in a discriminatory manner. I find that the investigation, prosecution and punishment for illegal departure under the I&E Act would be pursuant to a non-discriminatory law of general application and does not amount to persecution within the meaning of s.5J (4). I am not satisfied that it involves systematic and discriminatory conduct.
35. Having regard to all the material before me, I find that the applicant does not face a real chance of persecution on returning to Sri Lanka.

#### **Refugee: conclusion**

36. 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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37. 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**

38. 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.
39. Section 36(2B) provides that there is taken not to be a real risk that a person will suffer significant harm in a country if:
- it would be reasonable for the person to relocate to an area of the country where there would not be a real risk that the person will suffer significant harm
  - the person could obtain, from an authority of the country, protection such that there would not be a real risk that the person will suffer significant harm, or

- the real risk is one faced by the population of the country generally and is not faced by the person personally.

*Is there a real risk that the applicant will suffer significant harm?*

40. I have considered the applicant's claims individually and cumulatively and found that the applicant does not face a real chance of serious harm if he returned to Sri Lanka for reason of his ethnicity, area of residence, wealth status or having sought asylum in Australia. The "real risk" test in the complementary protection provisions imposes the same standard as the "real chance" test applicable to the assessment of "well-founded fear"<sup>11</sup>.
41. I accept that, on return to Sri Lanka, the applicant will be subject to a series of administrative processes (as outlined above) and identified as a person that departed Sri Lanka illegally and is a returning asylum seeker. I have found that the applicant is not a person of interest to the Sri Lankan authorities and, upon his return, I am not satisfied that the applicant faces a real risk of being arbitrarily deprived of his life; of facing the death penalty or of being subjected to torture. I am not satisfied that the acts or omissions of the Sri Lankan authorities during this administrative process are intended to inflict pain or suffering, severe pain or suffering or to cause extreme humiliation so as to amount to cruel, inhumane or degrading treatment/punishment. I am therefore not satisfied that there is a real risk that the applicant will suffer significant harm within the meaning of s.5(1) and s.36(2A) upon his return to Sri Lanka. Likewise I do not accept that having a fine imposed upon the applicant under the I&E Act for his illegal departure amounts to suffering significant harm within the meaning of s.5 (1) and s.36 (2A).
42. I am satisfied that as a necessary and foreseeable consequence of the applicant being removed from Australia to Sri Lanka (the receiving country), there is not a real risk that he will suffer significant harm now or in the foreseeable future.

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

43. There are not substantial grounds for believing that, as a necessary and foreseeable consequence of being returned from Australia to the 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>11</sup> *MIAC v SZQRB* (2013) 210 FCR 505 per Lander and Gordon JJ at [246], Besanko and Jagot JJ at [297], Flick J at [342].

## 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.