



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

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA18/04512

Date and time of decision: 5 September 2018 11:22:00  
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 a 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] September 2012 he arrived by boat in Australia. On 16 March 2017 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 2 March 2018 a delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa. The delegate accepted the applicant's [specified relatives] were killed and that [other relatives] joined the Liberation Tigers of Tamil Eelam (LTTE) in 2002 but he did not accept the applicant helped transport his [relatives] when they returned to visit their [family] or that the applicant was wanted by the authorities in connection with his family's LTTE links or that the authorities went to his home looking for him. He did not accept the applicant had a profile of interest to the authorities and 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. On 27 March 2018 the IAA received an email from the applicant's representative attaching a statement from the applicant. To the extent the statement engages in argument with the delegate's decision based on information which was before the delegate I have had regard to these arguments. In part it also restates claims made to the delegate which are already before me. It also contains new information.
5. In the statement the applicant refers to two news articles published just prior and just after the delegate's decision was made. No copies or extracts were provided, only references and hyperlinks. The IAA Practice Direction<sup>1</sup> relevantly states that in relation to new country information reports, copies or extracts must be provided, and hyperlinks are not acceptable. The applicant was assisted in the preparation of the statement by his representative. His representative is a solicitor and a registered migration practitioner who would be aware of the requirements of the IAA Practice Direction. I have decided not to accept this information.
6. In his statement the applicant states that it is the people who complain to organisations like the UNHCR, ICRC and IOM that are targeted and harmed by the authorities. This is new information. The applicant has not provided evidence in support of this information or indicated that it is something he only recently became aware of. The applicant has not claimed he or his family have complained to organisations like the UNHCR. I am not satisfied that there are exceptional circumstances to justify considering this information. The applicant has also not satisfied me as the matters in s.473DD(b).
7. In his statement the applicant says his doctor has given him a referral for a counsellor and that he is waiting for an appointment. This is new information. His mental health and his suicide attempt in March 2017 was squarely at issue in the SHEV interview and he provided the Department with a copy of his hospital discharge form in relation to his suicide attempt a

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

month later but no further submissions were made in this regard. He has not said when he obtained a referral or when his appointment is scheduled for. The new information contains very little detail. I am not satisfied exceptional circumstances exist to justify consideration of the information.

8. I have obtained the 2018 DFAT report on Sri Lanka<sup>2</sup>. I am satisfied there are exceptional circumstances to justify considering this recently published report which documents the changing conditions in Sri Lanka in relation to the treatment of Tamils, including those who left Sri Lanka illegally and sought asylum overseas. It was only published after the delegate's decision, and the delegate relied upon the earlier version of this report.
9. The applicant requests the opportunity for a further interview to discuss his refugee claims. In the circumstances I do not consider an interview is necessary. I consider the applicant has had adequate opportunity to present his claims. He has been represented since lodging his SHEV application by the same firm, who were also present during his SHEV interview, and who assisted him with lodging an extensive post-interview submission. He has not explained why any further important information could not be provided in writing to the IAA and any new information provided in an interview could only be accepted in exceptional circumstances.

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

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

- He is a young Tamil male from [City 1] in the Eastern Province of Sri Lanka.
- Three of his [relatives, Relative A, Relative B, and Relative C,] were killed by the army on suspicion of LTTE involvement; one was a LTTE supporter.
- In 2002 two of his [relatives, Relative D and Relative E,] joined the LTTE. They lived in his neighbourhood before joining and he spent a lot of time with them and escorted them home when they wanted to visit their [family].
- In 2002 and 2003 the army went to his family home looking for him and [Relative D and Relative E]. Following these incidents and in fear of his life he fled to [Country 1] in [year] returning in 2008.
- His [Relative F] was harassed by the authorities about the whereabouts of [Relative D and Relative E]. In 2007 she was shot dead in a nearby village and he believes this was by the army.
- His family were also harassed by the authorities who were looking for him and as a result his sister fled to [Country 2] in 2006 and has not returned.
- In 2009 he moved in with his brother in [Town 1], but restricted his movement and when he heard that people were being abducted in white vans in the area he fled by boat for Australia [in] September 2012 in fear of his safety.
- On [a date in] May 2013 the authorities went to his home looking for him and interrogated and injured his mother.
- In January 2014 the authorities went to his family home and took his passport.
- He left Sri Lanka illegally and will return 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 his evidence, including his documentary evidence, I accept he is [an age] year old Tamil male from [City 1] in the Eastern Province of Sri Lanka and that his parents, [and specified family] still live in Sri Lanka. I also accept he completed schooling to [specified level] and [vocational] training and has worked as [an occupation] and currently works [in a different role].
12. The applicant claims that [Relative A, Relative B, and Relative C] were killed by the army in [specified years], respectively. In the bio-data and arrival interviews he said one of [these relatives] was shot dead in front of him, however this claim was not repeated in his 2013 Protection Visa application, SHEV application or interview and I do not accept it. I have found the claims [that Relative A, Relative B, and Relative C] were killed to have been consistently made. In the SHEV interview he said his [extended] family had supported the LTTE and that was why they were targeted. He has also provided copies of [these relatives'] death certificates, which are broadly consistent with his claims. The country information before me indicates tens of thousands of people were killed on both sides during the conflict.<sup>3</sup> In light of the above, I accept the applicant's [Relative A, Relative B, and Relative C] were killed during the conflict as suspected or actual supporters of the LTTE.
13. The applicant claims his [Relative D and Relative E] joined the LTTE in 2002 and that he had spent a lot of time with them when he was young and associated with them after they joined the LTTE. He helped to transport them into their home village (which was also his home village) to visit their [family] after they had joined the LTTE. The country information before me indicates that many thousands had suspected links with the LTTE<sup>4</sup> and I am willing to accept his [Relative D and Relative E], who he spent time with when younger, joined the LTTE in 2002. In the SHEV interview he said [these relatives] visited their [family] every month commencing about six months after joining the LTTE in 2002 and that he last saw them in about May 2003. Unlike the delegate I am willing to accept he escorted them on occasion from the river into their home village between 2002 until May 2003 and that he has not seen them since. He was able to provide a lot of detail about this when questioned by the delegate in the SHEV interview and his explanation for not mentioning it earlier (in his 2013 Protection Visa Application or arrival interviews) because he was afraid to, I accept. While the delegate had concerns with this aspect of the claim because the applicant said he only had to transport them [a short distance] on his bike, stating that it would have been quicker and less inconspicuous if they were on foot based on the applicant's response it appeared his role was more as a "look-out" to ensure authorities were not nearby rather than simply to transport his [relatives].
14. The applicant claims that the army suspected him of being an LTTE member because of his family's LTTE links and his association with [Relative D and Relative E], including that people might have seen him escort them. Because of this he claims the army interrogated his family about his and his [relatives'] whereabouts and activities in late 2002 and 2003 but he was not at home on any of these occasions but that this led him to flee Sri Lanka for [Country 1] in fear of his safety in [year] and led to his sister fleeing Sri Lanka for [Country 2] in 2006 (and she has not returned). He also claims his [Relative F] was harassed and that she was shot dead in a neighbouring village in 2007, he suspects, by the army and that his entire family feared for their safety because of these incidents. He provided documentary evidence of his travel, and I

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<sup>3</sup> DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105.

<sup>4</sup> Danish Immigration Service, "Human Rights and Security Issues concerning Tamils in Sri Lanka", 71, 1 October 2010, CIS19345.

accept he legally travelled to [Country 1] in [year] and returned to Sri Lanka in 2008. The applicant also provided a copy of the death certificate for his [Relative F] and I accept she was shot dead in 2007. I am willing to accept she may have been questioned about her [family's] LTTE activities in 2002 or 2003 however in the absence of further information I consider the claim she was shot dead because of her [family's] involvement in the LTTE some four or five years later speculative and I do not accept this aspect of the claim. In the SHEV interview when the delegate asked the applicant to tell him about his sister the applicant said that the authorities came looking for him three or four times but that he thinks it was more than that and that his sister had to leave the country in 2006 because of this. I am willing to accept his sister travelled to [Country 2] in 2006 and has not returned because this has been consistently claimed. However I find the claim she left because the family were being harassed by the authorities in connection with the applicant lacking in detail and unsupported. Further, if his family were first harassed by the authorities in 2002 it is unclear why his sister only left some four years later if it was in connection with this. The applicant did not explain this despite being given the opportunity. I do not accept his sister left Sri Lanka because the authorities were harassing her about the applicant's whereabouts. For the following reasons I do not accept the applicant was pursued by the authorities on suspicion of LTTE links at that time or that this led him to flee to [Country 1] in [year] in fear of his safety:

- The applicant was able to legally travel on his passport to [Country 1] in [year] and return to Sri Lanka in 2008 without issue. The country information before me indicates authorities kept alert lists or lists of wanted people at the airport and that people on those lists would be passed onto the relevant department, whether it was the State Intelligence Service, Immigration, the police or the courts when intercepted at the airport.<sup>5</sup> In the SHEV interview the applicant confirmed his passport was still valid when he returned to Sri Lanka and that he had no issues at the airport.
- I consider it implausible that if he were genuinely of interest to the authorities in connection with an adverse security profile that he was not questioned or detained by the authorities in 2002 or 2003 prior to his departure from Sri Lanka, given the authorities knew where he lived.
- The applicant's evidence in relation to the authorities' claimed visits to his home are severely lacking in detail and not entirely consistent. I note he claims he was never at home when they visited which may partly explain this.
- As at 2002, [Relative A and Relative B] had been dead for some [number] and [number] years, respectively. [Relative C] was killed [more recently] but the applicant has not provided any credible evidence linking any of [these relatives] with his family's claimed harassment by authorities in connection with his suspected LTTE links in 2002, despite being given an opportunity to do so in the SHEV interview. His [Relative F's] death was years after he claims his family were first harassed by authorities in connection with him and I have not accepted she was killed by the army.
- The applicant's brother, who is only one year older than him, has remained in Sri Lanka and the applicant has not claimed his brother was ever questioned or harassed by the authorities in connection with his family's LTTE links. When the delegate raised this as an issue in the SHEV interview the applicant said he was specifically targeted because he had associated with his [Relative D and Relative E], his brother had not, and he mentioned the fact he had escorted them. When the delegate pointed out that he had said he had escorted them so that no one would see them the applicant said he could

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<sup>5</sup> Danish Immigration Service, "Human Rights and Security Issues concerning Tamils in Sri Lanka", 71, 1 October 2010, CIS19345.

not be sure members of the public did not see them and report them to the authorities. However, in the absence of further detail I find this claim unsupported.

- Despite claiming to have feared for his safety after the authorities looked for him in 2002 and 2003 (leading him to flee to [Country 1]) he appears to have continued to escort his LTTE linked [Relative D and Relative E] into his village on a monthly basis up until May 2003.
15. I do not accept the applicant was pursued by the authorities on suspicion of LTTE involvement in 2002 and 2003 and it follows that I do not accept the authorities went to his home looking for him when he was in [Country 1] or on his return. He claims he moved to [Town 1] to live with his brother (where he lived for three years until his departure in 2012) because he no longer felt safe in his own neighbourhood. He has variously claimed that he restricted his movement, did not really work (only [working for] people he knew) and that when he knew people were being rounded up he would go into hiding while in [Town 1]. However, when the delegate asked if the authorities ever came looking for him there, after some equivocating, he eventually said that they did not. I do not accept he was wanted by the authorities in connection with an adverse security profile when he left Sri Lanka in 2012 or that the authorities have gone to his home looking for him since he has been in Australia.
  16. In the SHEV interview the applicant mentioned he had been admitted to a hospital for about [time period] after a suicide attempt and that this was due to mental health issues and depression. When the delegate asked if he had any documentation in support of this, his representative said she would forward something to the Department. A copy of a “[named health service]” discharge summary was annexed to a post-interview submission. It states the applicant was admitted [in] March 2017 for [a condition] and discharged [number] days later and that he was to commence a mental health plan. I accept the applicant attempted to commit suicide in March 2017 and that he suffers some mental health issues. However, in the absence of any further information regarding his condition, such as a diagnosis, treatment he is receiving and details of any more recent episodes and given it was almost one and a half years ago and that he currently works, I do not accept the current condition of the applicant’s mental health to be acute.
  17. At some stage the applicant provided a note written in Tamil to the Department in support of his claims for protection. The note is dated 2013 and appears to have been lodged in connection with his 2013 Permanent Protection Visa application; regardless no English translation has been provided and it was not referred to by the applicant in his SHEV application, interview or post-interview submission. I place no weight on this document.
  18. I accept the applicant left Sri Lanka illegally and that on his return he will be identifiable as someone who has attempted to seek asylum in another country.

## **Refugee assessment**

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19. 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

20. 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.

21. I accept the applicant is [an age] year old Tamil male from the Eastern Province of Sri Lanka and that three of his [relatives] were killed during the conflict. I also accept two of his [relatives, Relative D and Relative E,] joined the LTTE some six years ago but that he has not seen them since May 2003. I do not accept the applicant came to the adverse attention of the authorities because of his association with his [Relative D and Relative E] or his family's LTTE links and I do not accept the applicant was wanted by the authorities in connection with an adverse security profile when he left Sri Lanka or that the authorities have continued to harass his family about his whereabouts since coming to Australia. I accept the applicant suffers from some mental health issues but I do not accept these are acute.

22. Based on the country information before me, conditions in Sri Lanka have significantly improved since the applicant left in 2012, particularly after the election of the Sirisena government in 2015, which was relevantly elected on a platform of ethnic reconciliation, transparency and the protection of individual freedoms and rights. After its election DFAT<sup>6</sup> reported that the Sirisena government 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. More recent country information notes that the Sirisena government's progress has been slow, that there are still reports of the systemic use of torture, that the PTA remains in force and that to date, little has been done to hold authorities accountable for human rights abuses committed during the conflict.<sup>7</sup>

23. Nevertheless DFAT<sup>8</sup> has also reported that Tamils have gained a significant amount of political power and are no longer harassed by the authorities for their involvement. While Tamils are underrepresented in the public sector this is due to a number of factors, such as disrupted education and language constraints rather than officially sanctioned discrimination. DFAT report that monitoring of Tamils in day to day life has decreased under the Sirisena

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

<sup>7</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>8</sup> DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064.

government.<sup>9</sup> It notes that the Tamil community in the north and east have reported that certain activities, such as public gatherings, continue to be monitored by the authorities but that they felt more empowered to question authorities about these monitoring activities. Overall DFAT assesses that Tamils face a low risk of official or social discrimination on the basis of ethnicity, including in relation to access to education, employment and housing. Consistent with this general reporting the UK Home Office notes that being of Tamil ethnicity does not, in itself, warrant international protection.<sup>10</sup>

24. 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. As at mid-2016 less than 50 suspects being investigated under the PTA by the Terrorism Investigation Division were in detention. While noting reports of the use of torture by authorities against suspects in the Tamil community DFAT states it has been unable to verify more recent allegations and reports that local sources indicate this behaviour is not sanctioned by senior police but rather broadly the result of poor policing methods and a lack of training.<sup>12</sup> The country information before me also indicates that while ongoing this practise is less prevalent than it once was.<sup>13</sup>
25. In a post interview submission the applicant's representative provided copies of a number of news articles broadly in support of the applicant's claims he will be abducted, tortured or otherwise harmed by authorities on his return to Sri Lanka. However many of these articles were somewhat dated and I consider the comprehensive reports of the UN Special Rapporteur, DFAT and the UK Home Office referred to above more informative on the use of torture and the treatment of Tamils by the authorities in Sri Lanka.
26. 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 court order, arrest warrant or order to impound their passport.<sup>14</sup>
27. The country information indicates the conditions for Tamils in Sri Lanka have significantly improved since the current government came into power, but could be improved. Those who come to the adverse attention of the authorities may be severely mistreated by them. Being of Tamil ethnicity however, in itself, is not sufficient; rather the country information indicates that those that remain at real risk are those with separatist, criminal and certain political backgrounds or those with links to high level LTTE members currently wanted by authorities. Based on the applicant's profile, his broader family's LTTE links and that I do not accept the applicant was wanted by the authorities in connection with an adverse security profile when

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<sup>9</sup> DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105. 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", 15 June 2017, OG6E7028826.

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

<sup>13</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; DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826.

<sup>14</sup> DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105, pp.18,33; DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064.

he left Sri Lanka, I am not satisfied the applicant faces a real chance of harm by reason of his origin, ethnicity, family connections, or past experiences in Sri Lanka.

28. I accept that on return the applicant may be identified by the authorities as a returning asylum seeker. DFAT notes that the biggest challenge facing returnees are bureaucratic inefficiencies, rather than official discrimination, which can result in delays in obtaining official documentation and support. Returnees have also reported suffering societal discrimination which, for many, affects their ability to secure employment and accommodation on their return. Most also have to repay costs associated with their journey. DFAT also notes that only 0.3 per cent of returnees interviewed by the UNHCR in 2016 indicated they had security concerns upon their return. DFAT is also aware of anecdotal evidence of surveillance of returning asylum seekers in the north as recently as 2017. However, the applicant is from the Eastern Province where he currently has family and he has not indicated he would relocate to the north. Based on the country information detailed above the applicant may initially face societal discrimination and associated difficulties reintegrating however I am not satisfied the treatment or difficulties the applicant may experience on his return, on account of his being a returning asylum seeker, would amount to 'serious harm'.
29. I accept the applicant left Sri Lanka illegally and that on return he may be identified by the authorities as such. DFAT<sup>15</sup> and the UK Home Office<sup>16</sup> indicate that following arrival at the airport, returnees will be processed in a group by a number of government agencies. The process can take several hours. If returning on a temporary travel document, police will undertake further investigations including contacting others like their family and town police, for example, to ensure the returnee is not trying to hide their identity due to a criminal or terrorist background, outstanding court order or arrest warrant. Overall, DFAT understands returnees are not mistreated during processing at the airport. 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 photographed, fingerprinted, a statement will be taken and then police will 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. Those charged must 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 involves legal and transportation costs. Cases are only heard when all members of a people smuggling venture have been located, which can result in long delays. While penalties can technically include imprisonment, the country information indicates no mere passenger has been given a custodial sentence and fines for a first offence are relatively low starting at 3,000 rupees, which can be paid in instalments. If pleading guilty they will generally be issued with fine but are then free to go. If not pleading guilty they will generally be granted bail on the basis of personal surety or guarantee by a family member, in which case they will need to wait for that family member to collect them. DFAT also notes that the cumulative costs for returnees associated with the court process can be high.
30. There is no evidence before me to suggest the applicant has a criminal or terrorist background or outstanding court orders or arrest warrants or is otherwise wanted by the authorities. There is nothing to suggest the applicant was a facilitator or organiser of a people smuggling venture.
31. The applicant is likely to be detained at the airport for processing and may be held in a holding cell for up to two days if a Magistrate is not available, as part of the usual procedures for

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<sup>15</sup> DFAT, "DFAT Country Information Report – Sri Lanka", 23 May 2018, CIS7B839411064.

<sup>16</sup> UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil separatism", 15 June 2017, OG6E7028826.

returnees who left illegally. As the applicant does not have an adverse security profile I am satisfied there is not a real chance he would be otherwise detained. The applicant has not indicated he would plead not guilty. If the applicant pleads guilty he will be fined and free to leave immediately. Given his family support in Sri Lanka, education and work history and option to pay a fine in instalments I am not satisfied on the evidence before me that he would not be able to pay a fine, if imposed or that this would threaten his capacity to subsist. If he does plead not guilty he will be immediately granted bail on certain conditions, he may be granted bail on personal surety or guarantee by a family member. There is nothing to suggest a family member would be unable or unwilling to act as guarantor, if required. He may also have to meet cumulative costs associated with the court process.

32. I accept there is a real chance the applicant, as a consequence of his illegal departure, may be interviewed, charged, briefly held, fined, and may 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.

33. I am not satisfied the applicant faces a real chance of persecution for reason of his illegal departure.

#### **Refugee: conclusion**

34. 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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35. 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**

36. 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.

37. For the reasons already discussed, 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 any of these circumstances would result in the applicant suffering '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.

38. As detailed above, I accept that the applicant may initially face societal discrimination and associated difficulties reintegrating. I am not satisfied that any of these circumstances of themselves, even when coupled with what he may experience for having departed Sri Lanka illegally, would result in the applicant suffering 'significant harm'.
39. 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>17</sup> For the same reasons, I am also not satisfied the applicant would face a 'real risk' of significant harm.

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

40. 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>17</sup> *MIAC v SZQRB* [2013] 210 FCR 505.

## Applicable law

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

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

In this Act, unless the contrary intention appears:

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***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.