



**Australian Government**  

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**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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SRI LANKA

IAA reference: IAA18/04399

Date and time of decision: 3 April 2018 12:08:00

Michael Simmons, 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 Tamil Hindu from Sri Lanka. On 16 February 2017 he lodged an application for a Safe Haven Enterprise Visa.
2. The delegate refused to grant the visa on 15 February 2018. In that decision it was accepted that the applicant was a Tamil from the Eastern Province, that his father was a village [official] and supporter of the Tamil National Alliance (TNA), and that he departed Sri Lanka unlawfully. The delegate was not satisfied that the applicant was of any interest to the Sri Lankan authorities at the time of his departure, and did not accept that he has real chance or risk of either serious or significant harm were he to return to Sri Lanka.

### 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 applicant's representative made submissions to the IAA on 12 March 2018 comprising a statement from the applicant witnessed by his representative. To the extent this statement contains legal arguments responding to the delegate's decision and reasserts claims that were before the delegate, I consider this does not constitute new information and I have considered it.
5. This statement advances claims which were not presented before the Delegate's decision and are therefore new information. No explanation was provided for why these claims could not have been made to the Delegate before their decision, nor why they constitute credible personal information which may have affected consideration of the matter. It is claimed that harassment in Sri Lanka will cause the applicant to suffer economic hardship, deny him the capacity to earn a livelihood or subsist, and cause him to be denied basic services. The applicant was instructed at the protection visa interview that it was important to provide complete and accurate protection claims as soon as possible, that any information not yet provide could be given at that interview, and that if the application is refused he may not have an opportunity to provide further information. The applicant's migration agent was present, and made written submissions to the Delegate following the interview, but those submissions did not advance these claims. In this context I am not satisfied that these claims could not have been made before the Delegate's decisions. I am also not satisfied these claims are credible information as they are lacking in detail. It is not apparent why he fears his economic circumstances would be significantly different to those he enjoyed in Sri Lanka prior to his departure. The applicant has also not indicated that he or his family have ever suffered economic hardship in Sri Lanka, but gave evidence that his father continues to run a business and that his is a qualified [occupation]. Also, the applicant did not indicate which basic services he fears he would be denied access to or why. That these claims were presented late in the protection visa process, after the delegate's negative decision, and after the applicant and his representative were alerted to the importance of providing information prior to the delegate's decision, also leads me to doubt their credibility. The applicant has not satisfied me that either s.473DD(b)(i) or (ii) are met.
6. I am also not satisfied on the information before me that exceptional circumstances exist that would justify considering these claims. In light of the instructions provided at the protection

visa interview, given the applicant's migration agent was present at the interview, and noting the lack of specificity in the new claims, I am not satisfied there are exceptional circumstances. Pursuant to s.473DD I am unable to consider this new information.

7. The statement also refers to media reports which were not before the delegate, dated 5 February 2018 and 1 March 2018, and a report from Human Rights Watch dated 27 January 2016. I note that copies of these reports have not been provided.
8. The Practice Direction has not been complied with in relation to the 5 February 2018 report, as a copy of this report was not provided. The statement referring to this report was prepared with the assistance of a legal practitioner and migration agent who would be aware of the requirements of the Practice Direction. In any event, even if I were to consider it, the applicant has not satisfied me that s.473DD(b) is met. The applicant refers to the first media report as evidence of the "mentality of the Sri Lankan authorities". The report appears to concern a gesture made by a Sri Lanka Officer in London. I am not satisfied that any of the information referred to from these reports is credible personal information that may have affected consideration of the applicant's claims, and no claims have been advanced arguing this. It is argued that this report could not have been provided to the delegate because the incident it refers to occurred in February 2018. However the media report was published 10 days before the delegate's decision, and given the applicant had the benefit of representation, I am not satisfied that this report could not have been provided. Section 473DD(b) is not met in respect of the 5 February 2018 report.
9. I am not satisfied that the Human Rights Watch report could not have been provided to the delegate, as this report predates the delegate's decision and also the visa application. I am not satisfied that any of the information referred to from these reports is credible personal information that may have affected consideration of the applicant's claims, and no claims have been advanced arguing this. The information referred to from this report appears to be general country information only. Section 473DD(b) is not met in respect of the Human Rights Watch report.
10. I accept that given its date of publication, the 1 March 2018 media report could not have been provided to the delegate, and as such s.473DD(b)(i) is met. However, I am not satisfied there are exceptional circumstances that justify consideration of this media report. The video report notes that there are ongoing allegations of torture in Sri Lanka, and reports on two Tamils who were accused of being LTTE members that claimed to have been tortured in Sri Lanka since Sirisena came to power. The information in this report reflects that contained in more detailed reports from various sources already before me, including reports specifically prepared for protection status determination purposes.<sup>1</sup> It does not provide additional insight into the situation in Sri Lanka beyond what can already be ascertained from the information before me. As such I am not satisfied that there are exceptional circumstances that justify considering it.
11. I note the delegate's decision appears to refer to a separate email submission from a representative concerning an unrelated matter. This does not appear to be relevant to this review.

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<sup>1</sup> These include: Freedom From Torture, "Sri Lanka – Update on torture since 2009", 6 May 2016, CIS38A8012881; International Truth & Justice Project Sri Lanka (ITJP), "Silenced: survivors of torture and sexual violence in 2015", 07 January 2016, CIS38A801275; DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED850AD105; UK Home Office, "Country Policy and Information Note, Sri Lanka: Tamil Separatism", version 4.0, March 2017, OG6E7028822.

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

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

- He is a Tamil male from Batticaloa District in the Eastern Province of Sri Lanka.
- His village was impacted by the 2004 Tsunami and was relocated to a new area. Both the original village of [Village 1] and the new village in [Village 2] were in Liberation Tigers of Tamil Eelam (LTTE) controlled areas. His community was supported by Tamil groups with links to the LTTE, including the Tamil Rehabilitation Organisation (TRO) who helped with the relocation and provided basic needs.
- The applicant's father was a village [official]. He was [an official] of the local Fisherman Society and [an official] of the [Village 1] Development Association. He helped people to resolve issues arising from the Tsunami and the relocation, and lobbied the Sri Lankan authorities about problems in the community. Because he held these roles he was required to work with the LTTE. In 2009 he began supporting the Tamil National Alliance (TNA) and encouraged others to vote for them, including in the 2010 presidential elections.
- The Tamil Makkal Viduthalai Pulikal (TMVP) or the Karuna group harassed the applicant's father due to his association with the TNA. They tried to coerce him into supporting the TMVP. Because he did not support the TMVP in the 2010 election they began threatening him. Around 3 months after the election, which the TNA won in Batticaloa, the applicant's father was abducted and beaten. Following this he was regularly abducted. Due to his father's on-going harassment, it was decided that the applicant and his brother should stay with relatives and avoid the family home.
- In mid-2011 supporters of the TMVP took the applicant, saying that they need him to carry out some repair work on their vehicle. After he completed the work he was beaten, questioned and held overnight. His father was able to secure his release the following day and took him to hospital.
- Due to these problems the applicant and his brother stopped staying in the family home. Arrangements were made for them to leave Sri Lanka. His brother left first, in August 2012.
- The applicant's father continued to support the TNA and assisted the party in the September 2012 local elections in Batticaloa. During this campaign threats continued to be made against the applicant and his brother. When the TNA won this election, TMVP supporters came to the applicant's house and attacked his parents and [sister] and threatened the applicant, who was not home at the time.
- The applicant departed Sri Lanka in November 2012 and sought asylum in Australia. If he were to return he will be stopped at the airport and may be tortured or killed. He may be detained under the Prevention of Terrorism Act (PTA).

## **Factual findings**

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### **Identity and background**

13. The applicant has consistently claimed, and I accept, that he is a Tamil Hindu and was born in [Village 1], Batticaloa in the Eastern Province of Sri Lanka. He provided documents in support

of his identity including his birth certificate and National ID Card. He has provided a consistent account of his identity and background throughout the protection visa process. I find that he is a Sri Lankan national that Sri Lanka is his receiving country.

14. I accept that following the 2004 Tsunami the applicant's family were displaced and that their village was subsequently relocated to [Village 2]. I accept that groups aligned with the LTTE provided support to persons affected by the Tsunami including the applicant's family and others in his village. I accept that [Village 1] and [Village 2] were both areas that came under the control of the LTTE during the conflict.
15. The applicant has reiterated throughout the process that his father was a village [official], including being [an official] of the Fishermen's Society and the [Village 1] Settlement Rural Development Society. I am satisfied that this is true. The applicant submitted a letter from the [Village 1] Settlement Rural Development Society indicating that his father was [an official] of the organisation. This same letter also gives the organisation's [address]. This supports the applicant's narrative that the people of [Village 1] were relocated to [Village 2] and that a new village was established with the help of aid agencies including a [Tamil] organisation.

#### **LTTE and TNA affiliation**

16. I am prepared to accept that due to the applicant's father's standing in the community he necessarily had dealings with the LTTE, given both [Village 1] and [Village 2] fell under LTTE control. I also accept that his father supported the TNA and encouraged members of his community to do the same, as has been consistently claimed throughout the protection visa process. I accept that the applicant's father supported the TNA in elections in 2010 and 2012.
17. Reports from the period following the end of the war in 2009 note that paramilitary groups including the TMVP, Pilayan and Karuna groups were active in the East, and that they engaged in abductions and extortion activities.<sup>2</sup> The UNHCR 2012 guidelines include reports of certain opposition politicians and political activists being detained and harassed during this period. This included a June 2011 TNA meeting in Jaffna reportedly being disturbed by "40-50 men wearing army uniforms carrying weapons."<sup>3</sup> In this context, it is plausible and I am prepared to accept that the applicant's father was harassed by paramilitary groups due to his support for the TNA and because he was known to have had dealings with the LTTE.
18. I have a number of concerns with the applicant's evidence regarding the adverse treatment he claimed he and his father received because of the father's affiliations. At the protection visa interview the applicant claimed that from approximately 3 months after the 2010 elections his father was kidnapped approximately once a month. He would be taken and beaten then someone would have to provide bail to secure his release. He also indicated that his release was usually obtained through influence from the local TNA MP who was known to the family.
19. I am of the view that the applicant has embellished the extent of the adverse treatment endured by his father and I do not accept this claim is credible. I do not consider it plausible that his father would remain at the same residential address and not take measures to avoid being subject to frequent and regular abductions and beatings. Further I have doubts that the applicant's father would continue publically support the TNA, including in the 2012 elections, if he were subject to frequent violence and if he believed his family were at risk because of this support. I am prepared to accept that the applicant's father was taken and beaten by

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<sup>2</sup>: Danish Immigration Service "Human Rights and Security Issues concerning Tamils in Sri Lanka", 1 October 2010, CIS19345, 25;

<sup>3</sup> United Nations High Commissioner for Refugees (UNHCR), "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183EA8, 29;

supporters of the TMVP, Karuna or Piliyan groups on a number of occasions due to his support for the TNA. However, I do not accept that this occurred on a near monthly basis over a number of years as claimed, as I find these aspects of claim to be implausible and embellished.

20. Key aspects of the applicant's evidence in relation to his own abduction has also varied, which lead me to also doubt the veracity of this claim. In his statement accompanying his visa application he indicated in mid-2011 he was at home when TMVP supporters came and took him in a white van and detained and beat him. His evidence at the protection visa interview was that he was taken from the [workplace] where he was working, along with his boss, and taken to a Karuna group office where he was detained and tortured. I draw no adverse inference from the references to his abductors being aligned with the TMVP and/or the Karuna group, as I am satisfied that there were various pro-government paramilitary groups operating in the area and the distinction between each group may not always have been apparent.
21. I do consider it significant that the applicant has variously indicated he was abducted from his home and from the [workplace] where he worked. On the evidence before me it is not possible for both accounts to be accurate, as the applicant has only indicated he was abducted once. While I accept a degree of variation throughout the protection visa process may not necessarily mean a claim is not credible, this is a significant discrepancy concerning a key aspect of the applicant's narrative. Further his statement with his visa application does not refer to being kidnapped with his boss, unlike his evidence at the protection visa interview and in the entry interview. The representative's submissions following the protection visa interview, and the statement provided to the IAA do not address these discrepancies but assert that the applicant has been consistent and his account his plausible. I am not satisfied this is so.
22. I note in the entry interview that the applicant indicated he was abducted by the white van people, possibly from the Criminal Investigation Department (CID). Subsequently throughout the process he has claimed it was pro government groups who abducted him, and has not reiterated the claim to have been taken by the CID. I note that the applicant applied for and obtained a Sri Lankan passport in 2012, after his alleged kidnapping. That he voluntarily approached the authorities for this purpose suggests that at this time, when he claimed to be taking aversive measures to avoid further adverse attention, he was not fearful of experiencing harm from the authorities should he come to their attention.
23. In addition, as was raised at the protection visa interview, the applicant indicated in his entry interview that he was kidnapped [in] August 2012, but subsequently asserted in the visa application and at the protection interview that this was a mistake and that the kidnapping actually occurred in mid-2011. I am conscious that the applicant may have difficulties recounting past traumatic events with detail. I am prepared to accept that the applicant was told to be brief at the entry interview and therefore may not have provided detailed claims at that time. I also note that he was unrepresented at the entry interview. However, I am not satisfied that such a significant variation in dates can be explained due to confusion or mistake. I also don't accept that being encouraged to be brief and not being able to provide detail can account for such significantly different evidence. The entry interview occurred relatively soon after the applicant's arrival in Australia, and at a point in time much closer to the events in question than his evidence in the visa application or at the protection visa interview. This variation, and the other discrepancies outlined above, supports a conclusion that the application was not abducted as claimed.
24. Considering the evidence in its totality, I am not satisfied that the applicant was abducted and tortured by any group, including the TMVP or Karuna group, or by the CID, as claimed. Given the discrepancies I have identified I am not prepared to accept that the applicant has provided

a truthful account of a lived experience. I find that the applicant has fabricated his abduction claim and I do not accept that this occurred.

25. In submissions to the delegate following the protection visa interview, the applicant's representative presented arguments as to why there is a real risk of harm to members of the LTTE like the applicant. It has not been claimed elsewhere that the applicant was a member of the LTTE. When asked by the delegate whether the LTTE tried to recruit him, the applicant indicated he was young when this was occurring and that it was mostly older boys who were recruited, and gave no indication that he was ever recruited or joined the group. As such, in the absence of any such claims by the applicant himself throughout the review process, I do not accept that the applicant was ever a member of the LTTE.

### **Illegal departure and seeking asylum**

26. I accept that the applicant left Sri Lanka by unofficial means as claimed, contrary to Sri Lankan law including the *Immigrants and Emigrants Act 1949* (I&E Act). I am satisfied that the Sri Lankan government may assume that, due to his mode of departure, the applicant sought asylum from Sri Lanka in Australia. I find that if he were to return to Sri Lanka he may be identified as a returning asylum seeker.

### **Refugee assessment**

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27. 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**

28. 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.
29. The applicant is a young Tamil male from the eastern province. Neither he nor his family were members of the LTTE, although he has claimed, and I have accepted that his father's role in the village required him to work with them. Country information before me indicates that while

the Sri Lankan government is sensitive to the potential re-emergence of the LTTE, Tamils are not currently at risk of persecution in Sri Lanka purely on account of their race, nor for originating from, or residing in, an area previously controlled by the LTTE. It does not support a finding that Tamil ethnicity of itself imputes LTTE membership or a pro-LTTE opinion, even when combined with other factors such as gender or place of origin. It does not indicate that the applicant would be imputed with being an LTTE supporter or of having a pro-LTTE opinion due to being a Tamil male from the Eastern Province or due to having lived in a former LTTE controlled area.<sup>4</sup> The UK Home Office considers that generally a person who evidences past membership or connection to the LTTE does not face a risk of serious harm from the Sri Lankan authorities, unless they have or are perceived to have a significant role in relation to post-conflict Tamil separatism.<sup>5</sup> In January 2017, DFAT assessed that those at highest risk of monitoring, arrest, detention or prosecution by authorities include high profile former LTTE members, including the former leadership, and members suspected of having committed terrorist or serious criminal acts in the war, or to have provided weapons or explosives to the LTTE, and people closely linked to such individuals.<sup>6</sup>

30. I do not accept that the applicant will be imputed as having any LTTE links of concern, including due to his father's past dealings with the LTTE as a village [official]. Neither the applicant nor his father were LTTE members and on the information before me I am not satisfied he is linked to any high profile former LTTE members or indeed that he has any links of substance. There is no indication that the applicant has been involved in Tamil separatist activities since the end of the war.
31. The US Department of State reported in 2015 of continuing human rights problems including harassment, arbitrary arrest, detention and torture of civil society activists, journalists, and certain LTTE sympathisers. However, both the US Department of State and more recently DFAT, identify a number of recent positive developments for Tamils in Sri Lanka, both politically and socially. These include decreases in monitoring and harassment of Tamil civilians, less restrictions on internal movement, the removal of checkpoints in the north and east, the return of land occupied by the military, increased Tamil participation in the police forces, greater representation for Tamils in all levels of government. DFAT reported in January 2017 that while some cases of monitoring continue to be reported, the overall prevalence of monitoring has greatly decreased under the Sirisena Government. Furthermore, members of the Tamil community also described a positive shift in interactions with authorities; indicating they feel able to question the motives of, or object to, monitoring or observation activities. The same report also observed that there were no official laws or policies that discriminate on the basis of ethnicity, including in respect of education, employment or housing.
32. Information before me does not suggest that TNA supporters with no other profile of substance, or their family members, would presently be of interest to the Sri Lankan authorities or any paramilitary groups in that country. I note that the International Truth and Justice Project reported 20 known cases of torture in 2015, of which 8 victims were involved in politics. This included persons who attended protests or election activities demanding rights for Tamils, and attending campaign meetings during presidential and parliamentary elections

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<sup>4</sup> DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105; US Department of State, "Sri Lanka - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320; UK Home Office, "Country Policy and Information Note, Sri Lanka: Tamil Separatism", version 4.0, March 2017, OG6E7028822.

<sup>5</sup> UK Home Office, "Country Policy and Information Note, Sri Lanka: Tamil Separatism", version 4.0, March 2017, OG6E7028822.

<sup>6</sup> DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD1053, 38.

in 2015 for MP's from the TNA and the Tamil National People's Front (TNPF).<sup>7</sup> Nevertheless I note that these reported cases represent only a fraction of the people who would have supported and voted for the TNA. Furthermore, subsequent reports observe that Tamils have a substantial level of political influence and their inclusion in political dialogue has increased since Sirisena came to power in 2015. There are a number of Tamil political parties, with the largest coalition of parties operating under the TNA umbrella. The TNA currently has 16 members of parliament and the TNA leader, Rajavaroatham Sampanthan, is leader of the National Opposition.

33. I do not accept that the applicant's father is currently of any ongoing adverse interest to the authorities or any groups in Sri Lanka. The applicant indicated that his father continues to reside at the same address with his mother and sister, and that he is still the subject of threats. I have accepted he did come to the adverse attention of pro-government paramilitary groups in the period following the war. However, given my concerns about the extent of the harm it is claimed he suffered, and in light of country information indicating improvements in the security situation in Sri Lanka under the Sirisena government, I am not satisfied such adverse attention is ongoing. I am prepared to accept that he continues to support the TNA and is publically known to hold such a view. Country information before me does not indicate that supporters of the TNA are presently targeted in Sri Lanka. I am not satisfied that he continues to be pursued due to his village [roles], which he no longer holds, or due the affiliations he had with the LTTE because of those roles. As such, I do not accept that the applicant is of adverse interest to the Sri Lankan authorities or any group, including the TMVP or Karuna groups in Sri Lanka for any reason related to his father's role as a village [official], because he is a known TNA support, or because of his prior dealings with the LTTE.
34. It is submitted that as a Tamil, the applicant may be jailed under the *Prevention of Terrorism Act 1979* (PTA) without cause. During the war, more Tamils were detained under the PTA than any other ethnic group. DFAT notes that this was primarily due to LTTE members and supporters being almost entirely Tamil, but that there were also likely instances of discrimination in the application of these laws, on the basis of ethnicity. Since 2015 the Sirisena government has released some PTA detainees and committed to reforming the PTA. DFAT assesses that there are currently fewer individuals detained under the PTA than during the war.<sup>8</sup> The information before me does not support a conclusion that his ethnicity, low level involvement in the TNA, his unlawful departure from Sri Lanka or having sought asylum in Australia would expose him to such a risk if he were to return. There is no indication he has been involved in Tamil separatist activities since the end of the war. I am not satisfied that a person with the applicant's profile presently faces more than a negligible chance of being detained under the PTA in the current political climate in Sri Lanka.
35. I do not accept there is a real chance of the applicant experiencing serious harm in Sri Lanka for reasons of his ethnicity, gender, his origin from or residence in a former LTTE controlled area his, because his father is a known TNA supporter or because he himself is a low level TNA supporter, or due to any of his father's past dealings with the LTTE.

#### *Illegal departure and returning asylum seeker*

36. According to DFAT, between 2008 and 2015, over 1,500 asylum seekers were returned from Australia to Sri Lanka as well many from the US, Canada, the UK and other European countries, the majority of which were Tamil. Of the thousands of returnees who have returned since 2009

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<sup>7</sup> The International Truth and Justice Project (ITJP), "Silenced: survivors of torture and sexual violence in 2015", 7 January 2016, CIS38A801275.

<sup>8</sup> DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105 at 3.8;

there have been relatively few allegations of torture or mistreatment. I accept that persons with certain profiles returning to the country, including senior LTTE members, separatist or other political connections, may face a risk of harm on return. However I am not satisfied these reports are indicative of the circumstances that would be faced by the applicant were he to return to Sri Lanka after having sought asylum, as I do not accept he has any such profile. Country information before me does not support a conclusion that being a returning asylum seeker would expose the applicant to a real risk of harm.

37. DFAT reports that upon arrival returnees to Sri Lanka are processed by agencies including the Department of Immigration and Emigration, the State Intelligence Service and the CID, who check travel documents and identity information against immigration databases, intelligence databases and the records of outstanding criminal matters. As the applicant departed Sri Lanka without a passport, it is likely any return travel to Sri Lanka would be undertaken on a temporary travel document. Country information indicates, and I accept, that as a returnee using a temporary travel document it is likely that the applicant would be questioned upon return, that his family may be contacted and that checks may be undertaken with police in his home area. DFAT assess that standard procedures are conducted in relation to returnees irrespective of ethnicity or religion, and that returnees are not subject to mistreatment while undergoing this processing. I am not satisfied the applicant faces a real chance of harm as a returning Tamil asylum seeker.
38. It is an offence under the *Immigrants and Emigrants Act 1949* (I&E Act) to depart Sri Lanka other than via an approved port of departure, such as a seaport or airport, which I have accepted the applicant did. DFAT reports that returning suspected offenders are arrested at Colombo's Bandaranaike International Airport. After police investigations are completed, which may take up to 24 hours after arrival, the individual is transported to the Magistrate's Court. The Magistrate then makes a determination as to the next steps for each individual. Should a magistrate not be available, for example, because of a weekend or public holiday, those charged may be held at a nearby prison. Sources including the US Department of State report that generally prison conditions in Sri Lanka are poor due to old infrastructure, overcrowding, and shortage of sanitary and other basic facilities. I accept that the applicant may be briefly detained in such conditions, possibly over a weekend or public holiday.
39. Country information suggests that no returnee who was merely a passenger on a people smuggling venture had been given a custodial sentence for illegal departure. However, fines have been issued to as a deterrent towards future illegal departures, which can be up to 200,000 Sri Lankan rupees / AUD 2,000, and may be paid by instalment. If a person pleads guilty, they will be fined and are then free to go. In most cases where a returnee pleads not guilty, returnees are immediately granted bail by the magistrate on the basis of personal surety or they may be required to have a family member act as guarantor. Where a guarantor is required, returnees may sometimes need to wait until a family member comes to court to collect them.<sup>9</sup>
40. On the evidence before me I am satisfied that the applicant was not involved in people smuggling, but was merely a passenger. I am satisfied that should the applicant plead guilty, he would be able to pay any fine, possibly by instalment. The applicant indicated that his family are operating a small business and can support themselves. I do not accept that the imposition of any such fine will amount to a hardship in this case that will threaten his capacity to subsist.

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<sup>9</sup> DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105 at 5.22.

41. I am not satisfied that any questioning, brief detention, or fine that the applicant may be subject to would reach the necessary level of being a threat to his life or liberty, significant physical harassment or ill treatment, or would otherwise constitute serious harm under s.5J(5) of the Act, even when considered together. In reaching this conclusion I have had regard to the nature and gravity of the possible brief loss of liberty and other potential penalties, and considered the applicant's personal circumstances.<sup>10</sup> There is no indication that the applicant has any particular vulnerabilities and I have found he has no adverse profile in Sri Lanka. I am not satisfied that any questioning and temporary detention the applicant may undergo, even considering the generally poor prison conditions he may face, would constitute serious harm, as this will be for only a brief period. I do not accept that the imposition of a fine will amount to a hardship that will threaten his capacity to subsist, as I am satisfied the applicant will be able to may arrangement for payment, possibly by instalment.
42. I am also not satisfied that any questioning, detention, or fine would involve systematic and discriminatory conduct of the Sri Lankan authorities per s.5J(4)(c) of the Act. There is no suggestion on the information that any such treatment the applicant may face would be different to that faced by suspected illegal departees generally.
43. As such, I do not accept that the applicant faces a real chance of persecution for reasons of his illegal departure from Sri Lanka, due to any questioning, detention or penalty because of his illegal departure, or for being a returning asylum seeker; or for belonging to any particular social group or being imputed with any political opinion by virtue of being an illegal departee or returning asylum seeker.

#### **Refugee: conclusion**

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

#### **Complementary protection assessment**

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45. A criterion for a protection visa is that the applicant is a non-citizen in Australia (other than a person who is a refugee) in respect of whom the Minister (or Reviewer) is satisfied Australia has protection obligations because there are substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm.

#### **Real risk of significant harm**

46. Under s.36(2A), a person will suffer 'significant harm' if:
- the person will be arbitrarily deprived of his or her life
  - the death penalty will be carried out on the person
  - the person will be subjected to torture
  - the person will be subjected to cruel or inhuman treatment or punishment, or
  - the person will be subjected to degrading treatment or punishment.

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<sup>10</sup> *MIBP v WZAPN; WZARV v MIBP* (2015) 254 CLR 610.

47. I have not accepted that there is a real chance the applicant will suffer harm for reasons of his Tamil ethnicity, because he is from an area formerly controlled by the LTTE, because his father was a village [official] affiliated with the LTTE, because of his and his father's association with the TNA, or because he has sought asylum in Australia. I also not accepted that there is a real chance of the applicant experiencing harm by being detained under the PTA. The requirement for there to be a "real risk" of significant harm applies the same standard as the "real chance" test.<sup>11</sup> As such, for the reasons set out above explaining why the applicant does not face a real chance of harm, I am also satisfied that there is not a real risk that he would face harm, including significant harm, for any of these reasons were he to return to Sri Lanka.
48. I have accepted that there is a real chance that the applicant may be questioned, detained for a short period and fined upon return to Sri Lanka due to his illegal departure from that country. Country information indicates that thousands of asylum seekers have returned to Sri Lanka since 2009, including from various western nations including Australia, with relatively few allegations of torture or mistreatment. While being aware that DFAT does not routinely monitor the situation of returnees, it has assessed that the risk of torture or mistreatment for the majority of returnees is low and continues to reduce, including for those suspected of offences under the I&E Act.<sup>12</sup> This is consistent with the view of the UK Home office, which notes that unlike in the past, returnees including those who have a previous connection with the LTTE are able to return to their communities without suffering ill-treatment. Civil society groups on the ground did not report recent issues of ill-treatment as at March 2017.<sup>13</sup>
49. In light of the country information and the applicant's individual circumstances, I am not satisfied that any brief detention, including in a prison, and any fine or questioning amounts to or would lead to a real risk of the applicant being subject to the death penalty, being arbitrarily deprived of his life or tortured. I am also not satisfied that there any such treatment would be carried out with an intention to inflict pain or suffering that is cruel or inhuman in nature, severe pain or suffering, or to or cause extreme humiliation. Furthermore, I am not satisfied that persons with the applicant's profile are subject to treatment different to that faced by any individual suspected of departing Sri Lanka illegally.
50. I find that any questioning, detention or fine the applicant may face arising from his illegal departure does not amount to a real risk of significant harm as defined in s.36(2A).

### **Complementary protection: conclusion**

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

### **Decision**

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

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<sup>11</sup> *MIAC v SZQRB* (2013) 210 FCR 505.

<sup>12</sup> DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105 at 4.22;

<sup>13</sup> UK Home Office, "Country Policy and Information Note, Sri Lanka: Tamil Separatism", version 4.0, March 2017, OG6E7028822 at 2.4.10.

## Applicable law

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

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

...

***bogus document***, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly

...

***cruel or inhuman treatment or punishment*** means an act or omission by which:

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature;

but does not include an act or omission:

- (c) that is not inconsistent with Article 7 of the Covenant; or
- (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

***degrading treatment or punishment*** means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:

- (a) that is not inconsistent with Article 7 of the Covenant; or
- (b) that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

***receiving country***, in relation to a non-citizen, means:

- (a) a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or
- (b) if the non-citizen has no country of nationality—a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.

...

***torture*** means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant;

but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

#### **5H Meaning of refugee**

(1) For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a refugee if the person:

- (a) in a case where the person has a nationality—is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or
- (b) in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Note: For the meaning of ***well-founded fear of persecution***, see section 5J.

...

## 5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
  - (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
  - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
  - (c) the real chance of persecution relates to all areas of a receiving country.

Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.

Note: For effective protection measures, see section 5LA.
- (3) A person does not have a well-founded fear of persecution if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country, other than a modification that would:
  - (a) conflict with a characteristic that is fundamental to the person's identity or conscience; or
  - (b) conceal an innate or immutable characteristic of the person; or
  - (c) without limiting paragraph (a) or (b), require the person to do any of the following:
    - (i) alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith;
    - (ii) conceal his or her true race, ethnicity, nationality or country of origin;
    - (iii) alter his or her political beliefs or conceal his or her true political beliefs;
    - (iv) conceal a physical, psychological or intellectual disability;
    - (v) enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
    - (vi) alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.
- (4) If a person fears persecution for one or more of the reasons mentioned in paragraph (1)(a):
  - (a) that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and
  - (b) the persecution must involve serious harm to the person; and
  - (c) the persecution must involve systematic and discriminatory conduct.
- (5) Without limiting what is serious harm for the purposes of paragraph (4)(b), the following are instances of **serious harm** for the purposes of that paragraph:
  - (a) a threat to the person's life or liberty;
  - (b) significant physical harassment of the person;
  - (c) significant physical ill-treatment of the person;
  - (d) significant economic hardship that threatens the person's capacity to subsist;
  - (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
  - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.
- (6) In determining whether the person has a **well-founded fear of persecution** for one or more of the reasons mentioned in paragraph (1)(a), any conduct engaged in by the person in Australia is to be disregarded unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.

## 5K Membership of a particular social group consisting of family

For the purposes of the application of this Act and the regulations to a particular person (the **first person**), in determining whether the first person has a well-founded fear of persecution for the reason of membership of a particular social group that consists of the first person's family:

- (a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in paragraph 5J(1)(a); and
- (b) disregard any fear of persecution, or any persecution, that:
  - (i) the first person has ever experienced; or

- (ii) any other member or former member (whether alive or dead) of the family has ever experienced;

where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.

Note: Section 5G may be relevant for determining family relationships for the purposes of this section.

#### **5L Membership of a particular social group other than family**

For the purposes of the application of this Act and the regulations to a particular person, the person is to be treated as a member of a particular social group (other than the person's family) if:

- (a) a characteristic is shared by each member of the group; and
- (b) the person shares, or is perceived as sharing, the characteristic; and
- (c) any of the following apply:
  - (i) the characteristic is an innate or immutable characteristic;
  - (ii) the characteristic is so fundamental to a member's identity or conscience, the member should not be forced to renounce it;
  - (iii) the characteristic distinguishes the group from society; and
- (d) the characteristic is not a fear of persecution.

#### **5LA Effective protection measures**

- (1) For the purposes of the application of this Act and the regulations to a particular person, effective protection measures are available to the person in a receiving country if:
  - (a) protection against persecution could be provided to the person by:
    - (i) the relevant State; or
    - (ii) a party or organisation, including an international organisation, that controls the relevant State or a substantial part of the territory of the relevant State; and
  - (b) the relevant State, party or organisation mentioned in paragraph (a) is willing and able to offer such protection.
- (2) A relevant State, party or organisation mentioned in paragraph (1)(a) is taken to be able to offer protection against persecution to a person if:
  - (a) the person can access the protection; and
  - (b) the protection is durable; and
  - (c) in the case of protection provided by the relevant State—the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system.

...

#### **36 Protection visas – criteria provided for by this Act**

...

- (2) A criterion for a protection visa is that the applicant for the visa is:
  - (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee; or
  - (aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or
  - (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
    - (i) is mentioned in paragraph (a); and
    - (ii) holds a protection visa of the same class as that applied for by the applicant; or
  - (c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
    - (i) is mentioned in paragraph (aa); and
    - (ii) holds a protection visa of the same class as that applied for by the applicant.
- (2A) A non-citizen will suffer **significant harm** if:
  - (a) the non-citizen will be arbitrarily deprived of his or her life; or
  - (b) the death penalty will be carried out on the non-citizen; or
  - (c) the non-citizen will be subjected to torture; or
  - (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
  - (e) the non-citizen will be subjected to degrading treatment or punishment.

- (2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:
- (a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or
  - (b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or
  - (c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

...

*Protection obligations*

- (3) Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.
- (4) However, subsection (3) does not apply in relation to a country in respect of which:
- (a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or
  - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.
- (5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:
- (a) the country will return the non-citizen to another country; and
  - (b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.
- (5A) Also, subsection (3) does not apply in relation to a country if:
- (a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and
  - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country.

*Determining nationality*

- (6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.
- (7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.