



**Australian Government**  

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**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA17/03628

Date and time of decision: 12 January 2018 08:14:00  
Katrina Fairburn, 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 a referred applicant, or their relative or other dependant.*

## Background to the review

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### Visa application

1. The referred applicant (the applicant) claims to be a male Hindu Tamil from the Ampara District in the Eastern Province of Sri Lanka. He fears returning to Sri Lanka because he would be at risk of being harmed by the Sri Lankan authorities, including the army and paramilitary groups, for supporting the Liberation Tigers of Tamil Eelam (LTTE) due to his ethnicity and area of origin, his forced recruitment and work at an LTTE camp for one month, his detention at an army camp for approximately four months, and for failing to comply with reporting conditions to the army. [In] March 2016, he lodged an application for a Safe Haven Enterprise (subclass 790) visa.
2. [In] September 2017, a delegate of the Minister for Immigration and Border Protection refused to grant the visa.

### Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. On 30 September 2016, the applicant forwarded to the IAA a submission containing argument about the findings and the basis of the delegate's decision and refers to information already before me in the materials given by the Secretary. To the extent the submission contains argument and material which is already before me, I do not consider this to be new information.
5. As part of the applicant's submission he included an extract from an undated online article titled, "Sri Lanka: Police arrest four LTTE operatives suspected of reviving separatist group". The article relates to the arrest of former LTTE operatives in the north and the east, including senior intelligence officers. I accept that the information was not before the delegate and is new information. As the extract is undated, I am not satisfied that the article post-dates the delegate's decision and I note that the applicant has not provided any explanation as to why the extracted material was not and could not have been provided to the delegate prior to their decision. I also note that the extract relates to information that is not personal to the applicant and is about the arrest of people who do not share the applicant's profile. The applicant has not provided an explanation as to how the extracted article constitutes credible personal information that had it been known would have affected consideration of the applicant's claims. The applicant has not satisfied me that s.473DD(b) is met.
6. I note that the applicant was represented by a legally qualified registered migration agent at the time of his visa application was lodged. His representative also attended the applicant's visa interview and provided multiple post-interview submissions on his behalf. The delegate indicated to the applicant during the interview that any further information in support of his claims received by the department prior to decision would be considered and I note that a period of almost a year lapsed between the conclusion of the visa interview and the delegate's decision. I consider the applicant has had adequate opportunity to present his claims for protection. The information contained in the extract appears to have little bearing on the applicant's circumstances or the claims for protection he has outlined in his application and at interview. Having regard to the applicant's circumstances and his claims for protection as a

whole, I am not satisfied there are exceptional circumstances to justify considering the new information.

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

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

- He is a male Hindu Tamil from the Ampara District in the Eastern Province of Sri Lanka, aged [age] years.
- In [year] his [Relative A] was shot and killed.
- In [year] the applicant's [Relative B] was shot and killed by unknown persons.
- In about 2007 he was forcibly taken to an LTTE camp approximately [distance range] from his home. He remained there for one month and was made to work and to undertake fitness training. He was released when his mother attended the camp and pleaded for him to be allowed to go home.
- After the war ended in 2009, the Sri Lankan army came to the applicant's house and arrested him on suspicion of supporting the LTTE. They placed him in a camp in [Town 1] for about four months. He was accused of being a member of the LTTE, mistreated and made to work by [undertaking various tasks].
- He was released from the centre [in] 2010 and departed Sri Lanka [a number of] days later by plane on a [temporary] visa for [Country 1].
- He stayed in [Country 1] for a couple of months until his visa expired and travelled illegally to [Country 2]. After being in [Country 2] for about one month, he was arrested by the [Country 2] police and placed in an Immigration Detention Centre. In [2010] he was deported to Sri Lanka.
- [A number of] weeks after he returned to Sri Lanka, the army came to his home and took him to the army camp to make him sign in. He was told he had to sign in at the army camp every week.
- In [2011], after a number of months reporting, the applicant decided not to sign in. [A number of] days later the army came to his house and took him to the army camp to make him sign in. As they were taking him to the camp, they [assaulted him] which caused [an injury]. The army officers kept him at the camp for the day and threatened that if he failed to report again they would kill him.
- The applicant failed to report to the army camp in late 2012. One day when he was not at home, the army visited and told his mother that he needed to report. He went into hiding. His mother told him that unknown people were asking about him.
- [In] November 2012, the applicant departed Sri Lanka illegally and travelled by boat to Australia.
- [In] December 2012, the applicant's mother told him that the army were still looking for him and had come to the family home.
- In December 2013, the applicant's mother made a complaint to police about unknown men coming to her home and making threats about the applicant.
- He has experienced low moods due to uncertainty about his future and [the death of a friend in Australia].

## Refugee assessment

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8. 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

9. 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.
10. The applicant provided detailed information about his background and family connections in his application and during his entry and visa interviews. Based on the documentation provided by the applicant, including his Sri Lankan birth certificate, passport biodata information and his personal information, I accept his identity is as claimed and that he is a male Hindu Tamil from the Ampara District in the Eastern Province of Sri Lanka, who is aged [age] years.
11. I accept that the applicant is a national of Sri Lanka and of no other country and that Sri Lanka is his receiving country.
12. The applicant made reference during his entry interview and in his written claims to a fear of harm arising from his connection to his [Relative A] who was shot in [year] and to the death of his [Relative B] who was shot by unknown people in [year]. I note that at the time the applicant’s [Relative A] was shot, the applicant was a small boy. The applicant has not disclosed any information about his [Relative A’s] or his [Relative B’s] activities or the circumstances leading to their deaths and it does not appear from his evidence about his encounters with the Sri Lankan army (discussed below) that he was ever questioned about his [Relative A] and [Relative B’s] activities. On the evidence before me, apart from the familial connection, there appears to be no other circumstances linking the applicant to the death of his [Relative A] and [Relative B]. Having regard to this, I do not consider the applicant to be at risk of any harm from the Sri Lankan authorities, including paramilitary groups, on the basis of this connection.
13. The applicant described his background growing up in an area controlled by the Sri Lankan army during the war with the LTTE controlling the area about [distance range] away. He claimed that one night in [2007] a number of men came to his house and forcibly took him

away to an LTTE camp. He remained at the camp for one month during which time he undertook work for the LTTE in the form of [various kinds of work]. He stated that he was also required to undertake fitness activities such as running in preparation for weapons and fighting training, but never undertook actual military training or fought for the LTTE.

14. The applicant stated to the delegate that after one month his mother located the LTTE camp and pleaded for him to be released because he was still studying. The LTTE released him into his mother's care and from this point he had no further involvement with the LTTE nor did they pursue him for any reason.
15. Country information before the delegate indicates that the LTTE supported its administration through foreign funding and the voluntary and forced recruitment of Tamils.<sup>1</sup> I found the applicant's description of his activities while placed at the camp to have been detailed and convincing. Having regard to his evidence and to country information, I consider it is plausible that the applicant may have been forcibly taken to an LTTE camp some distance from his home when he was [in specified age range], notwithstanding that his home was in an army-controlled area. I note the delegate expressed concerns with the applicant's credibility about this claim on the basis that the applicant had not referred to this encounter at the time of his entry interview. I have listened to the entry interview and am mindful that the applicant did not have the benefit of legal advice or assistance from a migration agent and the purpose of the interview was not primarily focussed on establishing his claims for protection. I note that when the applicant was asked about his reasons for departing Sri Lanka, he was instructed to respond in only two sentences. In the circumstances, I have not attached any weight to the applicant's omission of his encounter with the LTTE during his entry interview.
16. Having accepted that the applicant spent one month in the LTTE camp, I consider that his description of his activities represent low-level work over a very short period of time. I accept that he did not engage in any military training or fighting for the LTTE and experienced no further involvement with them following his release. Having regard to the applicant's evidence about his lack of any further involvement with the LTTE, I am satisfied there is not a real chance the applicant would be pursued or targeted with adverse intent by LTTE supporters in future.
17. The applicant relayed that following his return from the LTTE camp he remained at home and worked on the family farm. He stated that following the end of the war, he was suspected by the Sri Lankan army of having been involved with the LTTE and taken by them to an army camp near [Town 1] where he was detained for about four months. When questioned by the delegate, the applicant indicated that he believed he was suspected of being involved with the LTTE for the reason of being a Tamil and, having regard to the country information before the delegate about the detention of Tamils suspected of LTTE involvement at the conclusion of the war<sup>2</sup>, I accept the applicant's reasoning to be plausible.
18. The applicant described his experience at the camp as involving [work] for the army and he was not allowed out of the camp. He was also questioned about having any involvement with the LTTE and mistreated. During the visa interview, the applicant described hearing girls at the camp being sexually assaulted by the army officers but he, himself was never the subject of similar abuse. In support of his claim that he spent a number of months in a detention camp, the applicant provided a copy of his release certificate, dated [in] 2010. I accept that the

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<sup>1</sup> "DFAT Thematic Report People with Links to the Liberation Tigers of Tamil Eelam", *DFAT*, 03 October 2014, CIS2F827D91260, p.5

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

applicant was detained for 4-5 months in an army camp near [Town 1] on suspicion of being connected with the LTTE due to being a young Tamil male. I further accept that during this time, he was questioned about being LTTE and mistreated, required to work for the army, was restricted in his movements and was exposed to distressing incidents involving the abuse of girls at the camp. I note that during the period of his detention, despite being questioned, the applicant was not formally charged with any offences relating to LTTE activity.

19. The applicant stated that it was through efforts by his mother, including the provision of bribes, that he was released. The timing of his release coincided with arrangements undertaken by his mother for the applicant to travel to [Country 1] on a [temporary] visa [a number of] days later. In support, the applicant provided a page from his passport which showed his visa and entry to [Country 1]. On the evidence before me, I accept that the applicant was released from the camp and immediately travelled on his passport and a [temporary] visa to [Country 1]. However, I do not accept that the applicant was released from the camp solely due to the efforts of his mother. I consider that if the Sri Lankan authorities, including the army, had seriously considered the applicant to have been involved with the LTTE, he would not have been released, nor would he have been able to legally depart the country without questioning or intervention at the airport. Rather, I consider the applicant's release and the apparent ease with which he travelled overseas immediately afterwards indicates that while the army may have initially suspected the applicant of LTTE involvement on the basis of his ethnicity, following his time in the camp their suspicions were alleviated. On release he did not hold a profile for being involved with the LTTE or otherwise a security or political threat to the Sri Lankan government, despite his familial connection to [Relative A] and [Relative B] who had died from being shot and that he had spent one month at an LTTE camp in 2007.
20. The applicant has consistently reported his travel overseas as remaining in [Country 1] until after his visa expired and then travelling illegally to [Country 2] where he was apprehended by police, placed into an Immigration Detention Camp and held for a couple of months prior to deportation to Sri Lanka. Although the applicant claimed to have registered for refugee status with the UNHCR both in [Country 1] and [Country 2], there is no information before me to indicate the result of any UNHCR investigation into his case. In support of his claims about the manner in which he re-entered Sri Lanka, the applicant provided a partially untranslated document relating to a notification of expulsion from [Country 2]. I accept that the applicant was deported from [Country 2] to Sri Lanka [in] 2010.
21. The applicant stated that on arrival at the airport in Sri Lanka, he was questioned about his travel but not detained as he explained his purpose for travel to [Country 1] was to undertake work with an agency. I accept the applicant was not held or arrested at the airport and consider this indicates that he was considered by the authorities to hold a profile for LTTE involvement or considered a person of adverse interest at this time, notwithstanding that he had been released from an army camp earlier that same year.
22. The applicant stated in his written claims that within a few weeks of his return to Sri Lanka, local army officers attended his house and told him that he was required to sign in at the army camp, which was located [a number of] kilometres from his home, every week. He stated that he continued to sign in for a number of months but missed an occasion in [2011]. Within [a number of] days, the army officers attended at his home and forcibly took him to the army camp to sign in. As he was being taken, he applicant claimed the officers [assaulted him] causing him to [suffer an injury]. He was taken to the camp where he was threatened harm if he did not report in future and where he remained for the rest of the day. When he returned home he was taken to see a doctor to treat the [injury]. In support of his claimed injury, the

applicant provided a copy of the diagnosis ticket which reflected his admission to hospital [in] 2011 and a photograph depicting [his treatment]. The diagnosis ticket reflects that the applicant's injury related to an assault by unknown persons.

23. The applicant stated that he complied with the reporting conditions until an occasion towards the end of 2012, when he again failed to sign in because he was undertaking work on the family farm. He stated that given his earlier experiences for failing to report he went into hiding for a couple of weeks prior to his departure from Sri Lanka in November 2012. During the period the applicant was in hiding, he claimed that the army and other people had attended his house seeking his whereabouts and told his mother he was required to report.
24. The delegate indicated to the applicant during the visa interview that he had concerns with the applicant's claim to been required to sign in every week at the army camp when country information indicated that people suspected of significant involvement with the LTTE and who had been released from rehabilitation centres in 2010, were not required to sign in at all.<sup>3</sup> While I am satisfied on the evidence before me that the applicant sustained an injury to his arm in [May] 2011 and received treatment for it at the local hospital, I share the delegate's concerns about the credibility of the applicant's claim that he was required to report to the army camp every week since his return to Sri Lanka at the end of 2010. Having regard to the applicant's profile overall and the country information about the cessation of signing in requirements for people who had been detained at rehabilitation centres, I am not satisfied that the applicant was required to sign in every week as he has claimed or that he sustained the [injury] when army officers forcibly took him to the camp for failing to sign in. It follows that I do not accept that the applicant was in hiding in the weeks leading up to his departure from Sri Lanka or that people, including army officers, attended his home seeking his whereabouts and telling his mother that he needed to report.
25. I note that the applicant provided the delegate at interview with a translated copy of an extract from [a document of the Town 2 police], dated [in] December 2013, which records the details of a complaint made by the applicant's mother to police, including that a few days earlier people had come to the house and made threats about the applicant. The applicant also provided a letter from [a] solicitor, dated [the following day], purporting to confirm that the applicant was required to report at the army camp and was in hiding prior to his travel abroad. I note that the letter from the solicitor was prepared at the instruction of the applicant's mother and was obtained more than twelve months after the applicant had arrived in Australia. The letter from the solicitor also appears to have been obtained at a point close in time to the applicant's mother's complaint to police. As the [extract] and the solicitor's letter reflect circumstances based solely on the mother's report rather than an independent knowledge of events or investigation, I consider their corroborative value of the applicant's claims to be limited. Further, I consider that the close timing between the documents, that they were both obtained by the applicant's mother, and that they date from when the applicant had already spent a significant time in Australia suggests they were obtained for the purpose of bolstering the applicant's claims for protection. Accordingly, I have not given either document any weight.
26. For reasons already stated, I do not accept that the applicant was of adverse interest to the Sri Lankan authorities, including the army or any paramilitary groups, at the time of his departure from Sri Lanka. It follows that I also do not accept that his mother was visited by

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<sup>3</sup> International Crisis Group, "Sri Lanka's North I: the denial of minority rights", Asia Report No.219, *International Crisis Group*, 01 March 2012, CIS22742, p.11

army officers or other unknown persons seeking the applicant [in] December 2012 or in 2013 as reported by his mother to the [Town 2] police.

27. I accept that given the applicant's previous experience of being detained, questioned and mistreated at the army camp in 2010, he may be concerned about his future treatment by the authorities, including the army and paramilitary groups, should he return to Sri Lanka. However, country information before me indicates that the security situation in Sri Lanka has improved with a decrease in militarisation and monitoring trends of Tamils in the Eastern Province.<sup>4</sup> Reports do not support a conclusion that Tamils, including young Tamil men from the Eastern Province, are being systematically targeted and subjected to serious harm because of their race, religion, and/or area of origin.<sup>5</sup>
28. The applicant's profile otherwise does not suggest he would attract attention from the Sri Lankan authorities, on arrival in Sri Lanka. He has no criminal convictions or outstanding warrants. For reasons already stated, I do not consider the applicant either had a profile of any concern to the Sri Lankan authorities either at the time of his departure or following, that would result in their adverse interest in him on return. Given the applicant's profile and the country information in the review material about the change in Sri Lanka's political and security landscape since 2012, I am not satisfied there is a real chance that the applicant would be targeted by the Sri Lankan authorities, including the army or paramilitary groups, on return to Sri Lanka.
29. The applicant has raised a potential issue with his mental health indicating in his written claims that his mood has been affected by the [death of his friend]. In addition, his representative claimed in post-interview submissions to the delegate that inadequate mental services are available for the applicant to access in Sri Lanka. I note that there is no medical assessment of the applicant's mental health before me to establish that his health is impacted or that medical treatment has been received or is required in future. On the information before me, I am not satisfied that the applicant requires ongoing treatment for his mental health.
30. The applicant's representative has made a claim on the applicant's behalf in post-interview submissions that the applicant would not be able to articulate his political and cultural views due to fear of targeting by the Sri Lankan government. The applicant's representative claimed that since being in Australia, the applicant had participated in Maaveerar Naal and suggested that this would indicate the applicant may wish to participate politically if returned to Sri Lanka. I note that the applicant did not provide any detail or corroborative material in support of his claim that he had participated in Maaveerar Naal and this statement by his representative appeared to have little bearing on the applicant's claims for protection as outlined in his written claims and as articulated during his interviews with the department. On the basis of the evidence before me, I am not satisfied that the applicant has engaged in any Tamil diaspora activities since his arrival in Australia.
31. Notwithstanding my finding about his non-participation in Maaveerar Naal, I note that the applicant did not advance any particular reason why he would be specifically targeted by the authorities for articulating his political and cultural views. Country information before the delegate indicates that Sri Lanka is a democratic socialist republic and since 2015 the Siresena Government has made significant progress with respect to human rights and reconciliation such as replacing military governors in the north and east with civilians, returning land held by the military to former owners, releasing individuals detained under the *Prevention of Terrorism*

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<sup>4</sup> Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED850AD105, p.10

<sup>5</sup> Ibid, p.10 and pp.28-29

Act and committing to reform of this legislation.<sup>6</sup> Having regard to the country information about the current government's approach to human rights and reconciliation, I am not satisfied on the evidence before me that the applicant would be targeted by the authorities or come to harm should he voice his political and cultural views if returned to Sri Lanka.

32. The applicant has claimed he will face harm on return to Sri Lanka as a returned asylum seeker who departed Sri Lanka illegally. I accept that the applicant departed Sri Lanka illegally in November 2012 and has resided abroad since then. I also accept that he will return to Sri Lanka as a returned asylum seeker and is likely to be identified as such on the basis of returning on travel documents from Australia. The country information in the review material indicates that Sri Lanka's Constitution entitles any Sri Lankan citizen the freedom to return to Sri Lanka.
33. Recent country information in the review material does not suggest that Tamils who have lived abroad are facing harm at Colombo airport or in their home villages on return simply due to their time spent out of Sri Lanka or for being a returned asylum seeker. I note that the applicant had resided abroad for extended periods of time in [Country 1] and [Country 2] and was not targeted by the Sri Lankan authorities on the basis of having spent lengthy periods abroad alone. Given the applicant did not hold a profile of interest to the authorities at the time of his departure in 2012, I do not accept that he would be targeted on return for reason of having sought asylum abroad or for having resided abroad since that time.
34. DFAT reports that persons who depart other than via an approved port of departure (illegal departees), may be liable for imprisonment and a fine,<sup>7</sup> although penalties for such persons are discretionary and are almost always a fine. As the applicant does not have a profile for any connections with the LTTE or would otherwise be considered a security or political risk by the Sri Lankan authorities, I do not consider that the applicant would be targeted or subjected to processes on re-entry to Sri Lanka that would be different from the usual procedures outlined below.
35. I note that persons who departed Sri Lanka irregularly by boat (such as the applicant) may be considered to have committed an offence under the *Immigrants and Emigrants Act 1949* (the I&E Act). Upon arrival in Sri Lanka such persons are processed by a number of agencies who check travel documents and identity information. Processing of illegal departees may take several hours primarily due to the administrative practices, interview lengths and staffing constraints. As these persons are processed en masse, individuals are unable to leave the airport until all returnees have been processed. DFAT assesses that such persons are processed in accordance with standard procedures regardless of ethnicity and are not subjected to mistreatment during processing at the airport.<sup>8</sup>
36. Persons who have departed illegally who have been arrested can remain in custody at the CID's Airport Office for up to 24 hours after arrival and if a Magistrate is not available within this time, for example because of a weekend or public holiday, may be held at a nearby prison.<sup>9</sup>
37. I accept the applicant departed Sri Lanka illegally as a passenger on a boat. I accept that should he plead guilty he would be fined and would then be free to go. Having regard to the discretion about the quantum of a fine coupled with the country information in the review material that indicates the ability to pay the fine by instalment, I am not satisfied that a financial penalty would amount to economic hardship to the applicant amounting to serious harm.

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<sup>6</sup> DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105, p.8

<sup>7</sup> Ibid, p.33

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

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

38. Returnees who plead not guilty will, in most cases, be immediately granted bail by a Magistrate and released on the basis of a surety (personal or guaranteed by a family member) and will rarely be subject to any conditions in relation to the bail or any general requirement to report to police or police stations between court attendances.<sup>10</sup> In any event, having regard to country information that indicates a surety rather than immediate payment of money is required for bail, that the quantum of a fine is discretionary and may be paid by instalment, I am not satisfied that the applicant would face a longer than usual short period of detention on this basis.
39. I accept country information that the conditions of detention in Sri Lanka are poor<sup>11</sup> and the applicant is aged [age] years, and has experienced periods of low mood. I note that the period of detention at a prison awaiting a Magistrate's decision would be short and, on the information before me about the applicant's health, I am not satisfied that in the applicant's circumstances referred to above a short period in custody, together with a short period of questioning would amount to serious harm. For these reasons and as he would have the opportunity to pay a fine by instalment, I am satisfied that the totality of the circumstances he would face on return would not amount to serious harm.
40. Furthermore, there is no evidence before me that suggests the operating procedures under the I&E Act are discriminatory on their face, or that they are applied in a discriminatory manner. Accordingly, I am not satisfied on the evidence that detention arrangements for the purpose of being charged under the I&E Act and financial penalties imposed upon a plea of guilty involve discriminatory conduct.
41. DFAT notes that thousands of asylum seekers have returned to Sri Lanka since 2009, including from Australia, and assesses the risk of torture or mistreatment for the majority of returnees is low and continues to reduce.<sup>12</sup> The evidence before me does not support a conclusion that returning Tamil asylum seekers who departed illegally face a real chance of serious harm.
42. For the reasons stated above, I am not satisfied the applicant will face a real chance of serious harm on the basis of being a returned asylum seeker and/or for illegal departure.
43. In sum, the applicant is a male Hindu Tamil from the Ampara District in the Eastern Province of Sri Lanka, aged [age] years, who is related to [his Relative A] who was shot in [year] and [Relative B] who was shot by unknown people in [year]. When the applicant was [in a specified age range] he was abducted by the LTTE and detained at a camp when he undertook low-level work and fitness training. In 2009, in the months after the war ended, he was suspected by the army of being involved with the LTTE and was held in an army camp near [Town 1] for about four months where he was questioned about the LTTE, experienced some mistreatment and made to work. He was released from the camp in [2010] and immediately travelled on his passport and a [temporary] visa to [Country 1]. He overstayed his visa, travelled illegally to [Country 2] and was deported from [Country 2] to Sri Lanka at the end of 2010. On arrival in Sri Lanka he was questioned by airport officials about his travel to [Country 1] but was not otherwise detained or arrested. [In] November 2012, he departed Sri Lanka illegally and travelled by boat to Australia where he sought asylum. Noting the applicant's history and profile, and having regard to the country information about the political and security situation in Sri Lanka, and the possible consequences for his illegal departure, I am not satisfied that he faces a real chance of serious harm now or in the reasonably foreseeable future.

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<sup>10</sup> DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105, p.34

<sup>11</sup> Ibid, p.27

<sup>12</sup> Ibid, p.29

## Refugee: conclusion

44. 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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45. 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

46. 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.

47. For the reasons already stated, I have found that there is not a real chance the applicant will face harm from the Sri Lankan authorities, including the army or paramilitary groups, due to his Tamil ethnicity, his area of origin, his familial connection to [his Relative A] who was shot in [year] and [Relative B] who was shot in [year], his limited involvement with the LTTE when he was abducted for one month in 2007, his detention at the army camp near [Town 1] in 2010, or because he has spent a number of years abroad in Australia as an asylum seeker.

48. As 'real chance' and 'real risk' involve the same standard,<sup>13</sup> it follows that based on the same information, and for the reasons stated above, I am also satisfied there is no real risk of significant harm within the meaning of ss.36(2A) and 5(1) of the Act on these bases if returned to Sri Lanka.

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

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

51. I accept that conditions in prison and on remand for detainees are poor due to overcrowding and poor sanitation, but note this is due to limited resources rather than an intention by the

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<sup>13</sup> *MIAC v SZQRB* (2013) 210 FCR 505

state to inflict pain and suffering or degrading treatment.<sup>14</sup> I am not satisfied on the evidence that in questioning, imposing a fine and possible brief detention in these conditions there is an intention to inflict pain and suffering, severe pain or suffering or cause extreme humiliation.

52. Furthermore having regard to the applicant's circumstances, being his age and experience of occasional low mood, on the information before me I am not satisfied that a short period in custody, the short duration of any questioning and penalty such as payment of a fine, given the ability to pay a fine by instalment, would amount to significant harm.

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

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

54. There are not substantial grounds for believing that, as a necessary and foreseeable consequence of being returned from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm. The applicant does not meet s.36(2)(aa).

#### **Decision**

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

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<sup>14</sup> DFAT, "DFAT Country Information Report – Sri Lanka", 18 December 2015, CISEC96CF14143, p.27

## 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.