



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

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA18/04665

Date and time of decision: 24 September 2018 09:57:00  
J Maclean, Reviewer

**Decision**

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

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

## Background to the review

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### Visa application

1. The referred applicant (the applicant) claims to be a Tamil Hindu born in the Northern Province of Sri Lanka. On 14 March 2017 he lodged an application for a Safe Haven Enterprise visa (SHEV). A delegate of the Minister for Immigration and Border Protection (the delegate) refused the grant of this Visa on 24 March 2018.

### Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
3. On 16 April 2018 the applicant's representative, [Agency 1], provided the IAA with a submission signed by the applicant. To the extent the submission reiterates the applicant's claims, refers to caselaw, or to country information that was before the delegate, and responds to the delegate's findings, I consider this to be argument rather than new information, and I have had regard to it.
4. In the submission it is contended that the applicant's responses to the decision is based on the following factors:
  - At the first interview the case officer stated at the commencement of the interview that his response should be either yes or no, or a one line answer.
  - The general talk in the camp where he was living was that all detainees would be returned to Sri Lanka and all information taken from them would be shared with Sri Lankan authorities. The applicant had no idea this was just a rumour and was reluctant to divulge all his information, especially about his family, in case he was returned and the information used against him.
  - The interpreters used did not interpret properly, and tended to be either Tamil Malays, or Tamils who had been born in Australia, and therefore did not have a proper understanding of the applicant's dialect.
  - There were no independent legal advisors to provide the applicant with legal advice.
5. In the information before me is a copy of a transcript of the Enhanced Screening interview, and audio recordings from two interviews conducted with the applicant. I have reviewed the transcript, and listened to both interviews. As the applicant's representative has not specified the date of the 'first interview' being referred to I will consider each of the three interviews below. The Enhanced Screening interview was conducted in June 2013. At the commencement of that interview the transcript reports the applicant was asked 'Do you understand the interpreter' and he said 'yes'. It is not apparent to me from the transcript that the applicant was requested to provide only yes or no, or one line answers. Although many of the recorded responses are short, the applicant was given a number of opportunities to provide relevant information, including being asked at the end of the interview whether he had any other reasons for not wishing to return to Sri Lanka, and whether he had anything to add to what he had already said.
6. The second interview, the Irregular Maritime Arrival & Induction Interview (the Entry interview), was conducted on 2 August 2013. At the start of that interview the applicant was

advised 'this interview is your opportunity to provide any reasons why you should not be removed from Australia. If you do not answer questions a decision may be made on the basis of the information we have. You are expected to give true and correct answers to the questions I ask. You should understand that if the information you give at any future interview is different from what you tell me now, this could raise doubts about the reliability of what you have said'. The interviewer asked the applicant 'Do you understand what I have said?' and the applicant responded 'yes'. The interviewer did not specify the applicant should respond with only yes, no or a one line answer. At the conclusion of the interview the applicant was asked 'Is there anything else I have not asked you that you would like to say?' and the applicant said 'no'.

7. The third interview was conducted on 25 January 2017 (the SHEV interview). At the start of that interview the applicant was told to let the delegate know immediately if he did not understand the interpreter, or he thinks the interpreter does not understand him. He was then asked whether he had any objection to the interpreter being used for the interview, and said 'no'. The delegate also advised the applicant to ask him to repeat or reword a question if he did not understand something, and that details of his claims for protection would not be shared with the authorities in Sri Lanka or the public, and of the importance of telling the truth and providing the department with complete and accurate protection claims.
8. The applicant provided no specific example in the submission of any particular statements that were not interpreted properly during his interviews with the Department. The responses recorded on the transcript of the Enhanced Screening interview show the applicant provided appropriate and cogent responses to the questions posed to him through the interpreter. During the Arrival and SHEV interviews the applicant did not indicate there were any concerns regarding the ability of the interpreters. Of note, a representative from [Agency 1] was present at the SHEV interview, and no issues regarding difficulties with any interpreter were raised by the representative during the interview. From listening to the interviews, it is not apparent to me that the applicant did not understand the interpreters used. He provided cogent and appropriate responses to the questions posed to him through the interpreters, and at no point did the interpreters raise any concern with the interviewing officers that they were unable to understand the applicant's dialect. With regard to the inference that the applicant did not divulge all information because of fears the information would be shared with Sri Lankan authorities, the submission does not specify what information was not provided because of those fears. Similarly, the applicant has not identified any specific area where a lack of legal advice has negatively affected his ability to put forward his protection claims. The applicant was assisted by [Agency 1] to prepare his SHEV application and statement of claims, and a Registered Migration Agent from that service was also present during the SHEV interview and given the opportunity to make submissions at the conclusion of the interview, however he did not do so. Although the applicant may not have had representation at the earlier interviews with the Department, he was represented at the SHEV interview.
9. Having regard to the above, I do not consider the applicant's ability to present his case was adversely affected by the conduct of the interviews, including the interpreters used during those interviews, or resulting from a lack of legal advice, and I am satisfied he was given an opportunity to fully present his claims for protection, and respond to any relevant issues.
10. The applicant's representative provided the IAA with country information and other information that was not before the delegate and is new information. That information pre-dates the delegate's decision. The applicant's representative notes in the submission that all the information provided was published after the date of the applicant's interview, however has provided no explanation as to why the information could not have been provided to the

delegate, whose decision was made on 28 March 2018, or why it may be considered credible personal information. At the conclusion of the SHEV interview the delegate noted that any additional information provided before a decision was made would be considered, however no further information was provided prior to the decision being made. In the circumstances, the applicant has not satisfied me this information could not have been provided before the delegate made the decision, or that as general country information, it is credible personal information which was not previously known and, had it been known, may have affected the consideration of the applicant's claims. I am also not satisfied there are exceptional circumstances to justify considering the information.

11. I have considered a new report on Sri Lanka by the Department of Foreign Affairs and Trade (DFAT) published on 23 May 2018.<sup>1</sup> The report contains up to date information on the situation for people with a profile similar to the applicant's in Sri Lanka. It updates the DFAT report on Sri Lanka, published on 24 January 2017, which was before the delegate, and on which they relied. The report has been specifically prepared for the purpose of assisting with determination of protection obligations. I am satisfied there are exceptional circumstances to justify considering this information.

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

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

- He is a Tamil who was born in Jaffna District of the Northern Province of Sri Lanka.
- His father and uncle were members of the Liberation Tigers of Tamil Eelam (LTTE).
- He was caught up in the fighting between the Sri Lankan Army (SLA) and the LTTE and encountered numerous problems and had to move away. In 1987 he moved to [Town 1] and again encountered problems.
- In 1997 his uncle, who was a soldier for the LTTE, was shot and killed by the SLA.
- His father, and his family, were threatened and badly treated by the SLA on a regular basis. They had difficulties and lived in fear and hiding because of the fighting between the LTTE and the SLA.
- He married in 1999 and moved with his family to India because paramilitary and government forces were very active and giving them problems.
- In 2001 the Indian government told them it was safe to return to Sri Lanka and they did so. He had no job and their land was taken over by the SLA and they could not farm it. They were treated as LTTE sympathisers because they had recently come from India and security forces took this as a sign they must have fled to India because the forces were after them. He was arrested and interrogated on many occasions.
- In 2005 [Town 1] became a government controlled area, and the Sri Lankan government and the SLA set up refugee camps and tried to identify people who were associated with the LTTE or who were LTTE sympathisers. Because both his father and uncle were actively involved with the LTTE he was interrogated by the SLA about his involvement with the LTTE. After interrogation he was released on condition he did not leave the area and report every week.

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<sup>1</sup> DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064

- He reported for some time, but lived in constant fear of being identified or accused of collaboration with the LTTE. He left Sri Lanka by boat for India, where he lived in [a] camp.
- They were badly treated by Indian authorities whilst living in the camp and decided to depart India and go overseas.
- He departed India by boat in August 2012.
- He fears harm on return to Sri Lanka, from government forces, including the army and security forces and paramilitary groups, because of his links to the LTTE, and also based on his location, age and gender, which would result in an imputed political opinion as a supporter of the LTTE. He also fears harm as a failed asylum seeker who spent a significant time in a country with a large Tamil diaspora, and who departed Sri Lanka illegally.

### **Refugee assessment**

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13. 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**

14. 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.
15. I accept the applicant’s consistent evidence that he is a Tamil male of the Hindu religion, who was born in the Jaffna District of the Northern Province of Sri Lanka. There is no issue regarding the applicant’s claimed identity, and I accept he is a national of Sri Lanka from the Northern Province, and that Sri Lanka is the receiving country for the purposes of the Act.
16. I accept the applicant’s consistent evidence regarding his early life in Sri Lanka. He attended school in Jaffna until Year 5 in about [year] and worked in farming, on the family land helping his parents, and later farming his own land.

17. The applicant claims his father and uncle worked for the LTTE. In his statement of claims he described his uncle as a soldier for the LTTE, and that he was killed by the Sri Lankan Army in 1997. However during the SHEV interview he said his uncle was killed in [year] because he was an LTTE supporter, and that it was the Indian Army and other groups such as the EPDP who killed him. The applicant said his father worked with his uncle, that they would go to the market and collect things and money, or taxes, for the LTTE. He said his father did this work in the morning and finished by 10am and went to work on his farm. When questioned about whether his father wore a uniform, or did any formal training with the LTTE the applicant said 'no', however he said his father was getting paid for the work he did. The delegate questioned the applicant about when his father stopped working for the LTTE. The applicant initially said in 1989, but immediately afterwards said that after his brother was killed his father stopped working for the LTTE in [year], that his father remained living in the village for about two years before he went to [Town 2], where he stayed for one year before leaving for India in 1990. He said his father had a lot of problems and the Indian Army came in search of him for his contribution to the LTTE.
18. Country information reports that the majority-Tamil civilian population of the areas controlled by the LTTE were required to interact with the LTTE as a matter of course, and that during the civil conflict tens of thousands of people were killed on both sides.<sup>2</sup> Taking that into account, I am prepared to accept the applicant's uncle performed activities in support of the LTTE, such as collecting money for them, and that he was killed in [year]. I am also prepared to accept the applicant's father performed those activities in support of the LTTE until [year]. However, the level of involvement the applicant describes his uncle and father had with the LTTE does not accord with LTTE membership, and I do not accept either was an LTTE member. Taking into account that the applicant's father remained living in the village for two years after he ceased his involvement with the LTTE, and the applicant's reporting that either Sri Lankan authorities or the Indian Army came in search of his father during that time, I consider there was ample opportunity for his father to be detained or arrested if he had been of interest to Sri Lankan authorities, however he was not. As a result, I do not accept the applicant's father was of interest to Sri Lankan authorities at the time he departed for [Town 2] in about 1989.
19. At the SHEV interview the delegate asked when the applicant first started experiencing problems in Sri Lanka, and he said eight years after his father left the EPDP came looking for his father, they questioned his mother, and then questioned the applicant about his father's whereabouts, intimidated and threatened him. Initially the applicant said he was questioned almost every day for three years, however when questioned further by the delegate the applicant said it was not every day, but once in ten days or once in a month. He said sometimes he was taken to their camp for about an hour, and released when his mother came and pleaded to take him home. He estimated he was taken to the camp about 20 times in those three years. The delegate specifically asked the applicant whether he had ever been arrested in Sri Lanka and held overnight, and the applicant said he had been taken to the camp and questioned, but not arrested, and not for more than a few hours. When asked about whether anything physical happened to him during his interactions with the EPDP, the CID or the army, the applicant referred again to being taken to the camp for questioning about his father and uncle's actions and intimidating him, and he expressed his general fears of being harassed or killed on return to Sri Lanka, but did not suggest that he had been physically harmed at those times. He said he was married in 1999 and could not live in Sri Lanka because paramilitary and government forces were very active and gave them problems, and they moved to India in 1999. During the SHEV interview the applicant said he moved to [Town 2] from Jaffna in 1999, and afterwards went to India. According to the SHEV application the applicant stayed in India

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

until 2003 when he returned to Sri Lanka with his wife and children, and resided in Jaffna until 2007, when he returned again to India. I am prepared to accept the applicant's account provided in the SHEV application and at the SHEV interview of travel to the [Town 2] in 1999, and leaving Sri Lanka for India in 1999, returning to Sri Lanka in 2003, and returning to India in 2007.

20. The delegate notes that during the interview the applicant was evasive and inconsistent with his answers. I share the delegate's opinion that the applicant's responses appeared evasive, and in addition to the inconsistencies, particularly regarding dates of events, I consider his evidence was lacking in any detailed descriptions of the events claimed. The delegate noted a number of inconsistencies and sought comment from the applicant, including the claim made during the Arrival interview that he was beaten and detained by the army for three days in 2000. After the natural justice break the applicant said he was confused and had forgotten a few things, and mixed up the years and dates. He referred to the Sri Lankan Army beating him and detaining him on two occasions for two or three days in 2004. In his statement of claims the applicant refers to there being large military operations between the LTTE and Sri Lankan Army in 2005 and the government regaining control in [Town 1], that refugee camps were set up and the government was trying to identify people who were associated with the LTTE, or who were LTTE sympathisers. He said he was interrogated 'for some time' about his involvement with the LTTE, and released on condition that he did not leave the area and reported every week. Of note, in his SHEV application the applicant states his address to be in Jaffna from 2003 until 2007, and he did not refer to being in a refugee camp in Sri Lanka. In addition, the applicant's statement of claims does not refer to him being detained for any significant period at this time, or being mistreated during those interrogations.
21. Country information reports that many Tamils, particularly in the north and east, reported being monitored, harassed, arrested or detained by security forces during the conflict. I am prepared to accept the applicant may have been questioned by authorities on occasion whilst in Sri Lanka prior to his first departure to India, given his consistent reporting of such incidents in his statement of claims and during the SHEV interview. However I consider he has significantly exaggerated the level of interest in him to support his protection visa application. Taking into account the low-level involvement his uncle and father had with the LTTE, which ended in [year], and my finding that the applicant's father was not of interest to Sri Lankan authorities, I consider the questioning of the applicant resulted from the routine, but troubling, monitoring and harassment of Tamils at that time, rather than any specific security threat posed by the applicant or his family members. In regard to the claim that he was detained and beaten for two to three days on two occasions in 2004, the applicant's evidence on this issue was inconsistent, vague and unconvincing, and although he referred to being detained for three days during the Arrival interview, he said that occurred in 2000, which according to his later evidence was when he was in India. I do not accept the applicant would have forgotten to mention the highly significant events, of being detained and beaten for two to three days on two occasions, when initially questioned by the delegate, or that the failure to do so resulted from confusion regarding dates of events. I consider his failure to mention those events, and the lack of specific details, is because he was not recounting events that genuinely occurred. During the SHEV interview the applicant said that during 2004, 2005 and 2006, until he left Sri Lanka he was questioned and intimidated about where he was, what he was doing, and about his father's whereabouts, and that this happened very often, once a month. The applicant did not suggest during the SHEV interview that he was required to report on a weekly basis, a claim made in his statement of claims. I consider it significant that the applicant did not do so. Although I am prepared to accept the applicant may have been questioned by Sri Lankan authorities on occasion when he returned to Sri Lanka in 2003, as part of the routine practices at that time, I do not accept he was detained for more than a few hours, or that he was beaten

at those times, or that he had any weekly reporting requirement at the time he departed Sri Lanka in 2007.

22. With regard to the claim made in the statement of claims, that the applicant's land was taken over by the SLA and he could not farm it, during the Arrival interview the applicant said he was self-employed on the family farm from 1997 until 2007, however he reported his address as being in [Town 2] from 2003 until 2008. In his SHEV application the applicant listed his address as being in Jaffna from 2003 until 2007, and that his employment during that time was as a self-employed farmer in Jaffna. During the SHEV interview the applicant said he was in India until 2003 when he heard that the problems were solved in Sri Lanka and they came back to Jaffna. The applicant did not reiterate the claim regarding being unable to farm the land, and I do not accept he was unable to do so, or that the land was taken over by the SLA. I accept the evidence, during the Arrival interview, in his SHEV application, and at the SHEV interview, that the applicant worked in farming in Jaffna until he departed Sri Lanka in 2007.
23. I have considered the country information provided with the applicant's SHEV application, which comments on the continued reports of abductions, torture complaints and police use of excessive force against Tamils perceived to support the LTTE, and regarding the treatment of failed Tamil asylum seekers who departed Sri Lanka illegally, in particular the high risk of interactions with authorities and detainment on return to Sri Lanka. Of note the documents referenced were mainly published between 2011 and 2016. DFAT's recent assessment of the situation in Sri Lanka post-dates the information referred to by the applicant, and is based on on-the-ground knowledge and discussions with a range of sources in Sri Lanka.<sup>3</sup> I am satisfied it is an authoritative and credible document providing current and cogent information on the situation in Sri Lanka, and afford it greater weight.
24. The applicant fears harm from authorities in Sri Lanka and paramilitary groups, as a result of his Tamil ethnicity, his age, gender, and origins in the Northern Province, and being imputed to be a supporter of the LTTE.
25. The 2017 UK Home Office report notes the focus of the Sri Lankan government has changed, and the focus is now not so much on identifying anyone with past LTTE links. The government's present objective is to identify those who pose a threat to the government or a unified Sri Lanka, through involvement with Tamil separatist activities in the country or through links to the Tamil Diaspora. Those former LTTE members that are most at risk are persons perceived to have a significant role, such as the LTTE's former leadership (either combat or civilian) and former members suspected of committing serious criminal acts during the conflict. The UK Home Office and DFAT have more recently confirmed the UNHCR position that simply being of Tamil ethnicity, or a Tamil from an area formerly under LTTE control, no longer gives rise to a need for international protection, the rationale being that almost every Tamil who resided in those areas during the conflict had some sort of connection with the LTTE.<sup>4</sup>
26. Credible country information reports that the LTTE in Sri Lanka is a spent force, and there have been no terrorist instances since the end of the civil war.<sup>5</sup> The LTTE no longer exists as an organised force in Sri Lanka. However, DFAT confirms Sri Lankan authorities remain sensitive to the potential re-emergence of the LTTE throughout the country, and are likely to maintain intelligence on former LTTE members and supporters, and that high-profile former LTTE

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<sup>3</sup> DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064

<sup>4</sup> UK Home Office, "Country Policy and Information Note. Sri Lanka: Tamil separatism. Version 5.0", 15 June 2017, OG6E7028826; DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064

<sup>5</sup> UK Home Office, "Country Policy and Information Note. Sri Lanka: Tamil separatism. Version 5.0", 15 June 2017, OG6E7028826

members would continue to be of interest to the authorities and subject to monitoring. Further, DFAT assesses that close relatives of high-profile former LTTE members who remain wanted by Sri Lankan authorities may be subject to monitoring. DFAT assesses that, while monitoring of Tamils in day-to-day life has decreased significantly under the current government, surveillance of Tamils in the north and east continues, particularly those associated with politically sensitive issues.<sup>6</sup> The country information does not indicate that Tamils are currently at risk of persecution in Sri Lanka purely on account of their race, nor when they originate from, or reside in, an area previously controlled by the LTTE. Those reports no longer 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, age or place of origin.

27. Although virtually everyone agrees there has been progress towards alleviating the climate of fear in Sri Lanka, opinions differ markedly about the extent of that progress.<sup>7</sup> The UN Special Rapporteur on Torture, in his December 2016 report on Sri Lanka, noted the fragility of the reform process and that the country is at a critical moment in its history in terms of setting up the necessary mechanisms to remedy its past large-scale human rights violations and prevent their recurrence.<sup>8</sup> The country information provided by the applicant is critical of the human rights situation in Sri Lanka, and suggests the applicant remains at risk of mistreatment by Sri Lankan authorities. The 2018 DFAT report refers to allegations by several local and international organisations regarding torture by Sri Lankan military and intelligence forces, mostly from the period immediately following the conflict and involving people with imputed links to the LTTE. Reports have been made by credible sources such as Freedom from Torture and the International Truth and Justice Project, and other sources reported in DFAT and UK Home Office reports, such as Amnesty International and Human Rights Watch, of ongoing arrests and mistreatment amounting to torture perpetrated by security forces and police in Sri Lanka, predominantly affecting Tamils, and I have had regard to this information.<sup>9</sup> Such human rights abuses have primarily affected people with a real or perceived LTTE profile or anti-government or political activist profiles and refer to a very small number of people. The United States State Department reported in 2016 that arbitrary arrests and detention had decreased from 2014 and that the use of force against civilians by officials, although remaining a problem, was increasingly rare.<sup>10</sup> The HRCSL report from October 2016 to the UN Committee Against Torture reported that torture is 'routine [and] practiced all over the country, mainly in relation to police detentions'.<sup>11</sup> The UK Home Office reported in 2017 that since the current government has come into office the number of torture complaints has reduced. It notes however, that new cases continue to emerge of the police mistreating Tamils in order to extract confessions in criminal investigations, and was more prevalent in questioning of suspected LTTE members or supporters.<sup>12</sup> Consistent with this, DFAT states that recent publications indicate torture continues to be perpetrated primarily by police against Tamils, but notes that local sources have indicated this is primarily due to outdated policing methods rather than being ethnically

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<sup>6</sup> DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064

<sup>7</sup> UK Home Office, "Country Policy and Information Note. Sri Lanka: Tamil separatism. Version 5.0", 15 June 2017, OG6E7028826

<sup>8</sup> United Nations, "Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Sri Lanka A/HRC/34/54/Add.2", 22 December 2016, CIS38A80123313

<sup>9</sup> 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", 7 January 2016, CIS38A801275; UK Home Office, "Country Policy and Information Note. Sri Lanka: Tamil separatism. Version 5.0", 15 June 2017, OG6E7028826

<sup>10</sup> United States ("US") Department of State, "Sri Lanka – Country report on Human Rights Practices 2015", 13 April 2016, OGD95BE926320

<sup>11</sup> DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064

<sup>12</sup> UK Home Office, "Country Policy and Information Note. Sri Lanka: Tamil separatism. Version 5.0", 15 June 2017, OG6E7028826

based, that the message from senior officials prohibiting the use of torture has been slow to filter down, and relevantly assessed that overall there is a low risk of Tamils being tortured.<sup>13</sup> I am satisfied torture in Sri Lanka, perpetrated by either military, intelligence or police forces, is not presently systemic or state-sponsored, and that the risk of torture from military and intelligence forces has decreased since the end of the civil conflict, and that the risk of the applicant being tortured in Sri Lanka is remote.

28. Considering the applicant's circumstances and profile – accepting his uncle and father performed some low-level activities in support of the LTTE until [year]; that his uncle was killed in [year]; as a Tamil male who resided in an area formerly under LTTE control, and who, other than his familial links to the LTTE, does not claim to have had any involvement with the LTTE; he was briefly detained by Sri Lankan authorities on a number of occasions, and released without being charged with an offence; he has resided outside Sri Lanka for an extended period of time; he has not indicated he has participated in any Tamil diaspora activities, including in Australia, or suggested he would engage in activities which are politically sensitive, or could be considered to constitute post conflict Tamil separatism on return to Sri Lanka - I am not satisfied the applicant was of adverse interest to Sri Lankan authorities, or any paramilitary group at the time he left Sri Lanka in 2007, or that there is a real chance the applicant would be at risk of harm from these groups on return, because of any imputed links with the LTTE.
29. The delegate considered the chance of the applicant facing harm on his arrival at Colombo airport or afterwards on account of being a Tamil who has lived for periods abroad and who is returning as a failed asylum seeker who departed the country illegally. I accept the applicant's consistent evidence that he departed Sri Lanka for India in 2007, illegally by boat. I also accept the applicant departed India by boat for Australia. The statement of claims indicates that occurred in August 2012, however the SHEV application states the applicant arrived in Australia on 3 September 2013, which is inconsistent with the applicant being interviewed [onshore] in June 2013. Regardless of the date he departed India, or arrived in Australia, I accept that if the applicant returns to Sri Lanka he would do so as a failed asylum seeker, and that he would be identified by Sri Lankan authorities as someone who departed Sri Lanka illegally.
30. The applicant originates from the Jaffna District, and I accept it is very likely he would return to the Northern Province. DFAT reports that despite positive government sentiment, refugees and failed asylum seekers face practical challenges to successful return to Sri Lanka, and many have difficulties finding suitable employment and accommodation. DFAT assesses that reintegration issues are not due to failure to obtain asylum, but rather due to the employment and accommodation difficulties they may face. A UNHCR survey in 2015 reported that 49 per cent of refugee returnees in the north had received a visit at their homes for a purpose other than registration, with almost half of those visits from the police. The UNHCR also interviewed refugee returnees in 2016, and only 0.3 per cent indicated they had any security concerns following their return. While the government has reportedly decreased systematic surveillance of returnees, DFAT is aware of anecdotal evidence of regular visits and phone calls by the CID to failed asylum seekers in the north as recently as 2017. In addition, refugees and failed asylum seekers reported social stigma from their communities upon return.<sup>14</sup> It is possible the applicant, as a returning asylum seeker, may be monitored for a period of time on return to the Northern Province, and experience some social stigma, however, I am not satisfied this treatment would amount to serious harm.

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<sup>13</sup> DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064

<sup>14</sup> DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064

31. Entry and exit from Sri Lanka is governed by the Immigrants and Emigrants Act 1949 (the I&E Act). Under the I&E Act it is an offence to depart other than via an approved port of departure. Information from DFAT indicates all involuntary returnees undergo checks on arrival in Sri Lanka, including by the Department of Immigration and Emigration, the State Intelligence Service and the CID. For those travelling on a temporary travel document, as would be the case for the applicant, investigation is undertaken to confirm identity, which often includes an interview, contacting authorities in their home area, and neighbours and family, and checking criminal or court records, a process that can take several hours. According to DFAT all returnees are treated according to standard procedures irrespective of ethnicity, and are not subject to mistreatment during processing at the airport. Most returnees are questioned upon return (usually at the airport), and where an illegal departure from Sri Lanka is suspected they can be charged under the I&E Act. Those who are charged are, at the earliest opportunity after investigations are completed, transported to the closest Magistrate's Court, after which custody and responsibility shifts to the court or prison services. The magistrate then makes a determination as to the next steps for each individual, and individuals can remain in police custody at the CID's Airport Office for up to 24 hours after arrival. Should a magistrate not be available before this time – for example, because of a weekend or public holiday – those charged may be detained for up to two days in an airport holding cell.<sup>15</sup>
32. Those charged under the I&E Act are required to appear in court in the location where the offence occurred, which may involve legal and transport costs. Penalties for leaving Sri Lanka illegally can include imprisonment of up to five years and a fine of up to 200,000 Sri Lankan rupees, which may be paid by instalment. In practice no returnee who was merely a passenger on a people smuggling venture has been given a custodial sentence, and the usual result is a fine which can be paid by instalments. DFAT notes that, while the fines issued for passengers of people smuggling ventures are often low, the cumulative costs associated with regular court appearances over protracted lengths of time can be high. Given the applicant has not claimed to have been involved in people smuggling, it is likely if he pleads guilty he will be granted bail by the Magistrate on the basis of personal surety or guarantee by a family member. Although DFAT was unable to obtain any data in support, it reports there is anecdotal evidence that most passengers of people smuggling ventures spend many years on bail, and that most are free to go after paying a fine. Bail is usually granted to voluntary returnees, however bail conditions are discretionary, and can involve monthly reporting to police at the returnee's expense.<sup>16</sup>
33. I accept that given his mode of departure from Sri Lanka the applicant may be questioned and detained for up to two days in an airport holding cell, and that he will be subjected to the processes and penalties imposed under the I&E Act described above, including a fine, and associated process costs. The evidence before me does not indicate the I&E Act processes and penalties the applicant may face are discriminatory in nature or in its application or enforcement. I am not satisfied such treatment amounts to systematic and discriminatory conduct. I am also not satisfied on the evidence before me that the treatment amounts to serious harm for this applicant. On that basis, I am not satisfied there is a real chance of persecution on account of the applicant having departed Sri Lanka illegally.
34. Overall, I am not satisfied the applicant has a well-founded fear of persecution.

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

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

## Refugee: conclusion

35. 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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36. 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

37. 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.

38. I have found the applicant does not face a real chance of any harm because of his Tamil ethnicity, his age or gender, for originating from the Northern Province, as a result of any imputed LTTE links, including familial involvement with the LTTE, or because he has spent time outside Sri Lanka, including in Australia. As a 'real chance' equates to 'real risk', I am also not satisfied there is a real risk of any harm, including significant harm for the same reasons.

39. I accept the applicant will be identified on return as a person who departed illegally, and on arrival he will be subject to the processes and penalties resulting from application of the I&E Act, and he may be detained for up to two days in an airport holding cell and receive a fine for departing Sri Lanka illegally, and may be subject to associated costs. I am not satisfied such treatment constitutes significant harm as defined. There is no evidence to indicate the applicant faces the death penalty for any reason, and I do not accept there is a real risk the applicant will be arbitrarily deprived of his life or tortured during or as a result of this process. The evidence does not suggest that in the imposing such penalties and treatment there is any intention to inflict pain or suffering, severe pain or suffering, or cause extreme humiliation. I am not satisfied the treatment and conditions the applicant may face as a consequence of his illegal departure, amount to cruel or inhuman treatment or punishment or degrading treatment or punishment.

40. There is a possibility the applicant, as a returning asylum seeker, may face monitoring for a period and possibly social stigma, however I have found this would not amount to serious harm. I am also satisfied that any monitoring or social stigma the applicant may face would not amount to significant harm for the purposes of s.36(2A). I am also not satisfied that this treatment, when considered together with what he may experiences as an illegal departee amounts to significant harm.

**Complementary protection: conclusion**

41. 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.

## 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.