



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

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA17/03270

Date and time of decision: 20 October 2017 09:28:00  
Belinda Mericourt, Reviewer

**Decision**

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The IAA remits the decision for reconsideration with the direction that:

- the referred applicant is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*.

*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 national of Sri Lanka, of Tamil ethnicity and Hindu religion. [In] August 2016 he lodged an application for a Safe Haven Enterprise Visa (SHEV). In a decision dated [in] July 2017 a delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa. The applicant's claims are primarily that he was a member of the Liberation Tigers of Tamil Elam (LTTE) engaged in propaganda work and other activities. After his illegal departure from Sri Lanka his brother was detained by the authorities due to material he put on his [social media] and during his interrogation he told the authorities the applicant was the member of the family recruited to the LTTE.

### Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
3. No new information has been obtained or received by the Immigration Assessment Authority (IAA).

### Applicant's claims for protection

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4. The applicant's claims can be summarised as follows:
  - The applicant was forcibly recruited into the LTTE in about March 2007 and he was a member of the LTTE until January 2009. He was trained in the use of weapons and jungle warfare but never actually fought himself. His roles in the LTTE were [details of duties]. When asked to fight in January 2009, he suffered a minor injury from [an attack] near his [location] and taken to hospital. He fled the following day in civilian clothing and remained in hiding until he and his family surrendered to the Sri Lankan Army (SLA) in May 2009.
  - The applicant and his family suffered discrimination and verbal harassment and abuse from the SLA after their surrender while they were in [the] Refugee Camp. However they were protected from further persecution by the presence of NGOs such as the UNHCR.
  - In December 2009 the applicant and his family were released as they had established they had permanent residence with the applicant's [relative] in [City 1]. The applicant was able to undertake education and work in [City 1] until his departure from Sri Lanka in August 2012.
  - The applicant was involved as a volunteer for the Tamil National Alliance (TNA) in the election campaign in 2010. He put up posters, handed out flyers, attended rallies and talked to people about voting for the TNA. He was constantly harassed by opposition party supporters and paramilitary groups. He ceased any association with the TNA after the election, largely due to his parents' concern that someone may discover he had been a member of the LTTE and he would be at risk of harm from the authorities.
  - The applicant was questioned several times by the SLA and the CID about his possible membership of the LTTE, but never admitted he had been recruited or had a role in the LTTE. He was never arrested, detained or harmed in the course of this questioning.

- The applicant and his family were able to return to their family home in [Province 1] in April 2012 where they registered with the authorities including the local government and police. At that time he was subjected to detailed questioning about his connections with the LTTE and was asked why he was not a LTTE member given his profile (age, location, involvement in politics) and asking him to name other LTTE members. The applicant returned to [City 1] for work but twice returned to the Army camp to answer questions from CID officers about the LTTE. The last time he was questioned was at the beginning of August 2012. At that time there were many reports of young Tamil men being abducted and the applicant was concerned that the authorities would discover his LTTE connections and membership and that he would also be abducted.
- After his departure from Sri Lanka [in] August 2012, the applicant's family was approached by the CID in October 2012 who were enquiring about his whereabouts because he had not answered his mobile phone. The CID officers became angry when informed that his family did not know where he was and demanded he attend their office for further questioning.
- In November 2015, the applicant's [brother] posted a celebration of the LTTE [details of post], on his personal [social media]. In December 2015, the applicant's [brother] was arrested by the SLA and CID and detained overnight in [details of detention]. He was interrogated about his activities on [social media]. In the course of the interrogation he disclosed that the applicant was the only member of the family who was involved in the LTTE. He told the authorities this because they would not have let him go otherwise. The SLA and CID asked about his whereabouts, current activities and whether he had attended a rehabilitation centre organised by the SLA. Prior to his release, his brother was warned that if he continued to support the LTTE on [social media] or show any public support for the LTTE he would be arrested and jailed.
- The applicant fears that as a consequence of being a young Tamil man from the Northern province, who had been an active member of the LTTE and an active supporter of the TNA in the lead up to 2010 elections, he would be imputed with a political opinion as a sympathiser or supporter of the LTTE or someone seen to oppose the Sri Lankan government by holding Tamil separatist views. He also feared persecution as a person who had left Sri Lanka illegally by boat, was a failed asylum seeker in Australia and resident of Australia for a period of time. He fears that if he returns to Sri Lanka he will be imprisoned, interrogated and persecuted.

### **Factual findings**

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5. The applicant's claims as to his identity and nationality have been consistent since his arrival in Australia. He conducted interviews in the Tamil language and has submitted copies and translations of his national birth record and identification card. I accept the applicant's nationality, ethnicity and identity are as claimed and find Sri Lanka to be the receiving country for the purpose of the application. There is no evidence before me to suggest that the applicant has a right to enter and reside in any country other than Sri Lanka and I am satisfied he does not: s.36(3)

### **Refugee assessment**

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6. 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**

7. 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.
  
8. At his arrival interview the applicant stated that he feared returning to Sri Lanka because the Criminal Intelligence Department (CID) had suspicions that he was a LTTE member and came to his family home seeking to interrogate him. None of his family members were involved in the LTTE but they lived in an LTTE controlled area and the LTTE were known to recruit family members. He had been compelled to participate in anti-government demonstrations when he was at school but was personally against any violent conflict. When he and his family were resettled after the end of the war in 2009 he was asked if he was in the LTTE or knew anyone who was involved. The CID had his phone number, called him and asked him to report to the Army Camp to answer questions. The last time this happened was [in] August 2012 and he departed Sri Lanka [a few] weeks later. He feared being arrested, detained and interrogated on his return about his imputed connection with the LTTE. At both his entry interview and his written statement of [in] August 2013 he did not claim to be a member of the LTTE. In his written statement he elaborated on the situation his family faced during the war and claimed he feared he would come to the adverse attention of the authorities as a result of his perceived connection with the LTTE and his volunteer work for the Tamil National Alliance (TNA) in the 2010 elections.
  
9. In his written statements of [August] 2016 and at his SHEV interview, the applicant claimed he had been a member of the LTTE. He had been forcibly recruited when he was [age] years old and living at home in [Province 2]. At the time [his other siblings were not living at home] and his only other brother living at home was [age] so he was the person the LTTE wanted to recruit. He was given about three months training including weapons and combat training and then assigned to a Division of the LTTE in [Town 1] that was responsible for [details of activities]. He had a relatively low level role [details of role] for a total of about [duration] in both [Town 1] and [Town 2]. In about May 2008 he was told to do more combat training as the war had intensified but was then assigned to a role of [details of duties]. In the final stages of the war in January 2009 he was ordered to the front line and given a gun. He never actually fought himself. He and [a number of] comrades were in a [location] when they were [attacked] and he was [injured] and taken to hospital. At the hospital his [military equipment] were

removed. He was kept overnight and then amidst the chaos, he escaped the next morning dressed in [civilian clothes]. His family were in the area and he mixed in with the civilians who were fleeing in large numbers due to the advance of the Sri Lankan Army (SLA).

10. The applicant and his family were captured by the SLA in [location] and taken to an IDP camp [in] May 2009. Although they were verbally abused and harassed they were protected by the presence of NGO/ UNHCR staff. They were released to the applicant's [relative's] home in [City 1]. For almost three years the applicant and his family remained in [City 1]. He undertook some education in [details of education] and worked as [details of work]. He was involved in the 2010 election as a volunteer for the TNA putting up posters, handing out flyers and attending rallies but ceased any political activities or association after the election.
11. In March 2012 the applicant and his family were returned to the family home in [Province 1] where they registered with authorities. He was questioned in detail about his possible connection with the LTTE and asked to provide names of anyone he knew involved in the LTTE. The applicant returned to continue working in [City 1]. In his absence members of the CID came to his family home asking about his whereabouts. They called him on his mobile and asked him to report to the Army camp which he did. He was questioned both about his own suspected involvement and asked to provide information about former LTTE members. In August 2012 he was again contacted by the CID and asked to report to the [Province 2] Office which he did. At that time there were also reports of abductions of Tamil youth. Given the applicant's experience of the CID threatening him and the fact that there were no longer NGOs or the UNHCR present to protect people, the applicant feared he may be abducted himself and made arrangements to depart Sri Lanka, which he did at the end of August 2012.
12. After his departure, in October 2012, members of the CID called at his family home asking about his whereabouts as he had not been contactable by phone. His family reported that the CID officers became angry when told by his family they did not know where he was.
13. Finally, in November 2015, his [brother] shared a 'celebration of the LTTE' with [details of post] on his personal [social media]. He was arrested by the authorities in December 2015 and held for interrogation overnight. When the SLA and CID put to him that someone in his family would have been recruited by the LTTE he identified the applicant as the person who was involved in the LTTE. His brother was asked where the applicant was and whether he had attended a rehabilitation centre organised by the SLA. Before he was released his brother was warned not to show support of the LTTE on his [social media] or in any public forum again or he would be arrested and jailed.
14. The delegate was satisfied that the applicant is a Tamil from the Northern Province and that he had been involved as a volunteer supporter for the TNA in the 2010 election.
15. The delegate was not satisfied that the applicant was an active LTTE member and did not accept that he was identified, targeted, detained and interrogated by the Sri Lankan authorities for this reason. The delegate did have regard to the fact that a newly arrived detained applicant may have been advised not to disclose details of active involvement in the Sri Lankan conflict to the Australian authorities, but considered that the applicant's evidence at his SHEV interview lacked specific detail and he also lacked any independent evidence to support his claimed role in the LTTE. The delegate accepted the applicant's evidence about the location of his family both during and after the war.
16. I accept the applicant's evidence that during his boat journey to Australia in August/September 2012 he was warned by other Tamil people not to mention that he was a member of the LTTE

because the Australian authorities would view him as a security risk to the Australian community and that he would be detained by Australian authorities and immediately deported back to Sri Lanka. I therefore place little weight on the discrepancy between the applicant's stated reasons for his fear of persecution at his arrival interview and subsequently in his second written statement and at his SHEV interview.

17. Country information indicates that it was very common, if not routine, for the LTTE to forcibly recruit a member of each family in LTTE controlled areas during the Civil War<sup>1</sup>. The applicant has consistently stated that his family home was in [Province 2] which was an LTTE controlled area. I accept the applicant's evidence that he was the person in his family targeted for recruitment, given he was [age] years old, one brother [was not in Province 2], his [brother], at the age of [age], was seen as a less desirable combatant as he was of an age when he might marry, and his third brother was residing in [City 1] at the time. I therefore am satisfied that the applicant was forcibly recruited to the LTTE in March 2007.
18. The applicant's evidence in his statutory declaration of [August] 2016 and his SHEV interview [in] February 2017 about his history of involvement in the LTTE from March 2007 to January 2009 is consistent. I accept the applicant's evidence that although he was given training in the use of weapons and jungle warfare, that for [duration] he was involved he did [details of role], and that he was not an officer or leader of any kind and had no rank. The applicant was able to give details about what he did and, given his subsequent history as [occupation], I accept that he was assigned to this role due to some perceived skill he had [the role he performed].
19. I accept that when the war intensified in about May 2008 he was given further military training for two months at a camp in [Town 2]. I find the applicant's evidence less plausible that he was then assigned to the role of [details of duties], after having such military training, particularly as the LTTE were using as many young men as possible, and often children and older people at this stage of the war. His evidence about what he actually did to [carry out his role] was lacking in detail, other than to say he [details of duty] which implies that he was at the frontline if only to [perform his duties]. I also find the applicant's evidence less plausible that after suffering a minor wound he was able to flee by leaving the hospital in civilian clothes and then remain in the same area with his family where there was intensive fighting between the LTTE and the SLA without being drawn back into combat.
20. I am therefore satisfied that the applicant was actively involved with the LTTE for a significant period of time as a non-combatant involved in [details of role], and that it is likely he spent a period of time at the end of the Civil War as a combatant, albeit a reluctant one.
21. The applicant's description of his family's displacement during the war in 2008 and early 2009 has been consistent and I accept his evidence that his family were trapped within the remaining areas under LTTE control after the war escalated in 2008 and frequently moved from place to place until their capture or surrender to the SLA in [location] in May 2009. The applicant's evidence has also been consistent that he and his family were taken to an Internally Displaced Persons (IDP) camp [where] they remained until they were released to the applicant's [relative]'s home in [City 1] in December 2009. They remained in [City 1] until May 2012 when they were able to return to the family home in [Province 1]. I accept the applicant's evidence that he was able to remain in [City 1] to work from December 2009 until his departure from Sri Lanka in August 2012.

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<sup>1</sup> UN Human Rights Council, "Promoting reconciliation and accountability in Sri Lanka: Report of the Office of the United Nations High Commissioner for Human Rights", 24 February 2014

22. The applicant claims that after the end of the civil war he became involved in supporting the Tamil National Alliance (TNA) by putting up posters, handing out flyers, attending rallies and talking to people, encouraging them to vote for the TNA in elections in 2010. He claims that he was harassed and assaulted by members of opposition parties. He has not claimed to be singled out or targeted for harm by members of members of the opposition parties or any other persons. After the election he ceased supporting the TNA as his parents were worried that if he continued his political activities he would come to the adverse attention of the authorities who may discover he was a member of the LTTE. At his interview with the delegate he answered questions about the election results and had a basic understanding of the TNA political platform.
23. Based on the applicant's evidence I am satisfied that he spent several months volunteering for the TNA and undertaking the activities he described. I am satisfied that he held no office or specific position in the TNA, did not organise activities and was not personally targeted or harassed as a known supporter of the TNA. I am satisfied that he had no profile as a political activist at that time.
24. Given the current status of the TNA in the Sri Lankan government together with the applicant's evidence that he has had no further contact or engagement with the TNA since the election in 2010 I do not accept that the applicant, who had no specific political profile in the TNA in 2010, would be identified as someone of adverse interest to the authorities if he were to be returned to Sri Lanka now or in the foreseeable future, solely on the basis of his somewhat low-level involvement in and support of the TNA in the lead up to the elections in 2010.
25. However, I do accept that it is likely that the applicant would have been suspected by the authorities of having been a member of the LTTE, given his age, where his family were located, his Tamil ethnicity and the situation in Sri Lanka for some years after the end of the war.
26. I am satisfied that there would have been a number of times that he was questioned in [the] camp by the SLA about his suspected involvement in the LTTE, given he was a young Tamil man in an LTTE controlled area. I accept the applicant's evidence that he was never actually detained or placed in a rehabilitation camp, which at the time was the norm for Tamils the SLA had determined were involved as members of the LTTE<sup>2</sup>.
27. I accept that the applicant was not questioned by the CID again until he had to register back in his home area of [Province 1] in May 2012. A number of reports before the delegate indicate that at that time in 2012, although the LTTE itself had not held any military power or political authority since the end of the civil war in 2009, those people with real or perceived links to the LTTE were potentially in need of protection. There were numerous reports of arbitrary arrests, forced disappearances, abductions and killings in the North and East of Sri Lanka and Tamils with alleged links to the LTTE were increasingly at risk of arbitrary arrests and torture.<sup>3</sup> I accept that in August 2012 he feared that he was under suspicion by the CID and that he may be abducted or arrested and that this is the reason he fled Sri Lanka.
28. Recent country information supports the finding that a person being of Tamil ethnicity would not in itself warrant international protection. However, there is evidence that the security forces continue to detain individuals who they suspect of having LTTE connections and each

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<sup>2</sup> Department of Foreign Affairs and Trade (DFAT), "Country Information Report Sri Lanka", 24 January 2017, 3.8

<sup>3</sup> UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183EA8: UK Home Office, "Operational Guidance Note: Sri Lanka", April 2012, OGN v13; Amnesty International, "The Human Rights Situation in Sri Lanka – A Statement for the June Human Rights Session", 13 June 2012

case should be considered on the evidence provided.<sup>4</sup> The delegate referred to country information about some Tamils returning from the Middle East and the UK being detained on arrival at Colombo airport in the last two years. These reports indicate that those arrested were mostly known former LTTE members and are consistent with other country information about the Sri Lankan authorities continuing to take an interest in people who are known to be associated with the LTTE.<sup>5</sup> The delegate also considered the most recent Freedom from Torture report from May 2016 which indicates in nearly all cases related to detention and torture on return to Sri Lanka there were accusations of specific LTTE involvement or links<sup>6</sup> (rather than people being singled out for being simply a failed Tamil asylum seeker).

29. DFAT reports that Sri Lankan authorities remain sensitive to the potential re-emergence of the LTTE throughout the country.<sup>7</sup> It also notes that although the great majority of low profile ('low-risk') former LTTE members have already been released following their rehabilitation, any other low-profile LTTE members who came to the attention of Sri Lankan authorities would be detained and may be sent to the remaining rehabilitation centre.<sup>8</sup>
30. The United States Department of State (USDOS) 2016 Report on human rights in Sri Lanka covering 2015 noted that in the east and north, military intelligence and other security personnel, sometimes allegedly working with paramilitary groups, were responsible for the documented detention of civilians accused of LTTE connections. Observers reported that interrogation sometimes included mistreatment or torture following detention.<sup>9</sup> The report noted that unlike in the previous year, there were no substantiated reports of extrajudicial killings, although the use of force against civilians by government officials, while increasingly rare, remained a problem.<sup>10</sup>
31. I have had regard to the report in 2016 from the UK Home Office which assessed 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 a significant role in relation to post-conflict Tamil separatism or appear on a 'stop' list at the airport.*"<sup>11</sup> Although somewhat out of date, the 2012 UNHCR guidelines refer to a person's real or perceived links to the LTTE and who were employed in the media or propaganda divisions of the LTTE may give rise to a need for protection.<sup>12</sup> I therefore accept at the time of his departure from Sri Lanka he had a well-founded fear of harm.
32. I am satisfied on the applicant's evidence that he departed Sri Lanka by boat without the knowledge of the Sri Lankan authorities. The applicant has not claimed that he was anything other than an ordinary paying passenger. There is no evidence before me that the applicant has any criminal background.

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<sup>4</sup> UK Home Office, "Country Information and Guidance Sri Lanka: Tamil Separatism, Version 2.0", 19 May 2016, OGD7C848D17, 3.1.1.1

<sup>5</sup> Sri Lankan Mirror, "Another Tamil returnee arrested", 1 July 2015, CXBD6A0DE16698; Tamil net, "SL military continues to arrest Tamils from East returning from Middle-East", 31 May 2015, CXBD6A0DE7540; Tamil net, "16 Batticaloa Tamils arrested within last 100 days at Colombo airport", 3 May 2015, CXBD6A0DE6027 Sri Lanka Mirror, "10 Sri Tamils arriving in Lanka arrested", 4 March 2015, CXBD6A0DE6065

<sup>6</sup> Freedom From Torture, "Sri Lanka – Update on torture since 2009", 6 May 2016, CIS38A8012881

<sup>7</sup> DFAT, "Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, 3.29

<sup>8</sup> Ibid, 3.42

<sup>9</sup> US Department of State, "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320, p.7

<sup>10</sup> Ibid p.2

<sup>11</sup> UK Home Office, "Sri Lanka: Tamil separatism. Version 4.0", March 2017, Section 3, CISED50AD3779

<sup>12</sup> UNHCR, "Eligibility Guidelines for Assessment the international protection needs of Asylum-Seekers from Sri Lanka", 21 December 2012, CIS29707



33. The applicant and his representative have claimed that the applicant may be subject to torture if he returned to Sri Lanka as a failed asylum seeker. His representative cites a Human Rights Watch article dated May 2012 and a number of media articles dated from September 2012 to March 2016 to support this claim.<sup>13</sup>
34. DFAT advises that upon arrival in Sri Lanka, all involuntary returnees are processed by the Sri Lankan authorities for verification of their travel documents, identity and any outstanding criminal matters, which includes checks against immigration and intelligence databases<sup>14</sup>. Police undertake an investigative process to confirm the identity of returnees travelling on temporary documents, which often involves an interview, contact with the police in the returnee's home area and their neighbours and family, and checking criminal and court records, a process that can take several hours<sup>15</sup>. According to DFAT, all returnees are treated according to these standard procedures irrespective of their ethnicity, and are not subject to mistreatment during their processing at the airport<sup>16</sup>.
35. I accept that by manner of his return, the Sri Lankan authorities will infer that the applicant sought asylum in Australia. He will undergo an investigative process which will involve contact with the police in his local area and any reference to him on intelligence databases. I have accepted that the applicant was sought by the CID for questioning on two occasions after he registered in [Province 1] in May 2012. I accept his evidence that he reported to the CID office, was interrogated about his possible links to the LTTE and information about other LTTE supporters or members. I am satisfied that it is highly likely the CID contacted his family enquiring about his whereabouts after his departure from Sri Lanka in August 2012. I am therefore satisfied that at the time he departed Sri Lanka he was under suspicion from the local authorities and there is a real chance he will be undergo a more intensive investigative process on his return.
36. The applicant has claimed that his [brother] in Sri Lanka put information on his personal [social media] which would imply that he was a supporter of the LTTE and thus potentially a supporter of Tamil separatism. The applicant claims his brother was detained overnight in a camp and interrogated and that he told his interrogators that the applicant was the only member of the family who was a member of the LTTE. The applicant was only very briefly questioned about these claims at his SHEV interview and was not asked for any additional details other than he had provided in his statutory declaration of August 2016. I find it somewhat implausible that a Tamil person who could potentially be suspected himself of being a member of the LTTE would be likely to put such material on his [social media]. Without further detail or other evidence about this claim, I placed little weight on it.
37. As discussed, the delegate's decision refers to various reports of returnees being detained and tortured either on return to the airport or afterwards on return to their home areas, including some following the election of the Sirisena government in 2015. The majority of these appear to have involved persons with past LTTE involvement or links. As I have accepted that the applicant was a member of the LTTE engaged in [details of role] and it is likely he was also a combatant during the last few months of the war, I gave consideration to whether his profile would mean there is a real chance that he will experience serious harm on his return to Sri Lanka.

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<sup>13</sup> Human Rights Watch, UK: "Suspend Deportations of Tamils to Sri Lanka", 29 May 2012

<sup>14</sup> DFAT, "Country Information Report Sri Lanka", 24 January 2017, CISED50AD105, 5.19

<sup>15</sup> Ibid, 5.19, 5.20

<sup>16</sup> Ibid, 5.20

38. Based on the above information, I am satisfied that there is a real chance that the applicant will be investigated and detained at the airport. I have found that he has previously been of interest to the SLA and CID in 2009 and 2012 for a possible association or involvement in the LTTE. The applicant has not claimed to have suffered serious harm during the times he was interrogated. Nevertheless, based on my findings above, I am satisfied that the applicant was a member of the LTTE from the time he was forcibly recruited to the end of the war and that local authorities held suspicions about his involvement given he came from a family of four sons in an LTTE area, at least one of whom almost certainly would have been forcibly recruited into the LTTE. Notwithstanding the fact that the applicant was not detained for more than a few hours and he has not claimed he suffered serious harm during his interrogation, I consider it significant that he has previously come to the adverse attention of the SLA and CID. I also place some weight on the finding that the authorities continued to be interested in him after his departure from Sri Lanka.
39. There are numerous reported cases of Tamils who are suspected of having links with the LTTE being detained on arrival at the airport and it appears that the authorities at the airport are specifically screening returnees for such links.<sup>17</sup> There are also numerous reports indicating that any period of detention in Sri Lanka is accompanied by a substantial risk of torture and physical mistreatment. While DFAT has assessed that the risk of torture or mistreatment for the majority of returnees is low<sup>18</sup> there are credible reports indicating that the Sri Lankan authorities continue to torture suspected LTTE members or supporters in the course of investigations into their circumstances<sup>19</sup> and that Tamils are disproportionately affected by the application of the Prevention Against Terrorism Act. *“Despite the heavy criticism it has received nationally and internationally for allowing prolonged detention without due process, the Government has reportedly continued to rely on the Act to make new arrests, including exiled Tamils returning to Sri Lanka”.*<sup>20</sup>
40. I am satisfied that in the course of the routine investigation outlined above and contact with local officials, there is a real chance the authorities will become aware of the applicant’s involvement with the LTTE. Notwithstanding the information regarding the changed situation in Sri Lanka, in the particular circumstances of this applicant there is a small but real chance that he will face interrogation, detention and, in light of country information about the prevalence of mistreatment of Tamils with real or suspected LTTE connections while in police or military custody, suffer significant physical mistreatment. I find that this constitutes serious harm consistent with s.5J(5) of the Act. I find that the conduct of the authorities in inflicting such harm is systematic and discriminatory, as the country information demonstrates that such mistreatment is routinely inflicted by the Sri Lankan authorities on actual or suspected LTTE members and/or supporters. It would be directed against the applicant for the essential and significant reason of a political opinion imputed to him because of his connection with the LTTE. Such mistreatment therefore constitutes persecution within the meaning of s.5J(4).
41. I am satisfied the harm will be inflicted by the Sri Lankan authorities who exercise effective control over the entire country.<sup>21</sup> For this reason I am satisfied that the real chance of serious harm relates to all areas of the receiving country: 5J(1)(c). For the same reason I am satisfied

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<sup>17</sup> UK Home Office, *“Sri Lanka: Tamil separatism. Version 4.0”*, March 2017, Section 3, CISED50AD3779

<sup>18</sup> DFAT, *“Country Information Report Sri Lanka”*, 24 January 2017, 4.22, CISED50AD105

<sup>19</sup> UK Home Office, *“Sri Lanka: Tamil separatism. Version 4.0”*, March 2017, Section 3, CISED50AD3779

<sup>20</sup> The Human Rights Council, *“Report of the Special Rapporteur on minority issues on her mission to Sri Lanka - Note by the Secretariat”*, 31 January 2017, cited in UK Home Office, *“Country Information and Guidance, Sri Lanka: Tamil Separatism, Version 5.0”* June 2017

<sup>21</sup> DFAT, *“Country Information Report Sri Lanka”*, 24 January 2017, 2.37, CISED50AD105

and that effective protection measures are not available to the applicant and as such s.5J(2) does not apply.

42. As the harm arises as a result of past events of which the Sri Lankan authorities are aware, I find that there are no steps available to the applicant to modify his behaviour to avoid a real chance of serious harm and so s.5J(3) does not apply. I am satisfied the applicant has a well-founded fear of persecution within the meaning of s.5J.

#### **Refugee: conclusion**

43. I have considered the cumulative effect of the applicant's claims and circumstances, including his Tamil ethnicity, birth and residence in the Northern province, his membership of the LTTE and his role doing voice-overs in films and likely role as a combatant, albeit reluctantly, and his profile as a returned failed asylum seeker. I am satisfied that on return to Sri Lanka there is a real chance that he would be imputed with a political opinion as a sympathiser or supporter of the LTTE or as someone seen to oppose the Sri Lankan government by holding Tamil separatist views. As a consequence, I am satisfied that it is likely the applicant will be detained and interrogated on his return to Sri Lanka and there is a real chance he will suffer serious harm from the police, CID or other authorities, having regard to the instances of serious harm in s5J(5) of the Act, if he is returned to Sri Lanka now or in the foreseeable future.

44. The applicant meets the requirements of the definition of refugee in s.5H(1).

#### **Decision**

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The IAA remits the decision for reconsideration with the direction that:

- the referred applicant is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*.

## 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.