



**Australian Government**  

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**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA17/04084

Date and time of decision: 24 August 2018 16:26:00  
L Hill, Reviewer

**Decision**

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

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

## Background to the review

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### Visa application

1. The referred applicant (the applicant) claims to be a citizen of Sri Lanka. He applied for a Safe Haven Enterprise Visa (protection visa) on 28 February 2017. A delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa on 14 December 2017.

### 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. On 5 January 2018, the IAA received an email from the applicant. Attached to the email was a "Statement of the applicant" (IAA statement). The IAA statement is dated 5 January 2018. It post-dates the delegate's decision and as such the document itself was not in existence at the time of the delegate's decision. In part, the IAA statement reiterates and addresses claims made by the applicant to the delegate and provides country information which is already before me and which I have considered in this review.
4. In the submission, the applicant humbly requests that the IAA invites him to an interview to discuss his refugee claims. He strongly believes that his claims/profile which he presented to the Department was overlooked by the delegate when deciding his protection visa application. I am conducting a fast-track review and s.473DB of the Act sets out that, subject to the other provisions of Part 7AA, the review is to be on the papers. Unlike Part 7 of the Act, there is no right to a hearing and no statutory right for an applicant to present his or her case on review. The applicant has been given an opportunity to present his claims and was assisted by an interpreter when doing this. The applicant has also been represented throughout the protection visa process, and submissions have been provided in relation to the determinative issues. I am satisfied that it is not necessary to seek further information or interview the applicant in this case.

### Applicant's claims for protection

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5. The applicant's claims can be summarised as follows:
  - The applicant is a Tamil male who was born in [his home village in District 1] in the Northern Province of Sri Lanka.
  - The applicant's [Relative A], R was a member of the LTTE. Between May 2008 and March 2009, R was detained by the authorities in a rehabilitation camp. While detained, the applicant regularly visited R with his parents. On release, R spent a lot of time with the applicant. In 2011, R died in [an] accident. The applicant believes R was killed by the authorities and his death made to look like an accident.
  - The applicant and his father were fisherman and transported materials like [specified materials] in his father's boat for the LTTE.
  - In February 2012, the applicant and his father and other Tamil fisherman participated in a protest in [Town 1] about the impact of the resettlement of Sinhala fisherman in the district. Two days after the protest, when his father went to fish he was physically

assaulted by SLN officers and was unable to work for approximately four months. When his father returned to work the SLN again caused his father problems and closely monitored his father and told him that he had to return to shore by 5pm each day. When his father returned to shore late, his father was physically assaulted by the SLN.

- On three separate occasions in 2012, the applicant was taken, questioned and physically assaulted by SLN officers before being released. After these events the applicant's father made plans for him to depart Sri Lanka and travel to Australia by boat.
  - After the applicant's arrival in Australia, the authorities have attended the applicant's family home and sought his whereabouts. In 2013, the applicant's brother, B experienced problems because of his familial relationship to R. One night B was stopped by people he believed to be members of the SLA. They held a gun to his head and asked where R was. B told them that R was dead. The SLA did not believe B and continued to watch him and this led to B changing jobs.
6. The applicant fears on return to Sri Lanka he will be harmed by the Sri Lankan authorities including SLN on the basis of his ethnicity, his actual and imputed political arising from his and his father's assistance to the LTTE, his and his father's past interactions with the SLN, his close familial relationship to his [Relative A], R who was a member of the LTTE and because he has left Sri Lanka illegally and has sought asylum overseas. The applicant also fears he will be abducted in a white van. It has also been contended by the applicant's representative that the applicant will be harmed on return by the Sri Lankan authorities on the basis his ethnicity, age, his and his father's past employment as a fisherman and former residence in a former LTTE controlled area in the Northern Province.

## **Refugee assessment**

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7. 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**

8. 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.

9. I accept the applicant's identity is as claimed. I accept the applicant is [an age] year old Tamil male from the Northern Province of Sri Lanka, and a Sri Lankan national. Sri Lanka is the receiving country for the purpose of this assessment.
10. I accept that in the past the applicant's father worked as a fisherman. I accept while working as a fisherman the applicant's father held the position as the [office bearer] of the [local fishing agency]. I accept that on one occasion in February 2012, the applicant and his father along with approximately one thousand others protested in [Town 1] against the resettlement of Sinhala fisherman in the district. I accept the protestors shouted slogans and carried banners. I accept during the protest a Tamil Member of Parliament came and met the protestors and said he would take their concerns about the Sinhala fishermen to the higher authorities. I accept the applicant's father also spoke to the local church priest about these issues.
11. I accept two days after the protest, when the applicant's father went to sea to fish; his father was physically assaulted by SLN officers. I accept that arising from the injuries sustained his father was unable to work for approximately four months. I accept when his father returned to work the SLN again caused his father problems and told his father that he had to return to shore by 5pm each day. I accept that what the SLN told his father was different to other Tamil fisherman. I accept his father was closely monitored by the SLN and when his father returned to shore late, that being after 5pm he was physically assaulted by the SLN. I accept on one occasion, arising from the complications his father suffered after being physically assaulted by SLN officers, his father fell ill and this led to him being unable to continue to work as a fisherman. I accept the applicant's father no longer works as a fisherman.
12. The applicant's evidence regarding the difficulties his father encountered when working as a fisherman has been consistent throughout his interviews with the Department and plausible when considered against the contents of the 2012, International Centre for Ethnic Studies report which indicates that at the time claimed many problems in the fishing industry in the North were, directly or indirectly, related to the militarization process. At the end of the civil conflict designated High Security Zones (HSZ), still remained in some coastal areas and meant that fishermen remained banned from carrying out their livelihood activities in those areas and in many other areas fishermen were only allowed to go to sea within a permitted corridor and required a pass from military forces to do so. It also reported on the concern of the Northern fishermen about the violation of rules and regulations of fishing by Indian fishermen and Sri Lankan Southern fishermen in their traditional hunting grounds, with one fishing community leader in the North stating that in [District 1], the SLA was supporting the Southern fishermen.
13. The applicant's representative contended that the applicant's father difficulties with the SLN arose because of the family's relationship to a member of the LTTE. As discussed below, I have accepted that the applicant's [Relative A], R was a member of the LTTE but that he had died in [an accident] in 2011. A least one year passed between R's death and the events involving the applicant's father, and I find it implausible that after R's death, which I am satisfied, would have known by the authorities given the issuance of register of death certificate by the Sri Lankan government in [a nearby town], that the SLN would cause the difficulties for the applicant's father on the basis of his familial relationship to a deceased member of the LTTE. I do not accept that the applicant's father difficulties with the SLN arose because his father's familial relationship to a member of the LTTE.

14. In the first protection visa statement, the applicant claimed that arising from the harassment and close monitoring of his father by the SLN he was targeted. He stated he was taken, questioned and physically assaulted by the same SLN officers on three separate occasions. He stated that in July 2012, he was blindfolded and taken in a jeep by SLN officers to an unknown location where he was questioned about his father's profession and what he did. He did not fully understand what was being said as he did not speak Sinhala. He was held for approximately two hours before being released. He stated approximately one week later, he was again blindfolded and taken to an unknown location, physically assaulted and questioned. He was held for approximately two and a half hours before being released. He stated that in August 2012, he was taken for a third time by the SLN officers to an unknown location, physically assaulted and questioned. He stated that after these events his father made plans for him to depart Sri Lanka and travel to Australia by boat.
15. At the protection visa interview, the applicant reiterated his claims that he was taken and held by the SLN on three separate occasions. He further added that these events occurred on days when his father had not returned to shore on time and that he was released after his father returned or through the intervention of the local church priest. He was asked why he thought the SLN would want to take him. He stated that maybe it was because of his close relationship to his [Relative A], R who had lived with him and his family. The applicant's representative's also contended that the applicant's position as the eldest son in his family led to him being targeted by the SLN.
16. I accept that on three separate occasions in 2012, the applicant was taken by the SLN to their camp and held. I accept while held he was physically assaulted and questioned about his father before being released. These aspects of the applicant's evidence have been consistent throughout the applicant's interactions with the Department including at the entry interview.
17. I do accept however that the applicant was taken and held by the SLN because of his close relationship with his [Relative A], R who was a member of the LTTE or because he was the eldest son in his family. As discussed below, I have not accepted that the applicant had a close relationship with R. At least a year passed between R's death and the applicant being taken and held by the SLN, and I find it implausible that the SLN would go to the extent of taking and holding him for a few hours because of his familial relationship to a deceased member of the LTTE. I also find it to be mere speculation that he was taken and held because he was the eldest son in his family, and nor is there any independent information before me substantiating this contention. Furthermore, as discussed below, I have rejected the applicant's claims that he and/or his father assisted the LTTE by transporting goods for them and it follows that I do not accept that the applicant was taken and held by the LTTE on this basis. Instead, I am satisfied that the applicant was taken and held at the camp by the SLN on three occasions in 2012 because his father had not returned to shore at the required time.
18. The applicant's evidence is that he was detained for a brief period of time by the SLN, that being no more than three hours before being released. The UK Home Office indicates that at the time when the applicant was taken and held by the SLN, the authorities had the power under the PTA to detain a person without charge for three-month periods, not exceeding a total of 18 months, and I consider that had the applicant been of adverse interest to the SLN, given the powers available to the SLN under the PTA, he would not have been released by the SLN after the mere return of his father to shore or the intervention of the local church priest. I am satisfied that the applicant was released because his father had

returned to shore and because the SLN did not hold any serious or ongoing suspicions about him and not for any other reason.

19. I note that in the two letters the applicant has provided in support of his claims it has been stated that arising from the harassment of the authorities the applicant hide and move around. On the evidence before me, the applicant remained residing with his family up until the time of his departure; and I do not accept that the applicant was in hiding or that he moved around to avoid the authorities including the SLN prior to his departure from Sri Lanka.
20. In the applicant's first protection visa statement, lodged with the Department in 2013, the applicant claimed that his [Relative A], R was an LTTE fighter and with the LTTE for many years. He stated that he did not know much about R's details and his level of involvement with the LTTE.
21. In the applicant's second protection visa statement, lodged with the Department in 2017, the applicant claimed that he was very close to R. R was like a brother to him. Their families lived approximately one kilometre apart. He stated that R joined the LTTE when he was about 13 or 14 years old after some LTTE members abducted him. R was initially not interested in joining but he ended up staying voluntarily. For approximately two to three years, he did not know where R was however in 2007; R escaped the LTTE and returned to their home village. He stated as R had returned from the LTTE, it was believed that R would be shot if he didn't surrender to the authorities so the applicant's father took R to the Grama Niladhari and told him that R wanted to surrender. Arising from R's surrender he was detained in a rehabilitation camp for approximately two years. While detained the applicant would regularly visit R with his parents. On R's release from rehabilitation, he resumed spending a lot of time with him. In 2011, R died in [an accident].
22. At the protection visa interview, the applicant reiterated his claims that his [Relative A], R was a member of the LTTE. He further stated that R had lived with his family from a young age and as a result he was considered to be member of his family. R also worked for his father.
23. I accept the applicant's [Relative A] R, was a member of the LTTE. I accept arising from R's membership of the LTTE, between May 2008 and August 2008 he was detained in the [Town 1] Lock Up prior to being transferred to the [named] Rehabilitation Centre. I accept between August 2008 and March 2009, R was detained at the [named centre]. I accept on release from rehabilitation centre in March 2009, R had monthly reporting requirements and was monitored by the authorities. The applicant's evidence regarding these aspect of his claims is corroborated by the contents of the various documents in the referred materials including the untranslated rehabilitation documents, [an NGO] detention attestation, letter signed by [Person A] dated 14 May 2008, letter signed by the Grama Niladhari dated [in] October 2008 and [Church 1] dated 30 October 2008.
24. I do not accept however that the applicant's father assisted R to surrender to authorities, that R lived with the applicant and his family from a young age or that R worked with his father. I do not accept that the applicant regularly visited R while he was detained and on release, he and R spent a lot of time together. Nor do I accept that the applicant had a close relationship with R. The applicant's evidence regarding these aspects of his claims has evolved over time and is inconsistent with details in the documents before me.

25. The applicant's evidence that R lived with his family from a young age and that as a result he was considered to be member of his family was not mentioned in first or second protection visa statements. The claims that R, a member of the LTTE, had lived with his family from a young age and worked for his father, are significant claims, and I am satisfied that had these claims had any credible basis he would have included such claims in his statements, he did not. Furthermore, I find the details of the letters from [Church 1] and [Person A] dated 14 May 2005, contradict these claims. The letters both refer to R as the "bread winner" for his own family and requests R's release from rehabilitation on this basis, and I am not satisfied that such statements support that R was considered to be part of the applicant's family.
26. The applicant's evidence that his father assisted R to surrender to the authorities is contradicted by the details of the letter signed by [Person A] ([Relative A]'s mother) dated 14 May 2005. It states that it was R's mother who took R to the Eelam People Party (EPDP) office where R surrendered. It makes no reference to the involvement of the applicant's father in R's surrender to the authorities, and I am not satisfied he was.
27. Furthermore, the applicant's evidence that he had a close relationship with R has evolved over time. In January 2013, at the entry interview, which was conducted approximately four months after the applicant's arrival in Australia, when the applicant was asked why he had left Sri Lanka he referred to the issues his father had with the authorities. He made no mention of his [Relative A], R. I acknowledge that the applicant was told to keep his answers short at the entry interview, however I consider that had his claims regarding R had any credible basis, he would have provided this information, even if only to briefly mention R. In September 2013, in the first protection visa statement, the applicant stated that R was a member of the LTTE; however he stated that he not to know much about R's details or his level of involvement with the LTTE. He made no mention that he had a close relationship to R or that he had visited R while he was detained or that after R's release they had spent a lot of time together. The applicant was assisted to prepare this statement by a registered migration agent who was also a qualified interpreter in the Tamil language and I consider the applicant's claims in the second protection visa statement and interview that he had a close relationship with R, to be a significant change from his evidence about R in his first protection visa statement, and I am satisfied that had these claims had any credible basis he would have referred to them in his first protection visa statement, he did not.
28. In the second protection visa statement, the applicant claimed that in 2011 his [Relative A], R died in [an accident]. At the protection visa interview, the applicant reiterated that R had died in [an accident] however he believes that R's death was made to look like it an accident by the authorities when it wasn't.
29. I accept that in 2011, the applicant's [Relative A], R was killed in [an accident] however I do not accept that R's [accident] was caused by the authorities in order to make his death look like an accident. At least two years passed between R's release from rehabilitation and the [accident] and I consider it to be implausible that the authorities would wait for such an extended period of time before killing R and making it look like an accident. The applicant also made no mention of the authorities' involvement in R's death in his second protection visa statement. It is also not corroborated by the contents of any of the translated documents before me.
30. In the second protection visa statement, the applicant claimed that in 2013, his brother, B told him that he had experienced problems because of his familial relationship to R. One night B was stopped by people he believed to be members of the SLA. They held a gun to

B's head and asked where R was. B told them that R was dead. The SLA members did not believe B and continued to watch him when he travelled and this led to B changing jobs. At the protection visa interview, the applicant was asked whether anything had happened to his brother or any other members of his family after the event involving B in 2013, he stated no.

31. I do not accept that in 2013 arising from the applicant's brother's familial relationship to R his brother, B was stopped and questioned about R and a gun put to his head. I do not accept after this event B was watched and this led to B changing jobs. At least two years passed between R's death and the event involving B, and I find it implausible that after R's death, which I am satisfied, would have known by the authorities given the issuance of register of death certificate by the Sri Lankan government in [a nearby town], that the authorities would then go to the extent of stopping, threatening and questioning the applicant's brother, B and targeting him for the reasons claimed.
32. In the second protection visa statement, the applicant claimed that as fisherman, both himself and his father transported materials for the LTTE such as [specified materials]. He stated that he did this when he was quite young and many people in the fishing industry in [District 1] gave their support to the LTTE and that this was well known. He stated he had not previously provided this information to the Department as he was told by the people on the boat that if he told the Australian government about his connection to the LTTE this would be a problem for him.
33. At the protection visa interview, the applicant was asked what work his father did for the LTTE. He stated his father transported goods like [specified materials] in his boat for the LTTE. He was asked how long his father did that for the LTTE, he stated "I don't know".
34. I do not accept that the applicant or his father transported materials for the LTTE. The applicant made no mention of the claims regarding his and his father's assistance to the LTTE in his entry interview or in his first protection visa statement and while I have considered the applicant's explanation for the absence of these claims, I am unpersuaded by them. I do not accept that on the mere advice of others the applicant would decide to withhold information about his and his father's assistance to the LTTE yet provide more significant information regarding his [Relative A's], R membership of the LTTE. The applicant had the assistance of a registered migration agent who was also a qualified interpreter in the Tamil language to assist him with the first protection visa statement and I consider that had the applicant and his father assisted the LTTE, to the level that he has now claimed, he would have referred to such claims in this statement, he did not.
35. Furthermore, I do not accept that the applicant ever worked as a fisherman. The applicant did not mention as part of his employment history that he worked as a fisherman at his entry interview nor in either of his two protection visa applications and I am not satisfied that he did.
36. At the protection visa interview, the applicant claimed that since his arrival in Australia the authorities had gone to the family home and sought his whereabouts. He stated because of this he has stopped using [social media].
37. I do not accept the authorities have sought the applicant's whereabouts since his arrival in Australia. Nor do not accept the applicant has stopped using [social media] on this basis. I have not accepted that the applicant or his father had transported goods for the LTTE or that arising from the applicant's brother's familial relationship to R, the event involving his

brother, B in 2013 had occurred. I have accepted that on three separate occasions in 2012, the applicant was taken by the SLN to their camp and held however I have found these events occurred because his father had not returned to shore at the required time and not for any of the other reasons claimed. More than five years have passed since the applicant's departure and I am not satisfied that there is any reason for the Sri Lankan authorities to pursue the applicant's family and seek the applicant's whereabouts. I find that the applicant has fabricated the about the visits to his family by the Sri Lankan authorities to enhance his claims for protection

38. It has been contended that on return the applicant would be harmed by the Sri Lankan authorities because of his ethnicity, imputed political opinion arising from his ethnicity, age, gender, father's past employment as a fisherman, former residence in a former LTTE controlled area in the Northern Province, his and his father's past interactions with the authorities, his familial relationship to his [Relative A], R who was a member of the LTTE, his illegal departure and return as a failed asylum seeker and other matters which I have not found to be credible above.
39. I have accepted that arising from the applicant's father illnesses, his father no longer works as a fisherman. The applicant has not claimed that after his father ceased working as a fisherman he encountered any difficulties or that he was harmed by the authorities. I do not accept that arising from his father's past employment as a fisherman the applicant would be harmed on return.
40. The DFAT, UK Home Office and US Department of State reports indicate that the overall situation for Tamils in Sri Lanka has improved considerably since the end of the civil conflict in 2009. Tamils have a substantial level of political influence and their inclusion in political dialogue has increased since the Sirisena government came to power in 2015. As a consequence of the improving situation, in 2017 and again most recently in 2018, DFAT assessed that Sri Lankans of all backgrounds generally have a low risk of experiencing official or societal discrimination, including in relation to access to education, employment or housing. Furthermore, the 2017 UK Home Office reports has assessed that it was its opinion that being a person of Tamil ethnicity would not in itself warrant international protection.
41. I have had regard to the submissions provided by the applicant's former representative relating to the arbitrary arrest, detention, abduction, torture, sexual abuse and killing of individuals who were perceived to be connected to or supporters of the LTTE, while some of the information is dated, I accept there is credible evidence of serious harm being perpetrated against certain Tamils associated with, or perceived to be associated with, the LTTE by the Sri Lankan authorities in pre and post-war Sri Lanka.
42. I have also had regard to reports by the UK Home Office, US Department of State and DFAT, which while not suggesting that there does not continue to be issues of concern, suggest it is individuals who have or are perceived to have had a significant role in relation to post-conflict Tamil separatism or a renewal of hostilities within Sri Lanka who are now at risk of serious or significant harm on return. DFAT has assessed that those at highest risk of monitoring, arrest, detention or prosecution are 'high profile' former LTTE members, including the former leadership, and former members suspected of terrorist or serious criminal offences during the conflict or of providing weapons or explosives to the LTTE, and that close relatives of such people who remain wanted by the authorities may be monitored. People on a "stop list", those with extant court orders or arrest warrants or orders to impound their passport, may be at risk of being detained; and people on a

security services' 'watch list' for separatist or criminal activities, may be monitored. US State Department reported that although the use of force against civilians by government officials remained a problem it was increasingly rare, and that arbitrary arrest by police had decreased.

43. I have accepted that the applicant is a Tamil male, who has resided in areas in the Northern Province. Country information published by the UNHCR and UK Home Office supports that a person being of Tamil ethnicity from the North or the East would not in itself warrant international protection; and I am satisfied that the applicant will not be imputed with any type of profile arising from being Tamil male who resided in LTTE controlled areas in the Eastern Province.
44. I have accepted that the applicant is [an age] year old male Tamil, who has previously resided in in the Northern Province. There is no independent information before me, absent any other concerns to suggest that arising from a person's age or that Tamils who resided in former LTTE controlled areas who departed Sri Lanka are imputed with pro-LTTE or pro-separatist or anti-Sri Lankan government political opinion on this basis. I am satisfied that the applicant will not be imputed with any type of profile because he [an age] year old male Tamil who resided in the Northern Province including in former LTTE controlled areas on return and who was taken, questioned and physically assaulted three separate occasions in the past.
45. I have rejected the applicant's claims regarding his and his father's assistance to the LTTE. However, I have accepted that in 2012, on three separate occasions the applicant was taken to an SLN camp and held for brief period in which he was questioned and physically assaulted before being released. Nonetheless, I have found that these events occurred because his father had not returned to shore by the time required and found that as the applicant's father no longer works as a fisherman, the applicant would not be of interest to the SLN on this basis on return. There is no credible evidence before me that the applicant was a supporter or member of the LTTE. He has not committed any terrorist or criminal acts or that he is on a stop or watch list.
46. I have also accepted the applicant's [Relative A]; R was a member of the LTTE and that R died in [an accident] in 2011. I have rejected the applicant's claims that he had a close relationship to R or that his brother in 2013 was stopped, harassed and questioned by the authorities on account of his familial relationship to R. At least eight years have passed since R's death, and I do not accept that arising from this familial relationship, which I am satisfied, would have known by the authorities prior to the applicant's departure from Sri Lanka, he would be perceived to have heightened association or a supporter or a high level profile with the LTTE on return. There is also no credible evidence before me that the applicant's family members or friends have had any involvement with the LTTE, political organisations, or Tamil separatism activities.
47. I accept that as a Tamil, the applicant believes that Tamils are denied freedom by the government in Sri Lanka, however, other than his involvement in one protest in 2012, at least six years ago there is no other credible evidence before me to indicate that he has been involved with any political organisations or Tamil separatism activities and I am not satisfied he would be imputed with a pro-LTTE or pro-separatist or anti-Sri Lankan government political opinion on this basis.
48. Having regard to all the evidence before me, I am not satisfied that the applicant will be imputed with an adverse profile because of his or his family's past circumstances, on return

to Sri Lanka. I am not satisfied the applicant faces a real chance of persecution as a Tamil, or because of any actual or imputed pro-LTTE or pro-separatist or anti-Sri Lankan government political opinion on his return to Sri Lanka now or in the reasonably foreseeable future.

49. At the protection visa interview, the applicant claimed that he feared being abducted in white van on return. Articles reporting of white abductions were provided in support of these claims. I refer to my findings above. I have found the applicant would not be imputed with an adverse profile because of his or his family's past circumstances, on return to Sri Lanka. I am satisfied that the applicant's fears of being abducted in a white van are unfounded.
50. I accept the applicant left Sri Lanka illegally and he would return to Sri Lanka on temporary travel document. I accept the applicant would be returning to Sri Lanka after his asylum application has failed and that the Sri Lankan authorities may know or infer that he has made claims for protection in Australia.
51. The most recent DFAT report states that most Sri Lankan returnees, including those from Australia are questioned at the airport upon their return. DFAT has reported that for returnees travelling on temporary travel documents, police undertake an investigative process to confirm identity, which would identify someone trying to conceal a criminal or terrorist background, or trying to avoid court orders or arrest warrants. This often involves interviewing the returning passenger, contacting the person's claimed hometown police, contacting the person's claimed neighbours and family, and checking criminal and court records.
52. I accept, as a person returning on a temporary travel document, the applicant may be detained at the airport with other returnees for processing by the Sri Lankan authorities. I accept that during this process the authorities will become aware of the applicant's past circumstances. However, as discussed above, I have found that the applicant will not be perceived to have a pro-LTTE, pro-separatist or anti-Sri Lankan government political opinion on this basis. There is no evidence before me that he has outstanding court orders, arrest warrants or a criminal or terrorist background.
53. DFAT and other sources in the review material advise that returnees are treated according to the standard airport procedures, regardless of their ethnicity and religion and that they are not subject to mistreatment during processing at the airport. The process can take several hours, due to the administrative processes, interview lengths and staffing constraints at the airport. Returnees are processed in groups, and individuals cannot exit the airport until all returnees have been processed. The information before me indicates that the processing of returnees at the airport is not applied in a discriminatory manner or selectively enforced and nor will the applicant be mistreated.
54. Overall, I am satisfied that any period of detention that would occur while these investigations are ongoing will still be brief and would not exceed the several hours that group processing generally takes. I am not satisfied the applicant being subjected to standard processing at the airport amounts to serious harm.
55. I accept on return the applicant may be charged under the Immigrants and Emigrants Act (I&E Act) for departing Sri Lanka other than via an approved port of departure. Returnees who are arrested and charged under the I&E Act are processed at the airport where police will take photographs, fingerprints and statements from returnees, and further enquire about activities while abroad if returnees are former LTTE members. After processing

returnees may be detained at the airport for up to 24 hours. At the earliest available opportunity returnees are transferred to the closest Magistrates Court. Should a magistrate not be available before this time – for example, because of a weekend or public holiday – those charged may be detained in an airport holding cell for up to two days. Information before me indicates that detention is not selectively applied to returnees, or that returnees are processed in any discriminatory manner or that those who committed an offence under I&E Act, such as the applicant, face a higher risk of torture or other mistreatment.

56. DFAT reports that penalties for returnees who depart illegally can include imprisonment and a fine. According to the Sri Lankan Attorney-General's Department, no mere passenger on a people smuggling venture has been given a custodial sentence for departing Sri Lanka illegally. However, fines are issued to deter people from departing illegally in the future. There is nothing before me to indicate that the applicant would be perceived and treated as anything other than a mere passenger on the people smuggling vessel. I am satisfied that the applicant will not be given a custodial sentence.
57. If the applicant pleads guilty to departing illegally, he will be required to pay a fine (which he can be done by instalment) and will subsequently be free to go. Where a passenger returnee pleads not guilty, the magistrate will usually grant bail on the basis of personal surety or guarantee by a family member. Where a guarantor is required, returnees may need to wait for the guarantor to come to court. DFAT has indicated that anecdotal evidence suggests that most passengers of people smuggling ventures spend many years on bail, and that most are free to go after paying a fine. It further noted that the fines issued were low. The applicant has not claimed and there is no evidence before me to indicate he would not be granted bail on his own personal surety. The applicant's evidence is that parents, who he is in contact with, remain living in Sri Lanka and I am satisfied that either of his parents would be able to act as a guarantor if required.
58. Those charged under I&E Act will only need to return to court when their case is being heard, or if summonsed as a witness in a case against the organiser/facilitator of a people smuggling venture. There is no general requirement to report to police or police stations between hearings. DFAT noted that the fines issued for passengers of people smuggling ventures was often low, but that the cumulative costs associated with regular court appearance over a protracted lengths of time can be high.
59. I am not satisfied that the conditions of detention for a brief period at the airport in a holding cell or a fine or the costs associated with regular court appearances individually or cumulatively amount to serious harm in this case. In addition, the information before me does not indicate that I&E Act is discriminatory on its terms, that it is applied in a discriminatory manner or that it is selectively enforced. Accordingly, I am satisfied that any investigation, prosecution and punishment of the applicant under the I&E Act would be under a law of general application and would not amount to persecution for the purpose of ss.5H(1) and 5J(1) of the Act.
60. In its most recent report, DFAT reported that between 2008 and 2017, over 2,400 Sri Lankan nationals departed Australia for Sri Lanka. This includes nationals who were returned from the Australian community, and those removed from Australian onshore immigration detention centres. Many others returned from the US, Canada, the UK and other European countries, and most returnees are Tamil. In 2017, the Sri Lankan Prime Minister publicly stated that failed asylum seekers from Australia would be welcome back to Sri Lanka. However, DFAT has also reported that apart from this positive government sentiment, failed asylum seekers, may face practical difficulties on return. Failed asylum

seekers receive limited reintegration assistance and many returnees have difficulty finding suitable employment and reliable housing on return. However, DFAT assesses that reintegration issues are not due to failure to obtain asylum, but rather due to the employment and accommodation difficulties they may face. DFAT also notes that some failed asylum seekers reported social stigma from their communities upon return.

61. Furthermore, while the Sri Lankan government has reportedly decreased systematic surveillance of returnees, DFAT is aware of anecdotal evidence of regular visits and phone calls by the CID to failed asylum seekers in the North as recently as 2017. DFAT assesses that this surveillance of returnees contributes to a sense of mistrust of returnees within the community. However, in interviews with returnees conducted by UNHCR in 2016 only 0.3 per cent indicated they had any security concerns following their return.
62. I accept that the applicant would return to the North of Sri Lanka as failed asylum seeker and that as such the applicant may be the subject of some monitoring by the Sri Lankan authorities for a period and may face some reintegration issues that being difficulties finding employment and accommodation and some social stigma from his community; however I am not satisfied that such matters amounts to serious harm.
63. I am not satisfied the applicant faces a real chance of persecution, as a Tamil failed asylum seeker who departed illegally on his return to Sri Lanka now or in the reasonably foreseeable future.

#### **Refugee: conclusion**

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

#### **Complementary protection assessment**

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65. 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**

66. 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.

67. As the applicant would be travelling to Sri Lanka (whether involuntarily or otherwise) on temporary travel document, I have accepted he may be detained at the airport for processing on return and questioned. I have also accepted he may be detained briefly in an airport holding cell, fined and incur costs associated with regular court appearances. I am not satisfied these measures constitute significant harm as defined. I do not accept they would amount to the death penalty, constitute or result in an arbitrary deprivation of life, or torture. Nor does the evidence before me indicate that these processes, or the penalties implemented as a result involve any intention to inflict pain or suffering that could be considered cruel or inhuman in nature, severe pain or suffering or to cause extreme humiliation. I am not satisfied that it amounts to cruel or inhuman treatment or punishment or degrading treatment or punishment as defined.
68. I accept that the applicant as a returning failed asylum seeker in the North may be monitored by the authorities for a period and may face some reintegration issues that being difficulties finding employment and accommodation and some social stigma. The evidence does not suggest that the applicant will suffer the death penalty, arbitrary deprivation of life, or torture as a consequence of being a returnee. I am not satisfied that any monitoring and social stigma the applicant may face amounts to pain or suffering that is cruel or inhuman in nature, severe pain or suffering, whether physical or mental, or extreme humiliation, as required in the definitions of cruel or inhuman treatment or punishment or degrading treatment or punishment. I am not satisfied there is a real risk of significant harm on this basis.
69. Furthermore, having regard to the evidence as a whole, I am also not satisfied that the applicant being detained at the airport for processing and questioned or detained briefly in an airport holding, fined or costs incurred with regular court appearances, monitoring or reintegration issues that being difficulties finding employment or accommodation or facing some social stigma on return amounts to significant harm.
70. I have otherwise found the applicant does not face a real chance of harm on any or the bases claimed now or in the reasonably foreseeable future. As 'real risk' involves the same standard as 'real chance', I am also not satisfied that the applicant faces a real risk of significant harm on these bases.

### **Complementary protection: conclusion**

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

### **Decision**

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

## Applicable law

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### ***Migration Act 1958***

#### **5 (1) Interpretation**

In this Act, unless the contrary intention appears:

...

***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.