



**Australian Government**  

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**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA18/05521

Date and time of decision: 27 September 2018 11:25:00  
M Anderton, 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, a Tamil Hindu from [City 1], Sri Lanka, applied for a Safe Haven Enterprise visa on 2 September 2016.
2. In essence the applicant claimed to fear harm from Karuna or Pillayan groups because he was someone who worked for the LTTE and escaped. Three men visited his home with the intention to abduct him in January 2010 and they have visited his family home since. The applicant also feared detention, torture from authorities as a former LTTE member and because he sought asylum and illegally departed.
3. On 10 August 2018, the delegate refused the application on the basis that he was not satisfied that the applicant faced a real chance of serious harm or real risk of significant harm upon return to Sri Lanka.

### Information before the IAA

4. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
5. On 30 August 2018, the applicant's representative provided submissions which took issue with the delegate's findings and approach and made arguments on the matters considered. I have considered the submissions.

### Applicant's claims for protection

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6. The applicant's claims can be summarised as follows:
  - He is a Tamil Hindu from Batticaloa.
  - In his transferee interview the applicant claimed the army questioned and beat him in the past; the LTTE took him for training but he did not want to and as his uncle had died for the cause they let him work in the kitchen. The applicant refused to fight so was put to work in [an area] as punishment.
  - According to his statement, in 2001 the applicant was forced to join the LTTE. He refused to fight so was punished to work in [an area]. In 2004 he escaped and went to Colombo, where he worked as [Occupation 1] until 2006.
  - From 2006 until October 2009 he worked overseas in [Country 1] and [Country 2] as [an Occupation 2].
  - In January 2010 three men, who identified themselves as CID, came to his family home. His mother recognised one of them as former LTTE from when she visited the applicant when he worked with the LTTE as [an occupation]. She suspected the man was now a member of the Karuna or Pillayan group. The men told the applicant's mother they suspected the applicant of having weapons and wanted to know where he was. She told them the applicant had gone abroad. The men told her they knew she was lying and the applicant would be arrested when they found him.

- The applicant suspected the men planned to abduct him, like many other Tamils in his area. He was scared and began moving around frequently. He worked in remote villages and Colombo and kept a very low profile.
- Between 2010 and August 2012 members of Karuna or Pillayan visited his family home on 5 or 6 occasions. He does not know the dates but his mother told him each time. They told his mother he should see them at CID [offices] and another time told her, if not handed over to them, when caught he would be killed.
- The applicant wanted to flee Sri Lanka earlier but the agent who was arranging his trip to [Country 3] kept the money the applicant gave him in 2011. His first opportunity to escape was in August 2012.
- The applicant fears abduction and harm by Karuna or Pillayan group because he is someone who worked for the LTTE and escaped. He fears being killed, beaten, tortured or detained by authorities because he is former LTTE. He fears harm because he sought asylum in Australia, left illegally and would be treated more harshly because he is a Tamil.
- In November 2012 the applicant's mother told him the men from Karuna or Pillayan came to the family home and took photos of the family. They told the mother they knew the applicant had gone to Australia and that he would face repercussions. The applicant understood that to mean he would be killed upon return.
- At the protection interview the applicant added that he escaped twice from LTTE in 2001 and 2004. When he was abducted by the LTTE in year [grade] on his way to private tuition, he escaped from them and spent a 1 month in Colombo before returning to Batticaloa, when he took his exams and then was retaken by the LTTE in 2001. The applicant also claimed Karuna were looking for and recruiting him in 2004 in Colombo so he fled to [Country 1] in 2006.

## **Refugee assessment**

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7. Section 5H(1) of the Act provides that a person is a refugee if, in a case where the person has a nationality, he or she is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

### **Well-founded fear of persecution**

8. Under s.5J of the Act 'well-founded fear of persecution' involves a number of components which include that:
  - the person fears persecution and there is a real chance that the person would be persecuted
  - the real chance of persecution relates to all areas of the receiving country
  - the persecution involves serious harm and systematic and discriminatory conduct
  - the essential and significant reason (or reasons) for the persecution is race, religion, nationality, membership of a particular social group or political opinion

- the person does not have a well-founded fear of persecution if effective protection measures are available to the person, and
  - the person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour, other than certain types of modification.
9. I accept the applicant is a Tamil Hindu male from Batticaloa. Based on the visa evidence provided, I accept that he lived and worked in [Country 1] and [Country 2] between 2006 and October 2009.
10. However, having considered his claims and for the following reasons I find the applicant is not a credible witness and has fabricated the rest of his claims.
11. I consider the applicant has changed his account over time and his account lacked credibility. Further, his account was vague with few details and having listened to the protection interview I consider the applicant was making up his account as he went along in a number of respects.

*LTTE*

12. The applicant claimed he was forcibly recruited to the LTTE in 2001 until he escaped in 2004 and went to Colombo. However, I consider the applicant's account changed and lacked details and credibility. For instance, in his statement he claimed he was recruited in 2001 and escaped in 2004. However, at his protection interview he claimed he escaped from the LTTE twice. The applicant stated he was captured on the way to tuition, but escaped and went to Colombo for a month. He then returned home to sit his [exams]. After his exams he was again forcibly recruited and escaped in 2004 to Colombo. I find it difficult to believe that he escaped twice from the LTTE. Further his description of the escapes lacked details. Further, that he would escape from them once and return home lacks credibility. It does not make sense that he would return a month after escaping them to sit his [exams]. If he was frightened of them, had escaped and did not want to join them, it is difficult to believe that he did not remain in Colombo with his brothers. Further, the applicant had not mentioned these two escapes in his statement and it is difficult to believe that he would not mention such key event, if true.
13. I have considered the applicant's explanation that he was instructed in his transferee interview to provide a summary of his claims and not made aware that the information would be used for assessing his protection claims. However, there were a series of questions about the reasons he left Sri Lanka and travelled to Australia. I do not accept that if he had escaped from the LTTE twice that he would not have mentioned that, particularly given he mentioned the LTTE took him for training. Further, he did not mention he escaped twice from the LTTE in his written statement.
14. The applicant also provided little information about his LTTE activities. His account of standing up to the LTTE and refusing to join or fight as young [age] year old lacked credibility. Initially in the protection interview, the applicant claimed he did not do any training as he refused. When the delegate expressed doubts, the applicant changed his account and said he did physical training only. At interview the applicant claimed he spoke to a high profile LTTE and was allowed to work in the [area] instead of training. However, his transferee interview was inconsistent indicating on the one hand he avoided training because his uncle had died for them to he was punished to work in [an area]. I consider the applicant's account was

inconsistent about whether he was punished or he was afforded special favour because he spoke to a high lever LTTE person or due to his uncle's death.

15. Further, his account of his escapes lacked details, despite being asked to explain in detail how he escaped on both occasions.
16. Further, I consider that he escaped for a month and then sat his [exams], but was taken after that is lacking in credibility. I consider the applicant changed his account to accord with concerns that he had sat his [exams] during the time he claimed he was with the LTTE. Further, it is odd that if he feared forcible recruitment that he would not have lived with his brothers in Colombo.
17. Given the applicant's vague, changing evidence that also lacked credibility, I do not accept the applicant was forcibly recruited to or in the LTTE or that he escaped twice or did any work for the LTTE.

#### *LTTE uncle*

18. In his transferee interview the applicant claimed his uncle was LTTE and deceased. However, he did not include that claim in his written statement.
19. At the protection interview the applicant reiterated his uncle was LTTE and died in 2004 and the applicant did not know much about him, as he was a young boy. However in 2004, the applicant would have been [age] years old. Later, the applicant changed his account and said he did not know what year his uncle died. I consider this is another example of the applicant changing his account which indicated he was not recounting lived experiences. Further, while it was submitted the applicant was at risk of harm because of his relative's LTTE profile, the applicant did not have any information about his uncle's LTTE involvement.
20. It may be, on the benefit of the doubt, that the applicant's uncle was in the LTTE and deceased, as the country information indicates that this was not uncommon in the context of the civil war. Further, if he died when the applicant was a young boy, that would have been in the 80s or early 90s, which was many years ago. I do not accept that the authorities had or would have an interest in the applicant due to his uncle.

#### *2004 - 2006*

21. In his protection interview the applicant added further claims. For instance, he claimed Karuna came looking for him when he was in Colombo in 2004 – 2006, so he fled to [Country 1].
22. However, he had not claimed this before. I find it odd that he would not mention such a claim in his previous interview or at least in his written statement, if this claim were true. It is a key claim. While I accept that there may be elaboration of claims at interview, this was a new claim. Further, it was clear in the written statement that the applicant worked as [an Occupation 1] from 2004 – 2006 in Colombo, but there was no mention of any fear of harm or Karuna visiting him. Further, it was very clear in his statement that the applicant had gone overseas to [Country 1] and [Country 2] to work as [an Occupation 2] and he made no mention of fleeing Sri Lanka in 2006 or living in fear or that Karuna were looking for him then. The statement explained his reasons for leaving Sri Lanka related to CID (or Karuna) coming to visit his mother at the family home in January 2010. There was no mention of any prior problems with Karuna. It is also difficult to believe that he would not have mentioned that Karuna were trying to recruit him or had come to the home, if that were true.

23. Further, I consider the applicant's evidence in the protection interview changed and was problematic. For instance, when asked if he had any problems during the two years in Colombo, the applicant confirmed he had no problems, other than the army checking ID cards. Later he contradicted this when he said he went to [Country 1] because Karuna were trying to recruit him as they knew he worked for the LTTE.
24. When the delegate expressed doubts that he could escape detection in Colombo for 2 years if he were known LTTE, the applicant's evidence was unconvincing. The applicant said the people who checked did not know that he was LTTE. He then added he was in the shop all the time and did not go outside. He then added they came to his house to look for him, so he went to [Country 1].
25. Having listened to the interview, I consider the applicant was making up his responses as he went along. Further, it was contradictory to his earlier evidence in the interview that he had no problems for the two years in Colombo.
26. Further, it is not credible that if he were known as LTTE that the applicant would not have been detained, given monitoring and checkpoints during the civil conflict and the country information that checkpoints were not removed until 2015.
27. Further, the applicant worked at his brother's [shop] for two years and could have been easily identified and found. I consider if the applicant were considered LTTE or wanted by Karuna, he would have been easily found at home or at the store. Further, during that period he had obtained a passport and work visas to [Country 1] and he departed Sri Lanka with no apparent problems at the airport. His details and whereabouts would have been known by authorities and the Karuna group given their association during that time. The applicant also returned to Sri Lanka in October 2009, not long after the end of the civil conflict. He confirmed at interview that he had no problems at the airport upon arrival.
28. Further, there is no claim or evidence that he was detained by authorities or sent to a rehabilitation camp. According to country information almost anyone with any LTTE links was so detained. The fact that he was not is strong evidence that he was not LTTE or suspected LTTE or of adverse interest to authorities or to Karuna group (who had connections with the authorities at the time) or CID.
29. I accept that he was subject to ID checks as the country information makes clear that it was not uncommon for ID checks of Tamils and others to be conducted during that period. However, I do not accept the applicant faced any harm or was known or suspected LTTE or that Karuna or any group tried to recruit him in Colombo or was looking for him or that he fled to [Country 1] to avoid harm. I consider the applicant went to [Country 1] to work as [an Occupation 2].

*2010 - 2012*

30. The applicant claimed people who identified themselves as CID came to the home in January 2010, but the applicant suspected they were members of Karuna or Pillayan groups who had come to abduct him. In his protection interview he claimed the trouble started two or three months after his arrival from [Country 2].
31. However, the applicant's description of what happened to him lacked details and was vague despite the delegate spending a lot of time trying to obtain information and details from the applicant. The delegate asked him to provide more detail a number of times. For instance, his

description at interview was he thought there were three people and his mother told them he was overseas. He had no other information about the visits. Further, he could not even approximate when any of the visits occurred. While the applicant's claims were he was not present at the visits and it was his mother who had the contact, I consider it particularly odd that the applicant had so little information about this given it was his main claim and reason he departed Sri Lanka.

32. Further, I consider his very limited account was not spontaneous but told in a piecemeal fashion, such that I consider he was making it up as he went along. For instance, in his statement the applicant claimed that on one visit they told his mother to visit them at CID office and another that if caught he would be killed. However, the applicant did not articulate this at interview, despite being asked for more detail.
33. When asked why he thought he was to be abducted, the applicant stated it was during a period where a lot of LTTE people were abducted and he was scared and had worked for the LTTE for three years. The delegate expressed concerns that there was no other indication that the men were there to abduct him. The applicant then added that the men told his mother that the applicant knew where there were weapons. I consider the applicant's account was hesitant, piecemeal, lacked details and he was making it up as he went along.
34. This was also evident in the claim that he was in hiding and never went home from January 2010 to his departure in August 2012. When asked to expand on this claim, the applicant's response lacked any information other than he was hiding in different places. When asked for further information about the different places and periods he was at each place, the applicant listed a few places, but provided no details of what he was doing there, where or whom he lived or worked or what periods he was at each place.
35. Further, when the delegate expressed doubt that he could travel around and between the north, east and Colombo through checkpoints without problems, the applicant delayed his response. He eventually said a Sinhalese person took him on inside roads and protected him. I consider such a claim lacks credibility, particularly given country information about checkpoints which were not ceased until 2015 and the applicant's claims he worked in many different areas including Colombo. Further, his claim that a Sinhalese person protected him for two years lacked any details. Such a claim also lacked credibility, because it is difficult to believe that the same Sinhalese person would and was able to protect him for such a period given claims the applicant moved around so much and was in casual jobs. I consider the applicant made up this explanation in response to the delegate's concerns.
36. Further, the applicant obtained a police clearance in 2010 and had renewed his passport which was valid until 2014, so the applicant would have been easily found.
37. The applicant provided untranslated newspaper reports of general abductions and former LTTE members being questioned in 2012 and 2013. I accept that country information indicates these type of events occurred during this time. However, for reasons set out above, I do not accept that Karuna or Pillayan tried to abduct the applicant or that they were looking for him or that he was former LTTE.
38. I consider the applicant has fabricated his claims in their entirety. I do not accept that Karuna, Pillayan, CID, the authorities had or have any interest in the applicant. I do not accept they were looking for him while in Sri Lanka or since then. I do not accept he was in the LTTE or escaped the LTTE or that he was in hiding. I do not accept he is on any stop or watch list or of any interest to authorities, Karuna, Pillayan or anyone.

*Persecution*

39. I accept at least until the end of the civil war in 2009 that Sri Lankan citizens of Tamil ethnicity suffered disproportionately at the hands of the Sri Lankan authorities, particularly in North and East areas. I accept there are continuing detentions and torture against Tamils, who may be suspected LTTE or criminals, even since the end of the war.
40. I am mindful of the information that people with significant links to the LTTE may still face a real chance of harm, if returned to Sri Lanka.
41. As discussed above, I do not accept the applicant faces any harm due to his claimed LTTE uncle as he died when the applicant was a young boy (which would be the 80s or early 90s) and it was in the context of the civil war and remote in time and the applicant has continued to live and work in Sri Lanka for many years without harm, including returned to Sri Lanka in 2009 through the airport with no apparent problems. I do not accept the applicant is or will be of any interest to authorities due to his uncle.
42. I do not accept the applicant or his family have an anti-government LTTE profile. I am satisfied that the applicant does not have any criminal charges, warrants for her arrest, and is not suspected of being anti-government or involved in or interested in Tamil separatism or reviving the conflict.
43. While I accepted he was subject to ID checks and possible harassment during the conflict, this was in the context of the civil war and remote in time and the situation as improved considerably since then.
44. I do not accept the applicant faces a real chance of any discrimination or other harm as a Tamil. The DFAT reports in the review material indicate that the overall situation for Tamils in Sri Lanka has improved since the end of the civil conflict in 2009.
45. Further, the country information before me indicates that the monitoring and harassment of Tamils in day to day life has decreased significantly under the Sirisena government. Politically, the new government has taken a more proactive approach to human rights and the issue of reconciliation than previous governments. The overall prevalence of monitoring of Tamils has greatly reduced. Members of the Tamil community have described a positive shift in the nature of the interactions with authorities, including feeling able to question their motives or object to monitoring.
46. Based on the country information, I find the applicant does not face a real chance of suffering harm on account of his ethnicity. Looking to the future and having regard to the country information and the applicant's circumstances, I do not accept the applicant faces a real chance of any harm in that regard.
47. I do not accept he faces any harm from Pillayan or Karuna groups or other groups, as I have found he was not of interest to them. Further, country information is that such groups are no longer the force they were. I do not accept he faces harm from security forces jointly working with pro-government Tamil militant groups as I do not accept that he has been targeted in the past and do not accept that he faces a real chance of such harm in the future.
48. I accept the applicant was subject to the immigration data breach. However, I do not accept that raises his profile or puts him at risk of harm. While his personal details were released for a short period, his claims were not. I do not accept that faces longer questioning upon return due to the data breach. Further, upon return it will be evident that he was an asylum seeker

as he will return on a temporary travel document. The country information is that many thousands of Tamils, including Tamil asylum seekers, have returned without harm and there is no mistreatment upon airport questioning.

49. Further, having considered the applicant's circumstances and the country information I do not accept that the applicant faces a real chance of harm because of his ethnicity, age, background, family (including uncle), being a male Tamil from the Eastern province or formerly LTTE controlled area, subject to immigration data breach, political opinion, or membership of any particular social group.

*Failed asylum seeker*

50. I accept that if the applicant returns to Sri Lanka, he would do so as a failed asylum seeker on a temporary travel document. I do not accept the data breach raises his profile as his return on a temporary travel document from Australia would identify him in any event. Further, the data breach did not disclose his claims. I do not accept he faces a real chance of harm due to the data breach.
51. The DFAT reports indicate that thousands of Tamils have been returned to Sri Lanka since the end of the Sri Lankan civil war, including from Australia, and claimed asylum. Although there have been reported instances of returnees being harmed, the information before me suggests those were people with substantial links to the LTTE or outstanding warrants and I have not accepted that the applicant has such a profile.
52. While not claimed specifically, I note country information about social stigma for returnees or asylum seekers as people resent the financial support provided to refugee returnees. I consider the applicant has been educated, and has work skills and experience and some family in Sri Lanka. Given his education, previous work and family support in Sri Lanka, I am not satisfied that he faces a real chance of social stigma as a returnee. Further, and in any event, I do not accept social stigma amounts to serious harm.
53. I note while the government has decreased systematic surveillance of returnees, DFAT is aware of anecdotal evidence of regular visits and calls by CID to failed asylum seekers in the North in 2017. UNHCR survey reported 49 percent of returnees in the north received a visit in 2015. However, the applicant is from Batticaloa district in the East and I do not accept he has any profile of interest or is wanted by authorities. I am not satisfied that the applicant faces a real chance of such visits or as a returning asylum seeker.
54. Having regard to the country information in the review material and in particular in the DFAT reports, I am not satisfied there is a real chance the applicant would face serious harm upon return by the Sri Lankan authorities or otherwise because of his background or he applied for asylum in Australia, is a returnee or returning on a temporary travel document or on account of the data breach.

*Illegal departure*

55. I accept the applicant departed Sri Lanka without a passport and therefore illegally. For that reason, he has committed an offence under Immigrants and Emigrants Act ("IAEA") and may face questioning at the airport and may be charged and fined.
56. I have considered the submissions about possibility of interrogation, ill treatment and suffering in detention, while awaiting bail or upon return home. I have not accepted that the applicant has a profile of interest to authorities. Further, as discussed below, while he may

face questioning upon return due to his illegal departure, country information does not support claims of ill treatment and even if there is a period of detention, it is short and persons are released.

57. The country information before me indicates that all returnees are treated the same regardless of their ethnicity and religion and the laws are not applied in a way that is discriminatory or selectively enforced against a particular group of those returnees. I do not accept that Tamils are treated differently. The country information is that they are not subject to mistreatment during processing at the airport. I do not accept the applicant faces a longer detention than others, as I do not accept he is or will be of adverse interest to authorities. I do not accept his connection to his long since deceased LTTE uncle raises the applicant's profile or means he will be detained longer.
58. Further, the applicant has travelled through Colombo airport twice without incident or difficulty in 2006 and 2009. I accept that this was not in the context of illegal departure. However, if the authorities had concerns about the applicant, because of his connection to his uncle, it is difficult to believe that he would not have been questioned in that regard, particularly given his return in October 2009, shortly after the conflict ended.
59. Country information is that bail is usually granted to voluntary returnees. While facilitators and organisers of people smuggling venture can be charged under s.45C of the IAEA and are not usually released on bail, there is no evidence or claim that the applicant is of that profile. I find the applicant will be released on bail.
60. Country information is that a guilty plea by a returnee attracts a fine of LKR 3000 (approximately \$25AUD) for a first offence to LKR 200,000 (AUD\$1670). Country information is that if a guilty plea is made, the returnee is free to go and the fine can be paid by instalments. I find if the applicant pleads guilty he will be free to go.
61. Country information is if a plea of not guilty is made, bail is granted immediately to the returnee on the basis of personal surety or guarantee by a family member. If a guarantor is required, returnees may need to wait for the guarantor come to court. I do not accept he will suffer in detention while waiting for a relative or family. I consider the chance of the applicant being required to have a family member act as guarantor is remote.
62. I do not accept he faces any harm if he is required to travel to attend court appearances in the future, or that that amounts to serious harm.
63. While there are reports of arrests and torture, they were of person known or suspected as former LTTE members. As discussed above, I do not accept the applicant or his family have an LTTE or anti-government profile. I do not accept the authorities, Karuna or Pillayan or anyone have any adverse interest in him.
64. Based on the country information and the applicant's circumstances I do not accept the applicant faces a real chance of torture, interrogation, mistreatment on arrival in Sri Lanka or during the questioning process to establish identity, criminal history and possibly bail. Further, I do not accept he faces a real chance of any harm as a result of authorities checking with his home area about his identity as I have found he is not of adverse interest to CID, Karuna, Pillayan, armed groups, the authorities, or other groups or anyone.
65. I accept that if the applicant arrives over the weekend he may be briefly held in airport holding cell until he can appear before a magistrate. However, DFAT has assessed risk of

torture or mistreatment to detainees is low and considered with the applicant's profile and circumstances I do not accept the applicant faces a real chance of torture, interrogation or mistreatment upon arrival, during questioning or possible brief detention. I do not accept he faces a long detention as I do not accept he is of interest to authorities.

66. I note prison conditions and accept on the basis of country information that they are generally poor, overcrowded and unsanitary. However, I do not consider there is a real chance the applicant will be held in prison. The information is that he may be held in an airport holding cell.
67. Further, the applicant does not have an anti-government or LTTE profile, outstanding charges or is of interest to authorities and do not accept there is a real chance of torture, assault or mistreatment if held, or that any brief detention in these conditions amounts to serious harm for this particular applicant.
68. Furthermore, I do not accept that the IAEA provisions that deal with breach of the departure laws from Sri Lanka are discriminatory on their face, or disclose discriminatory intent or that they are implemented in a discriminatory manner. I find that the Sri Lanka departure laws are laws of general application.
69. I am not satisfied, that questioning, arrest, and being held in airport holding cell, travel or possible costs for court appearances and the application of a penalty for illegal departure amount to systematic and discriminatory conduct as required by s.5J.
70. I have had regard to all of the evidence before me and I have considered the applicant's claims individually and cumulatively, as well as considering the personal circumstances of the applicant. I am not satisfied the applicant has a well-founded fear of persecution from CID, Pillayan, Karuna, Sri Lankan authorities, or unknown armed groups or anyone for reason or combination of reasons in s.5J(1)(a), now or in the reasonably foreseeable future, if he returns to Sri Lanka.

#### **Refugee: conclusion**

71. 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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72. 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**

73. 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.
74. As to treatment for the illegal departure and any questioning and detention the applicant may experience in relation to this, I find the applicant is very likely to be issued a fine and released. In the event he pleads not guilty, he will be released pending his court date and may have to return to court for future appearances. If he arrives on a weekend he may be held in an airport holding cell over the weekend while waiting to come before a magistrate, However, I am not satisfied there is a real risk he would be subject to the death penalty, arbitrarily deprived of his life or be tortured. I have not accepted that he faces a longer detention or will be held in prison.
75. Having regard to his circumstances, I am also not satisfied that the treatment, travel to court appearances, possible costs and penalties the applicant may face as an illegal departee amount to severe pain or suffering, pain or suffering that is cruel or inhuman in nature or extreme humiliation, intentionally inflicted or caused.
76. I am not satisfied that, individually or cumulatively, any processes or penalties the applicant may encounter under the IAEA or as a returning asylum seeker or social stigma, would constitute significant harm as defined under ss.36(2A) and 5 of the Act.
77. In relation to the balance of the claims which I have accepted, I have found that the applicant does not have a real chance of harm on any of the bases claimed. For the same reason and applying the authority in *MIAC v SZQRB* [2013] FCAFC 33, I am not satisfied the applicant will face a real risk of harm of if removed to Sri Lanka.

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

78. 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**

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.