



**Australian Government**  

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**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA18/04122

Date and time of decision: 4 October 2018 13:38:00  
G Deal, 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 applicant (the applicant) claims to be a Tamil from Sri Lanka. [In] October 2012 he arrived by boat in Australia. On 4 April 2016 an application for a Safe Haven Enterprise Visa (SHEV application) was lodged on the applicant's behalf with the Department of Immigration, now part of the Department of Home Affairs.
2. On 9 January 2018 a delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa. The delegate accepted the applicant had low-level involvement with the Liberation Tigers of Tamil Eelam (LTTE) and was questioned by authorities on suspicion of LTTE involvement in 2009 and 2011, but ultimately did not accept he had a profile of on-going interest to them. She did not accept he had reporting obligations on release, went into hiding just prior to his departure, and was on a "watch list" or that the authorities had gone to his home looking for him since leaving Sri Lanka. She found he did not meet the relevant definition of refugee, did not face a real risk of significant harm and was not a person in respect of whom Australia had protection obligations.

### Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. The IAA received a submission and other supporting documentation from the applicant on 29 January and 5 March 2018. In addition to any arguments and claims already before me (which I have considered) it contains new information.
5. The applicant made the new claim that he may be at risk because Tamil paramilitary members are now part of a legitimate force and those that remain in Sri Lanka may know the applicant. No detail or supporting information has been provided in respect of this new claim. The applicant also claimed that on return he will be processed en masse with other returnees which may result in delays and he may be imputed with political opinion not held because other members of such a group are found to be a person of interest. Again, very little detail or supporting information has been provided in respect of this new claim of an imputed political opinion arising out of en masse processing.
6. The applicant has not explained why any of these claims are only now being raised. I consider the applicant has had adequate opportunity to provide his claims and supporting information. His then representative attended his SHEV interview and made oral submissions. He also lodged a post interview submission detailing a number of new claims. The new claims are essentially a number of assertions with no real detail or evidence in support. I am not satisfied exceptional circumstances exist to justify consideration of the new information.
7. In the submission it states that the IAA should have regard to DFAT's reports from 2009 to 2011 when assessing the plausibility of the applicant's claims regarding claimed events in those years. No copies or extracts of these reports were provided as required under the IAA Practice Direction<sup>1</sup>.

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<sup>1</sup> IAA Practice Direction 1, "Practice Direction for Applicants, Representatives and Authorised Recipients", 6 February 2017.

8. Relevantly attached to the submission were copies of a June 2017 report by the UK Home Office on Tamil Separatism and a 2016 Committee against Torture Report. The applicant has not explained why these reports could not have been provided to the delegate before her decision was made and noting the applicant's circumstances, I am not satisfied they could not have. They are also not 'personal' information in the relevant sense. The applicant has not satisfied me as to the matters in s.473DD(b).
9. I have obtained the 2018 DFAT report on Sri Lanka<sup>2</sup>. I am satisfied there are exceptional circumstances to justify considering this recent report which documents the changing conditions in Sri Lanka in relation to the treatment of Tamils, including those who have left Sri Lanka illegally and attempted to seek asylum in another country. The delegate relied upon the earlier version of this report. The 2018 report was published after the delegate's decision.

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

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

- He is a Tamil male from the north of Sri Lanka.
- He fled to India from 1990 to 1992 after being harassed by the Indian Peace Keeping Forces (IPKF) on suspicion of LTTE involvement.
- He relocated to the Vanni from [City 1] (as the army were advancing) from 1995 to 2005 where he underwent training with, and worked for the LTTE in various capacities including as part of border force. He hid weapons and valuables for the LTTE in bunkers. He was injured in a shell attack and [injured himself]. In 2005 he returned to his home village in the north and brought a [vehicle] which he used to earn money transporting things.
- In 2007 because of the lack of freedom of movement he relocated back to Kilinochichi and then back home by boat about a year later in August 2008 when the war intensified. In October 2009 he was arrested and tortured by authorities on suspicion of LTTE involvement. After this incident he kept a low profile, stopped driving his [vehicle], and worked in construction.
- In May 2011, after starting to drive his [vehicle] again, on noticing his [injury] an army officer questioned, arrested and assaulted him on suspicion of LTTE involvement. He was released with reporting obligations. In fear of his safety he relocated to [City 2] where he worked for someone as a fisherman, keeping a low profile until he departed Sri Lanka in October 2012 in fear of his safety.
- In about 2017 his wife told him that the people who worked with him for the LTTE were now being questioned by the army and CID in relation to the weapons and valuables they hid. The authorities had also gone to his family home looking for him in 2015 and had questioned his son about his whereabouts in 2016.
- The authorities have his full details and photograph and he is on their watch list. He is a failed asylum seeker.

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<sup>2</sup> DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064.

## Factual findings

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11. Based on the applicant's evidence, including his documentary evidence, I accept he is a Tamil male from the north of Sri Lanka and that his wife and children (about [age] years of age) currently live in the north of Sri Lanka.
12. The applicant claims that from about 1989 to 1990 the IPKF regularly abused him on suspicion of LTTE involvement and because of this he went to India by boat for two years from 1990 to 1992. This was not mentioned in the arrival interview although I accept this may be because it was said to have occurred some 20 years prior. In the SHEV interview the applicant said that he returned to Sri Lanka legally on his passport after spending two years in India, which I accept. The country information before me indicates that at that time LTTE activities were concentrated in the Northern Province and the IPKF arrived in 1987 and left in March 1990.<sup>3</sup> Based on the information before me, I am willing to accept the applicant left Sri Lanka for India in 1990 after harassment by the IPKF on suspicion of LTTE involvement but that he legally returned to Sri Lanka in 1992. He has not said he was apprehended at the airport or otherwise on suspicion of LTTE involvement on his return to Sri Lanka to the north.
13. The applicant claims that in about 1994 he was advised by the LTTE to relocate to Kilinochichi district because the army were advancing. He was in Kilinochichi from 1995 to 2005 (only returning home in 1995 to get married). He worked with the LTTE in their [business] from 1995 to 1996 and did five months training with the [LTTE]. In 1997 he was instructed to help the LTTE at [particular location]. He was required to work for the LTTE for a set number of days a month digging bunkers, arranging sand bags and looking out at night for the army. In 2005 he and his family relocated back to their home village in [City 1]. There was no freedom of movement in his home village and so in 2007 he relocated to Kilinochichi again. He helped the LTTE by digging bunkers and caring for the wounded. In September 2007 he was wounded, including [an injury], in a shell attack. As the war intensified he eventually escaped in August 2008 back to his home village by boat and worked transporting items with his own truck but kept a low profile and did not register with the army.
14. When asked in the arrival interview whether he was involved with the LTTE he said he was in an LTTE controlled area in the Vanni for 10 years and that everyone in the area was asked to dig bunkers when they were short of people but said he was not part of the LTTE. This is inconsistent with his SHEV application which claims he worked for them in various capacities including in [a location] over a period of about 10 years, including not only digging bunkers, but also caring for the wounded, watching out for the army at night, undertaking training, and helping them with [a certain] business. I note the limitations of arrival interviews, including that they are intended for the collection of a raft of information in addition to identifying why a person has left their country of origin, that they are often conducted shortly after the person arrives in Australia and before they have had an opportunity to talk to a representative. However in this case, I found the interviewer's questioning of the applicant in the arrival interview thorough. A significant portion of the interview was dedicated to discussing his experiences which led him to leave Sri Lanka. At the beginning of the arrival interview the applicant appeared to have difficulties answering questions in relation to his work and address history (which form an integral part of his claims he moved around as he was hiding or on the run from authorities or working for the LTTE), often providing irrelevant details or other responses which did not answer the delegate's questions. Eventually the interviewer said that

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<sup>3</sup> Centre on Conflict, Development and Peacebuilding (CCDP) - Graduate Institute of International and Development Studies, Geneva, "An Institutional History of the Liberation Tigers of Tamil Eelam (LTTE)", CCDP Working Papers, 1 November 2014, CISA447F082828.

it was important that he was very clear about what he was saying as it was all being put into a legal document and she asked him to concentrate on providing responses to the questions posed to him.

15. In the SHEV interview the applicant said that after completing his training he was absorbed into the border force and posted to checkpoints and had to monitor the army's movements. When asked for more detail about this he did not really answer the question, again referring to his training. He mentioned being at the elephant pass when the ceasefire ended in 1996. When asked what his role was he did not really answer the question. When asked if he fought with the LTTE he said he was with them at a "big fight" and was digging bunkers and [was injured] in shell fire. He said he trained the LTTE in [a certain area] and was paid for this for one year. At the end of the SHEV interview he mentioned, for the first time, that he was required to hide LTTE weapons and valuables such as jewellery in the bunkers he dug and that he was told by his wife that the other people who helped with this were now being questioned by the army and the CID on the location of these items. In the SHEV interview his representative also said it was the first time she had heard this claim and said she would provide this information in writing to the Department.
16. In a post interview submission the applicant elaborated on the claim, providing detail about the dimensions of the bunkers he was required to dig and stating that the authorities had gone to his home looking for him in 2015 and that his son was questioned in 2016 about his whereabouts. Given his SHEV application was lodged in 2016 it is surprising that his claim the authorities looked for him in 2015 was not included.
17. The country information before me indicates that during the conflict civilians in LTTE controlled areas were forced to interact with the LTTE on a daily basis.<sup>4</sup>
18. Based on the consistency of the claim he was asked to assist the LTTE digging bunkers along with other civilians as they were in an LTTE controlled area and based on the country information above I am willing to accept this aspect of the claim. However I have generally found the applicant's evidence provided during and after the SHEV interview about his greater level of involvement with the LTTE uncertain and increasingly exaggerated. Significant aspects were belatedly raised. I do not accept he worked for the LTTE over a period of about 10 years in the other various capacities claimed including in the border force or as part of a unit that hid weapons and valuables for the LTTE. I find it implausible that the authorities would commence looking for the applicant some seven years later because he dug bunkers for the LTTE, along with others in the area, during the conflict. This claim was also belatedly raised in his post interview submission. I do not accept the authorities went to his home looking for him, or questioned his son, since arriving in Australia. I consider it plausible that the applicant may have been injured as a civilian during the conflict. The country information before me indicates that during the conflict many thousands of Tamils were displaced.<sup>5</sup> I am willing to accept the applicant moved between his home town and Kilinochichi in the Vanni due to the conflict and that he [was injured] and was scared in a shelling attack.
19. The applicant claims that in October 2009 while driving his [vehicle] he was arrested by CID officers along with five other males. He was questioned and severely mistreated on suspicion of LTTE involvement. He still suffers issues with his [injury] as a consequence. He was released and warned not to tell anyone about the incident. He stopped driving his [vehicle] and worked for a construction company in his home village in [City 1] for about seven months (which would

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<sup>4</sup> UN High Commissioner for Refugees, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183EA8.

<sup>5</sup> Ibid.

make it until about May 2010). This claim was mentioned in his arrival interview. In his SHEV interview he said on release he was told he must report to them whenever called and so he stopped driving his [vehicle] and went into hiding. When asked if he worked during this time he said he worked for someone in construction but that the location of this work meant he kept a low profile. The applicant has also submitted a number of documents in support of his claims including a letter from his wife, which is handwritten in English and unsigned. It contains very little detail other than that already provided to the delegate about his claims and some inconsistent details, such as that the army [injured him] (rather than it being the result of a shelling attack as he claims) and I place little weight on it. The country information before me indicates that after the war thousands of Tamils were harassed, questioned, detained and mistreated by authorities on suspicion of LTTE involvement.<sup>6</sup> On the totality of the evidence before me, including the country information detailed above and that he has consistently claimed he was assaulted by authorities on suspicion of LTTE involvement in 2009 I accept this occurred, and that he and other Tamil males were questioned. That he was released indicates he was no longer of interest to the authorities. I accept that he kept a lower profile following the incident and given young Tamil men were typically targeted by authorities at that time, as detailed above, but I do not consider that he could be said to have been in hiding as he has said he continued to work following the incident.

20. The applicant claims that while transporting items for the army in his [vehicle] in May 2011 he was questioned, arrested and assaulted by an officer on suspicion of LTTE involvement when the officer noticed the applicant's [injury] ([occurred] in the 2007 shell attack). The officer said that if he saw any LTTE people that he should inform them immediately. He was released with reporting obligations. He feared for his safety and in August 2011 he relocated to [City 2] by bus where he worked as a fisherman for someone, staying out at sea fearing the CID or army would find him. He had been working for about a year when he was told of an opportunity to go to Australia and so left by boat for Australia in October 2012, after returning home for one month in September 2012 to spend time with his family before his departure.
21. The applicant did not mention being questioned by the army in 2011 in his arrival interview. Nor did he mention going to [City 2] in August 2011, stating he was in his home town in [City 1] up until his departure from Sri Lanka in 2012 and that his last job was driving his [vehicle] (not a fisherman in [City 2]). It was only in the SHEV application that he mentioned being questioned and asked to tell them if he recognised any LTTE members in the area and in the SHEV interview that he first mentioned being arrested and assaulted and released with reporting obligations. Despite this being the most recent incident prior to his departure from Sri Lanka, I found the applicant unable to clearly answer questions posed to him about this incident, such as why they let him go and whether he was questioned in [City 2] or had any problems with the authorities there. He also claimed he was not discovered in [City 2] because he was always out at sea, changing boats before coming to shore and worked for someone secretly and so did not need a fishing licence. He also first mentioned the authorities went to his home looking for him four or five times, and only after the delegate asked if they looked for him while in [City 2]. He did not mention returning home for a month in September before his departure.
22. Overall, I found the applicant's evidence about his last two years in Sri Lanka to be inconsistent and increasingly exaggerated. I also consider the fact he was transporting items for the army to be inconsistent with his claim he was wanted by them. On the totality of the evidence before me I am willing to accept an army officer may have casually spoken to the applicant

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<sup>6</sup> UK Home Office, "Country Policy and Information Note. Sri Lanka – Tamil Separatism. Version 4.0", 31 March 2017, OG6E7028822.

asking him to tell them if he recognised any former LTTE members (having lived in the Vanni for an extended period of time) but I do not accept he was arrested and assaulted on suspicion of LTTE involvement or released with reporting obligations or that he fled to [City 2] in fear of his safety after this incident and hid while working as a fisherman. Nor do I accept the authorities went to his home four or five times during this period looking for him. The applicant has also generally claimed he moved around Sri Lanka because the authorities were searching for him and in light of the above, including that I do not accept he worked for the LTTE to the extent claimed or that he continued to be of interest to the authorities after his questioning in 2009, I do not accept this aspect of the claim. It follows that I do not accept the authorities have gone to his home looking for him since being in Australia.

23. The applicant claims the authorities have his photo and details and that he is on a “watch list”. However, other than mentioning this in his SHEV application, no further details have been provided and he did not mention this in his arrival or SHEV interviews or post interview submission. I do not accept this claim.
24. I accept the applicant may be identifiable as someone who has attempted to seek asylum overseas.

### **Refugee assessment**

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25. 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**

26. 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.
27. I accept the applicant is a male Tamil from the north, that he was forced to dig bunkers for the LTTE during the conflict and that he was questioned and mistreated after the end of the war on suspicion of LTTE involvement, along with other suspects, but released no longer of interest. I also accept that while transporting items for the army in 2011 he was told by an officer to let

them know if he saw any former LTTE members given his time spent in the Vanni. However I do not accept he continued to be of interest to the authorities in connection with an adverse security profile after his questioning in 2009 or that he moved around and often hid because the authorities were pursuing him. I do not accept he was wanted by the authorities in connection with an adverse security profile when he left Sri Lanka in 2012.

28. The country information before me indicates that conditions in Sri Lanka have significantly improved since the applicant left Sri Lanka and particularly since the election of the Sirisena government in 2015. After the current government's election DFAT<sup>7</sup> reported on a number of improvements, including that they had replaced military governors with civilians in parts of Sri Lanka, returned some land confiscated during the conflict, released some detainees held under the *Prevention of Terrorism Act (PTA)*, committed to reform the PTA, engaged constructively with the United Nations and made certain symbolic changes, among other things. I note, there have been more recent criticisms on the government's slow progress in delivering promised reforms, for example, there are still reports of the systemic use of torture, the PTA remains in force and to date, little has been done to hold authorities accountable for human rights abuses committed during the conflict.<sup>8</sup>
29. In relation to the conditions for Tamils in Sri Lanka, DFAT<sup>9</sup> has consistently reported a decrease in day-to-day monitoring by authorities and a significant increase in political power. While certain activities, such as public gatherings, continue to be monitored in the north and east, members of the Tamil community have expressed increased confidence in questioning the authorities about these and other activities. DFAT assess that Tamils face a low risk of official discrimination on the basis of ethnicity which is consistent with the UK Home Office which states that being of Tamil ethnicity, in and of itself, is not sufficient to attract international protection.<sup>10</sup>
30. The UN Special Rapporteur<sup>11</sup> has reported that torture has continued to be used by the authorities when investigating criminal and terrorist related crimes, and disproportionately against Tamils, but the figures quoted reveal that this is less prevalent than it once was, for example, as at mid-2016 less than 50 suspects being investigated under the PTA by the Terrorism Investigation Division were in detention. Other country information before me is consistent with this.<sup>12</sup>
31. DFAT understands that close relatives of high profile former LTTE members, who are wanted by the authorities, may be subject to monitoring, that the government remains sensitive to the potential re-emergence of the LTTE and that the authorities maintain 'stop' and 'watch' electronic databases, to alert security forces to those of particular interest, such as former LTTE cadres, those who have engaged in separatist or criminal activities or those with an extant

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

<sup>8</sup> DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064; United Nation, "Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Sri Lanka A/HRC/34/54/Add.2", 22 December 2016, CIS38A80123313.

<sup>9</sup> DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105; DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064.

<sup>10</sup> UK Home Office, "Country Policy and Information Note. Sri Lanka: Tamil separatism. Version 4.0", 31 March 2017, OG6E7028822.

<sup>11</sup> United Nation, "Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Sri Lanka A/HRC/34/54/Add.2", 22 December 2016, CIS38A80123313.

<sup>12</sup> UK Home Office, "Country Policy and Information Note. Sri Lanka: Tamil separatism. Version 4.0", 31 March 2017, OG6E7028822.

court order, arrest warrant or order to impound their passport.<sup>13</sup> I have not accepted the applicant is on a watch list.

32. In her decision the delegate considered whether the applicant's scars and [injury] would attract adverse attention from the authorities. The country information before me indicates it was not uncommon for civilians to be injured during the conflict and while there were reports that immediately after the war this would lead to being imputed with LTTE involvement, the country information before me indicates this is no longer the case.<sup>14</sup>
33. The country information above indicates that the conditions for Tamils have significantly improved since the election of the Sirisena government but that some issues remain. While those who come to the adverse attention of authorities may be severely mistreated, it is former LTTE members or those with other significant links or those who have engaged in separatist or criminal activities that are of interest. Based on the country information and the applicant's profile, including his time spent in the Vanni, assistance provided to the LTTE and questioning by authorities I am not satisfied the applicant faces a real chance of harm by reason of his origin, ethnicity or past experiences in Sri Lanka.
34. I accept the applicant will be identifiable by the authorities as someone who has attempted to seek asylum overseas. DFAT notes that the biggest challenge for returnees is bureaucratic inefficiencies, resulting in long delays vis-a-vis obtaining support and official documentation. Returnees also report suffering social stigma which can affect their ability to secure employment and accommodation, and some have to repay the costs of their journey. Only 0.3 per cent of returnees interviewed by UNHCR in 2016 said they had security concerns. There have also been reports of authorities monitoring returning asylum seekers in the north as recently as 2017, although DFAT notes evidence of this is only anecdotal and the country information indicates past victims of monitoring and harassment have been former LTTE members or those with other significant links with the LTTE.<sup>15</sup> The applicant's immediate family still live in the north of Sri Lanka and he has not indicated he would reside elsewhere. He may initially face some social stigma, reintegration issues and be visited by authorities but based on his profile I am not satisfied there is a real chance he would suffer serious harm.
35. The applicant's evidence indicates he left Sri Lanka illegally by boat. DFAT<sup>16</sup> and the UK Home Office<sup>17</sup> indicates that following arrival at the airport returnees are processed in a group by a number of government agencies which can result in delays and take several hours. When returning on a temporary travel document further investigations are undertaken to confirm their identity for example, to ensure they are not trying to avoid court orders or arrest warrants. Overall DFAT understand returnees are not mistreated during this process. If a returnee departed illegally by boat, they will be found to have committed an offence under the *Immigrants and Emigrants Act 1949* (I&E Act). If arrested they will be fingerprinted,

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<sup>13</sup> DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105; DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064.

<sup>14</sup> Freedom from Torture, "Out of the Silence: New Evidence of Ongoing Torture in Sri Lanka", 1 January 2011, CIS23554; Human Rights Watch, "Sri Lanka After the Tigers", 19 February 2016, CX6A26A6E2961; UK Home Office, "Sri Lanka March 2012", 7 March 2012, 3523; UK Home Office, "Sri Lanka December 2012 - Bulletin: Treatment of Returns", 1 December 2012, 3853.

<sup>15</sup> Sri Lanka Mirror, "Another Tamil returnee arrested", 1 July 2015, CXBD6A0DE16698; Tamil net, "SL military continues to arrest Tamils from East returning from Middle-East", 31 May 2015, CXBD6A0DE7540; Tamil net, "16 Batticaloa Tamils arrested within last 100 days at Colombo airport", 3 May 2015, CXBD6A0DE6027; Sri Lanka Mirror, "10 Tamils arriving in Lanka arrested", 4 March 2015, CXBD6A0DE6065.

<sup>16</sup> DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064.

<sup>17</sup> UK Home Office, "Country Policy and Information Note. Sri Lanka: Tamil separatism. Version 4.0", 31 March 2017, O6E7028822.

photographed and a statement will be taken. Police will then transport them to the closest magistrate's court to determine what happens next. If a magistrate is not available, for example on a weekend or public holiday, those charged may be held for up to two days in an airport holding cell. They must also appear in court when their case is being heard or they are summonsed as a witness in a case. The offence will be heard in, and they must attend, the court closest to the occurrence of the offence which can involve legal and transportation costs. The legal process can also be delayed because cases are only heard when all members of a people smuggling venture have been located. Penalties can include imprisonment however the country information indicates passengers are generally only given fines and for a first offence these are relatively low, starting at 3,000 rupees, and they can be paid in instalments. If pleading guilty, a fine will generally be issued but they are then free to go. If they do not plead guilty they are usually granted bail on the basis of personal surety or guarantee by a family member (and will have to wait to be collected by that family member). The cumulative costs associated with the court process can also be high for returnees.

36. There is no credible evidence before me to indicate the applicant has a criminal or terrorist background or that he has any outstanding court orders or arrest warrants or that he is otherwise wanted by the authorities.
37. Having regard to the country information detailed above I accept the applicant may be detained at the airport for processing and may be held in an airport holding cell briefly (up to two days) if a Magistrate is not immediately available, as part of the usual procedures applying to returnees who have left Sri Lanka illegally. However, he does not have an adverse security profile and I am not satisfied there is a real chance he would be otherwise detained. The applicant has not indicated he would plead not guilty. If he pleads guilty after being fined he will be free to leave. Based on the evidence before me, including the option to pay a fine in instalments, and the applicant's own circumstances, I am not satisfied there is a real chance the imposition of the fine would threaten his capacity to subsist. If pleading not guilty the Magistrate will usually grant bail on personal surety or guarantee by a family member and there is nothing to suggest a family member would be unable or unwilling to act as guarantor. He may also have to meet costs associated with the court process, but, I am not satisfied there is a real chance this would threaten his capacity to subsist.
38. In summary, I accept that the applicant may be interviewed, charged, briefly held, fined, and may possibly have to attend court appearances and meet costs associated with this, but I do not accept these experiences would amount to 'serious harm'. Furthermore, I am not satisfied that the relevant laws and procedures dealing with those who depart Sri Lanka illegally are discriminatory, or intended to apply or are applied or enforced in a discriminatory manner. I am not satisfied the applicant faces a real chance of persecution because of his illegal departure.
39. I am not satisfied he has a well-founded fear of persecution.

#### **Refugee: conclusion**

40. 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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41. 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

42. 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.
43. As detailed above, I accept the applicant may be interviewed, charged, briefly held, fined, and may possibly have to attend court appearances and meet costs associated with this. However, I am not satisfied that these circumstances amount to 'significant harm' as defined for the purposes of s.36(2A). There is not a real risk the applicant would be arbitrarily deprived of his life or subject to the death penalty on his return or be subject to torture. Furthermore, the evidence before me does not support a conclusion that there is an intention to inflict severe pain or suffering, pain or suffering that is cruel or inhuman in nature or to cause extreme humiliation. I am not satisfied the applicant faces a real risk of significant harm as a consequence of his illegal departure.
44. I accept that the applicant may initially face some social stigma, bureaucratic issues and may be visited or monitored by authorities on his return. I am not satisfied that these circumstances, even when coupled with what he may experience for having departed Sri Lanka illegally, would amount to 'significant harm'. The harm feared by the applicant does not include deprivation of life, the death penalty, or torture; nor am I satisfied he will be subject to cruel, inhuman or degrading treatment or punishment as defined.
45. In considering the applicant's refugee status, I have otherwise concluded that there was no 'real chance' the applicant would suffer harm on his return to Sri Lanka for the other reasons claimed. 'Real chance' and 'real risk' involve the same standard.<sup>18</sup> For the same reasons, I am also not satisfied the applicant would face a 'real risk' of significant harm.

### Complementary protection: conclusion

46. 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).

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<sup>18</sup> *MIAC v SZQRB* [2013] 210 FCR 505.

## **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.