



**Australian Government**  

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**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA21/10063

Date and time of decision: 16 December 2021 16:58:00  
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 who was born in the Northern Province of Sri Lanka. He arrived in Australia in October 2012. In May 2017 he lodged a valid application for a Safe Haven Enterprise Visa (SHEV). On 8 October 2021 a delegate of the Minister for Immigration (the delegate) refused to grant the visa because the delegate found the applicant is not a person in respect of whom Australia has protection obligations.

### Information before the IAA

2. I have had regard to the review material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
3. According to information in the review material, on 2 March 2021 a Case Worker from the International Organization for Migration (IOM) advised the department the applicant self-referred to them requesting Assisted Voluntary Return (AVR), and that on 1 March 2021 he had a face to face appointment with the IOM and completed a Voluntary Return Declaration form. On 18 June 2020 the department sent a letter, by registered post, to the applicant at the address in [Suburb], NSW, reported in the SHEV application. The letter noted he may be invited to an interview to discuss his SHEV application in the coming months. The letter was returned as unclaimed on 22 July 2021. On 2 July 2021 the department contacted the applicant by email regarding his SHEV application. The email address used is the same recorded on documents provided by the IOM. The writer notes several unsuccessful attempts had been made to contact him on his mobile phone, that he previously discussed the option of Assisted Voluntary Departure with the department and had been advised the IOM would assist him to obtain travel documents. He was requested to provide an update on the matter, and a form for withdrawal of the SHEV application was also attached for him to complete. A further email on 7 July 2021 notes that a department officer had a telephone conversation with the applicant on the same date, with the assistance of a Tamil interpreter, and attaches a further withdrawal form for the applicant to complete and return. A further follow up email on 13 August 2021 also attaches a withdrawal form, and the writer notes they also tried to contact the applicant on his mobile phone unsuccessfully several times. On 7 September 2021 the applicant was invited to attend a WebEx interview, on 29 September 2021 at 9:00 am, to discuss his SHEV application. The invitation was sent to an address in [Suburb], which is a different address than the 18 June 2020 letter referred to above, but the same address recorded by the IOM in March 2021. The delegate's decision reports unsuccessful attempts were made to contact the applicant by telephone, on 26 and 28 September 2021, to confirm his attendance at the interview. On the day of the interview the applicant did not login via WebEx, and between 9:39 and 9:50 am the delegate made three attempts to call the applicant on his mobile phone numbers. The delegate left two voicemails requesting the applicant contact them, but all calls were unanswered. Unlike the earlier correspondence, there is no indication the invitation was returned unclaimed. There is also no indication the applicant contacted the department prior to the delegate making their decision on 8 October 2021.
4. On 14 October 2021 the IAA wrote to the applicant to advise that his case had been referred to the IAA. The correspondence was sent to the [Suburb] address the IOM recorded for the applicant in March 2021, and also to the email address recorded by the IOM, which was previously used by the Department. Also provided to the applicant with the correspondence were copies of an information sheet about the IAA, in English and Tamil, and the Practice

Direction for Applicants, Representatives and Authorised Recipients. On 14 October 2021 the IAA called the applicant on both telephone numbers provided by the department and left messages requesting him to contact the IAA. As at the date of this decision the applicant has not contacted the IAA. The correspondence has not been returned unclaimed, nor is there any indication the email 'bounced back'. I am satisfied the applicant was properly notified of the opportunity to attend an interview but despite multiple attempts to contact him, he has not responded to correspondence and calls from the Department or the IAA.

5. I have turned my mind to whether it is necessary to seek further information in writing or by means of an interview. However, given the multiple attempts that have been made to engage the applicant, that he did not take the opportunity to attend the interview with the delegate or answer when called by the delegate on the day of the interview, he has not responded to the IAA's email or to phone calls made by the IAA to both telephone numbers provided by the department, and he has not provided any submissions or comments about the delegate's decision, I am not satisfied any further attempts to correspond with the applicant would be fruitful. In all the circumstances I consider it appropriate to proceed to make the decision on the information before me, and without inviting the applicant to attend an interview or otherwise provide further information.

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

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6. The applicant's claims, detailed in a statement dated 10 April 2017 (statement of claims), can be summarised as follows:
  - He is a Tamil who was born in Sri Lanka in [Year].
  - Until about 2006 he lived in [City] which was under government control, however the LTTE were also active in the area. The Sri Lankan Army (SLA), Criminal Investigation Department (CID) and other authorities would from time to time search their houses, and there were checkpoints in the area.
  - From the age of about [age range] he worked as a contractor doing driving, including driving a [vehicle]. The work was channelled to him through the Liberation Tigers of Tamil Eelam (LTTE), who were in control of resources such as [vehicles].
  - An uncle who lived near him was sympathetic to the LTTE, and sometimes the LTTE hid weapons at his uncle's house. In about April 2006 the CID came in a white van in search of his uncle at his uncle's house and at the house he lived at with his grandmother. He told the CID his uncle had gone to work and they left. The next day his uncle went to work and has not been seen since.
  - Three nights later another uncle, who lived close by, was shot and killed. For a long time that uncle had connections to the LTTE, and had kept weapons under his grandmother's house.
  - Due to these incidents, and fears for his safety, he left the area and travelled to [Town] with LTTE members. He then undertook training with the LTTE for various periods of time. After training he was deployed to the front line operating heavy machinery until he was injured in late 2007. He then worked translating SLA communications for the LTTE, and in about August or September 2009 while doing this work he received a further injury from a bomb.
  - After the end of the war he was stopped with his wife and their child at an SLA checkpoint and questioned about LTTE involvement. He told them where he had worked in the LTTE

and they were sent to an SLA camp, along with other Tamils. He escaped with his family, by bribing the CID officers who controlled the camp, and went to live in a Sinhalese area.

- In late 2009, after six months, he surrendered to the CID because they could not survive in hiding. He was allowed to live in his grandmother's village, but required to report and sign in with the SLA each day. After a number of years of reporting an SLA officer told him he would be sent to jail in 2013 because he had been in the LTTE.
- His step-father had been involved with the Liberation Tigers of Tamil Eelam (LTTE) for about 14 years and was sent to jail in 2010 for that involvement. He was released in 2012 and said he had been subjected to brutal torture. While his step-father was in jail he (the applicant) was questioned twice by the CID about the location of weapons, and was mistreated at these times.
- He was scared for his life if he was sent to jail, and also scared of what the CID would do to him.
- After leaving Sri Lanka the SLA have searched for him at his mother's house and his home. His step-father was required to report to the SLA base and sign documents, initially monthly, then after about five months reducing to every two months. Eventually the SLA told his step-father they found out he was in Australia and he did not have to report any more.
- He fears if he returns to Sri Lanka he will be seriously harmed by the Sri Lankan government, the SLA and the CID, including death, detention and questioning, continual harassment, and beatings, because of his Tamil ethnicity, as a former LTTE member, as a person who has avoided jail on account of being an LTTE member, and for being imputed with a political opinion as being someone who supports the LTTE.

## **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. The applicant claims to be a Tamil born in the Northern Province of Sri Lanka in [Year]. To support his identity he has provided a number of untranslated documents, including a Sri Lankan National Identity Card (NIC) bearing his photograph, a Sri Lankan Driving Licence, birth certificates for himself, his wife, and their [children], his wife's NIC, and a marriage certificate. He was assisted by a Tamil interpreter during the Irregular Maritime Arrival Entry Interview (Arrival interview), [in] December 2012, and appeared to converse easily in the language. On the information before me, I accept his identity is as claimed, that he was born in the Northern Province of Sri Lanka, he is of Tamil ethnicity, he is a national of Sri Lanka, and Sri Lanka is the receiving country for the purposes of the Act.
  10. I accept the applicant's broadly consistent evidence about his background and family in Sri Lanka, as follows: he was born and always resided in the Northern Province of Sri Lanka; he attended school up to year [grade]; he married his wife in 2006 and they have [children] together, born in [year range], his father died when he was young; in the late 1990s his mother remarried; his mother, step-father, and [sisters continue to reside in the Northern Province of Sri Lanka; and he has maintained contact with his family in Sri Lanka.
  11. In his interactions with the department the applicant has consistently referred to being of the Catholic religion, and I accept he is a Catholic. It is not apparent to me he claims to have experienced any harm or discrimination as a result of his religion, or that makes any protection claims on account of religion.
  12. The applicant has provided a photograph of a man, a woman, and [children], presumably his family, and a number of documents which are not in English, and for which no translations have been provided. No explanation has been provided about the significance of these documents, nor is it apparent from the documents.
  13. The applicant has also provided a letter from the Parish Priest from [a] Church, [Town 1], dated 28 December 2012, indicating the applicant is known to the writer personally, that he was a victim of the war, that the SLA suspects him as an LTTE member, and that 'he has been injured very often to the extent of threatening his life'. No information has been provided as to when the writer first met the applicant or the context that occurred in, nor has any information been provided about how the writer is aware of the applicant's circumstances described in the letter. It is not apparent to me the writer has any first-hand knowledge of the applicant's situation, and I afford this letter little weight in my assessment.
  14. In his statement of claims the applicant refers to his mother, step-father, and [sisters] living in [named town]. He claims authorities, including the SLA and CID, searched their houses from time to time, and that there were checkpoints around the area. He notes his step-father had been in the LTTE for about 14 years, and that he had been hit in the head by a shell and been injured. The applicant has provided two documents in his step-father's name. They are a Release Certificate, issued by the Commissioner General of Rehabilitation, indicating he was released to [City] [in] April 2010, and a card issued by the International Organisation for Migration [in] March 2010. Country information reports that during the war Tamils, particularly in the north and east, reported being monitored, harassed, arrested or detained by security forces. Towards the end of the conflict, a large number of LTTE members were arrested and detained by Government security forces following their surrender or capture, and in the immediate post-war period those with links to the LTTE, imputed or otherwise, continued to be detained, the large majority of those arrested being sent to Government-run rehabilitation

centres.<sup>1</sup> In the context of the country information I can accept the applicant's family home may have been searched, and that there were security checkpoints in place in their area. Despite the lack of information about when his step-father was in the LTTE, what duties he performed for the LTTE, when he was injured or the nature of the injury, and when he was detained for rehabilitation, I am prepared to accept he was an LTTE member who was injured by shelling, and who was detained by authorities and sent for rehabilitation. The applicant suggested at the Arrival interview his step-father was released after one year, but in his statement of claims he indicates his father was 'in jail' in 2010 for about two years for his alleged LTTE involvement, and he was released shortly before the applicant left Sri Lanka, which was in late 2012, it was actually for about two years, and it occurred from about 2010 to 2012. Surprisingly the applicant makes no mention of the Release Certificate in his statement of claims, and does not suggest in his step-father was detained on two occasions. Considering the documentary evidence, I am prepared to accept the applicant's step-father was detained for up to two years, and, as noted on the Release Certificate, he was released in April 2010. Having attended for rehabilitation I consider it implausible the applicant's step-father would have been detained further for his LTTE involvement, which on the information before me I am not satisfied was other than as a low-level LTTE member. I do not accept the applicant's step-father was detained by Sri Lankan authorities as a result of his own LTTE involvement, or that he was imprisoned, after April 2010.

15. The applicant goes on in his statement of claims to refer to various incident in the area he was living in, which he indicates was under government control, but that the LTTE were very active in the area. He claims that in about April 2006 the CID came in a white van and surrounded his uncle's house, which was also the house the applicant was living in with his grandmother. He claims they called for the applicant and asked about his uncle, and he told them his uncle was at work. Later when his uncle returned home the applicant told him the CID had been looking for him, and his uncle said they had approached him on the road. The next day his uncle left for work and he has not been seen since. People at the shops said they had seen his uncle being taken by a white van. His grandmother told him it was not safe for him, the SLA would take him, and that he should leave. He also refers to his Uncle U, who lived near his grandmother's home being sympathetic to the LTTE, or having long-standing connection to the LTTE, and assisting the LTTE to hide weapons at his house, or the grandmother's house. He claims that about three nights after his Uncle P disappeared Uncle U was killed in a shooting incident. Although the applicant notes the incident was witnessed by various people, including Uncle U's wife, it is not apparent the applicant has indicated who was responsible for Uncle U being shot, or that he was shot by Sri Lankan authorities. He mentions Uncle U's death in the context of weapons being buried at his grandmother's house, and to fighting happening at this time, and in the context of the country information, which reports that up to 40,000 civilians may have been killed during the war, I am prepared to accept Uncle U was an unfortunate casualty of the war. Country information also reports that during the war systematic abductions using white vans occurred, which often led to enforced disappearance,<sup>2</sup> and in that context I can accept the applicant's account of these events, and that Uncle P disappeared as claimed. I can also accept that a number of the applicant's relatives may have provided support to the LTTE, such as permitting them to hide weapons at their homes.
16. The applicant claims he left the area because of the danger to him as a result of these incidents, and because of fighting in the area, and I can accept that was the case. He claims he went with a group of LTTE who were travelling to [Town], and that they were able to avoid the SLA by

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<sup>1</sup> Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

<sup>2</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

using forest paths. He goes on to refer to training with the LTTE at an LTTE camp for five days before transferring to another LTTE camp for about three months training, having a break for about three months, then having another three to four months training, and a further three months of training, followed by a break and a further one month of training. He describes marrying his wife, who he knew when living at his grandmother's house, a few months after starting LTTE training, and staying with her during breaks in training. After training he was deployed to the front line of the war to make bunkers with sand. He was then given the role of using the bulldozers, diggers and other equipment to build bunkers, and had about 'one a half months' training on how to use these heavy machines. He noted that generally he would have armed LTTE protecting him and the vehicle in case of attack, but that he was never involved in attacks where engagement in offensive military action was required. He goes on to describe an incident in late 2007 when he was working in the forest using large equipment and had four female LTTE fighters protecting him. One of the woman was hit by a shell and the other three fighters took the injured fighter for medical treatment. While they were gone the SLA kept shelling and the applicant was also hit and received [injuries]. He went into the bunker he had been digging, used the walkie-talkie to request help, and the LTTE came and got him and took him to the medical tent in the forest. He spent 10 days in the medical tent before being sent back to the LTTE base, where he did small jobs, such as driving 4WDs. After some time the LTTE let him go back to live with his wife for four or five months, then he was required to go back and work for the LTTE. He did not want to return, but feared if he did not do so he would be forcibly recruited and faced problems with the LTTE, including his wife being forcibly recruited. When he returned to the LTTE, because of his injuries and because he spoke Sinhalese and Tamil, he was given a job listening to SLA communications and passing the information on to the LTTE.

17. The applicant claims that in around August or September 2009, he came out of the underground bunker where he had been working and, [was] injured when an SLA plane dropped a shell. He went back underground and had medical treatment there and was later treated in hospital. After the end of the war his wife and child were with him and they had to pass through SLA checkpoints. At one checkpoint the SLA asked if he had been in the LTTE and what division he had been in. He was honest and told them he had worked in the LTTE. As he had his wife, and his child was crying, he thinks the SLA had pity on him, and instead of sending him to jail they put him and his family into an SLA camp with other Tamil people, and they were not allowed to leave. He claims he recognised some CID officers guarding the camp and was able to bribe them and escape with his family after about 14 days in the camp. They went to a Sinhalese area to hide for about six months and they could not work and it was very difficult. They could not survive in hiding, and he was worried about his wife and young child, so in late 2009 he decided to surrender to the CID, and was allowed to return to his grandmother's village to live.
18. I have a number of concerns about the applicant's evidence regarding his involvement with the LTTE, and events after the war ended in 2009, which leads me to believe he has not been entirely truthful. Firstly, despite claiming to have undergone at least 10 months training with the LTTE, other than suggesting he was required to be armed during certain periods of training, and that he received about one and a half months training on how to use heavy machinery, no information has been provided about exactly what the training entailed. The lack of detail about this important aspect of his claims is in my view not indicative of lived experience. Secondly, the applicant's own evidence is that whilst he was performing work driving heavy machinery that it was usual for him to be protected by armed LTTE members, and that he was 'never involved in attacks' or 'required to engage in offensive military action', and I consider it implausible such a person, whose role was to operate heavy machinery, would have received the claimed level of training. Thirdly, I consider it entirely implausible a group of LTTE fighters

assigned to guard the applicant and the machinery he controlled would leave him to continue his work unguarded on the front line at the location of a shelling incident, particularly when they could have requested assistance for the injured fighter in the same manner the applicant claims he later used when he was injured. Fourthly, with regard to the purported injuries he sustained due to shelling, no documentary evidence has been provided, such as any medical reports, to support he incurred the claimed injuries, or that any injuries he may have could have resulted from the purported incidents. In addition, the applicant suggests the second injury occurred in August or September 2009, some three months after the war ended and the LTTE were defeated in May 2009. I consider it implausible that the applicant would have been injured in the manner claimed some months after the war had ended, and also that he would be mistaken about the date of such a significant event.

19. Fifthly, I have listened to the recording of the applicant's Arrival interview, and what the applicant said at that interview, with regard to his involvement with the LTTE, is distinctly different to the version of events provided later in his statement of claims. He made no mention of working for the LTTE as a driver, but rather said from the age of [age] until he left for Australia he worked in his own business as a [vehicle] driver, and sometimes engaged in cultivation. He did refer to being suspected of being an LTTE supporter, and being questioned by authorities and required to report, but when asked if he had ever participated in any armed conflict or fighting, or whether he had ever received training in preparation for conflict he said 'No' to both questions. He went on to refer to LTTE practice exercises during Year [grade] at school, which he did not mention later in his SHEV application. I am aware of the caution that needs to be exercised when relying on interviews such as the Arrival interview attended by the applicant, the purpose of which was not for assessment of protection claims. In his statement of claims the applicant made a number of corrections to the written record of the interview, but provided no explanation about why he did not disclose his LTTE training and work. If the applicant had genuinely had the purported lengthy involvement with the LTTE I consider he would have mentioned this at the Arrival interview, either when asked about his employment, and whether he received training in preparation for conflict. I consider the applicant has significantly embellished his evidence in the SHEV application to bolster his protection claims.
20. Sixthly, in his SHEV application the applicant indicates his employment from 2006 to 2009 to be as a 'driver paid under salary by LTTE but not paid from late 2008'. The applicant being in paid employment is inconsistent with the claim that he was engaged in training with the LTTE, or an LTTE member during that time. Seventhly, given the country information which supports that towards the end of the war, and for several years after, those suspected of any association with the LTTE were arrested and detained under the *Prevention of Terrorism Act (PTA)*, with many being sent for rehabilitation,<sup>3</sup> it is entirely implausible the SLA would simply have allowed the applicant to enter an SLA camp with his family if he had disclosed his involvement with the LTTE, regardless of him being with his wife and a crying child. I consider if he had disclosed his LTTE involvement he would have been taken for questioning and sent to a rehabilitation camp, as purportedly happened to his step-father, and the fact that this did not occur is indicative the applicant did not disclose his LTTE involvement, and that those authorities did not have suspicions that the applicant had connections to the LTTE.
21. Eighthly, no details have been provided about how the applicant was able to support his family during the time he claims they were in hiding, exactly where they were located, or how they were able to travel to the location. I consider it entirely implausible a Tamil family, such as the applicant's, would have been able to travel to a Sinhalese area and remain in hiding and undetected by authorities for about six months. In addition, the applicant did not describe

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<sup>3</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244



being questioned by the CID, or being suspected of being an LTTE member when the purported surrender occurred in late 2009, but he was simply allowed to return to his grandmother's house to live, albeit with a purported regular reporting requirement. I consider a person surrendering at this time would have been suspected of being in hiding because of their LTTE involvement, and they would have been questioned and detained, and the fact that the applicant make no mention of this is indicative he was not of interest at that time, and that the claimed events did not occur.

22. Country information reports that at its peak in 2004 the LTTE exercised effective control of approximately three-quarters of the territory in the north and east of Sri Lanka, and that the mostly-Tamil civilian populations of the areas controlled by the LTTE were required to interact with the LTTE's military and civil administration as a matter of course.<sup>4</sup> In that context, I am prepared to accept the applicant assisted the LTTE by operating heavy machinery, performing tasks such as digging bunkers, and also that he assisted by listening to SLA communications in Sinhalese and translating information for the LTTE. However, overall I am not satisfied the applicant received training to be an LTTE member, or that he was ever an LTTE member. On the evidence before me, I am also not satisfied he was injured in shelling incidents as claimed. I can accept that at the end of the war he, his wife and child were taken to an SLA camp and they were not allowed to leave, but I do not accept he revealed having involvement with the LTTE to the SLA. I do not accept they escaped from the SLA camp by bribing CID members, or that the applicant then surrendered after about six months in hiding, but rather consider it most likely the family were released from the SLA camp because the applicant was not considered a security risk, or suspected of having LTTE involvement, and they were allowed to return to his former place of residence.
23. The applicant claims that on return to his grandmother's village in late 2009 he was required to report to the SLA every day and sign a form in Sinhalese, which confirmed he had to report every day, and had an official seal, and he did this for almost three years. He took his wife and child with him so the SLA would treat him better, and if he did not do so the SLA would beat or otherwise harm him. He decided to move to his mother's village because the SLA base was closer to the house there and he was more able to make sure someone went with him to the base so he was safe. For the last four months he was in Sri Lanka he was required to report once a month, and he did that on a Sunday. The applicant claims he was mistreated at times when he reported to sign, and also when he saw SLA officers in the street. After a number of years of reporting an SLA officer he knew told him he would be taken to prison in 2013 because he had been in the LTTE. He was scared for his life and what would happen to him if he went to jail, as after his step-father had been released he told the applicant he had been brutally tortured. He goes on to claim that during the time his stepfather was in jail, in about 2011, he had to go to the CID for enquiries on two occasions. The first time he was asked questions about his uncle having buried weapons under the house and whether there were more weapons anywhere. He was intimidated and locked in a dark room overnight, and he could hear people being hit and screaming. The second time he was there for 10 to 12 hours during which he was beaten and questioned, and told if he revealed where the weapons were they would let his uncle go. He was very scared of what the CID or the SLA would do to him or his family.
24. I have a number of concerns about the applicant's account of these events. Firstly, I have not accepted the applicant's step-father was detained in 2011, and I consider if the purported enquiries by the CID occurred whilst his step-father was detained it must have been prior to April 2010, when he was released from rehabilitation. Nevertheless, given these interactions

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<sup>4</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

reportedly occurred shortly after the end of the war, I am prepared to accept the applicant was questioned by the CID on two occasions, and he may have been mistreated at the time. I can also accept the applicant may have feared for his safety as a result of these incidents with the CID. Secondly, even if authorities had been aware of the applicant's involvement with the LTTE, which I have not accepted, I consider it entirely implausible a person such as the applicant, who was not an LTTE member and only assisted the LTTE as a driver and [another role], would have been required to report to the SLA every day for almost three years before his reporting level was reduced to monthly. Although I can accept he may have been required to report on a daily basis for a period of time, and that he was mistreated at those times, and also by SLA officers generally, I do not accept a person with his profile, having provided support to the LTTE, would have been required to report on a daily basis for an extended period of time. The applicant's evidence is that his reporting requirement was eventually reduced to monthly, which is indicative that after reporting for a period of time, and being questioned on a number of occasions, that he was not of interest or considered a security risk, and I consider this would have occurred at an earlier time than noted by the applicant. I am not satisfied the applicant had any reporting requirement at the time he departed Sri Lanka. Given the country information reports regarding Tamils being monitored, harassed, arrested and detained by security forces during the war, and the period immediately after it ended,<sup>5</sup> I am satisfied the treatment of the applicant was part of the unfortunate but routine treatment of Tamils at the time, rather than because he was specifically of interest to Sri Lankan authorities or considered a particular security risk for any reason at the time of those events, or at the time he departed Sri Lanka. Nevertheless, I can accept the applicant may have had subjective fears of being harmed by Sri Lankan authorities, and this formed at least part of the reason he left Sri Lanka.

25. In his statement of claims the applicant also refers to SLA personnel taking his motorbike or [vehicle] whenever they wanted during the time he was reporting, and him being too scared to say or do anything about it. Having accepted the applicant was required to report for a period of time I can also accept the applicant's property was used as claimed by the SLA, and that if he refused he feared he would be harmed.
26. With regard to events in Sri Lanka after he departed, the applicant claims that after he was released from immigration detention in 2012 he heard that a friend from his village, who was in the LTTE, but in a different unit, was imprisoned in 2012 and only released about a year ago in 2016. The applicant also refers to a boy named [Mr C], who was a distant relative who came from [another town] to stay with the applicant's family to help out at the house about two months prior to the statement date, which was in April 2017, and who was taken by the CID when he was walking down the road, and has not been seen since. The applicant indicates he has known [Mr C] since he was young, and also that he knew him when he was in the LTTE, presumably meaning [Mr C] was an LTTE member.
27. The person who was purportedly imprisoned in 2012 is not named, and there is no information before me about the role that person or [Mr C] reportedly had with the LTTE, or about any activities they may have been involved with at the time of the purported detention or apprehension by the CID that may have caused them to be of interest to authorities. I have not accepted the applicant was an LTTE member, and I am not satisfied these people have a similar profile to the applicant or that their detention or apprehension is indicative of a risk of harm to the applicant. In any event, these alleged incidents occurred several years ago, and as discussed below, I am not satisfied the security conditions at those times reflect the present security situation.

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<sup>5</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

28. Since leaving Sri Lanka the applicant's family have told him the SLA searched for him at his mother's house and asked where he is, and that his mother said she didn't know where he was, and he lived with his wife. His mother said she would speak to his wife and tell the SLA. The SLA then searched for him twice at his home and told her to bring him in as he had not signed in for over a month. His wife told them she was not in contact with him as they had a fight, and she did not know where he was. She told him that after he left Sri Lanka the SLA she and his step-father were required to report, but she was scared to report, presumably meaning she did not report. His step-father and mother went to the SLA base and told them he had gone to another area to work. His stepfather signed a document promising to make him come home, and he signed this document every month for about five months. The SLA then said he could sign only every two months. Eventually the SLA told his step-father they found out the applicant was in Australia and his step-father didn't have to sign the document anymore.
29. I note at the Arrival interview the applicant said his stepfather disclosed the applicant was in Australia, however this is inconsistent with the statement of claims, indicating SLA officer said they found out the applicant was in Australia. I consider this inconsistency casts doubt about the credibility of these claims. In addition, the applicant does not report there were any adverse consequences for his step-father or wife for failing to produce the applicant, or in regard to the apparent failure of his wife to report as requested, which I consider would have been the case had authorities had a genuine interest in apprehending the applicant. I do not find it credible that the step-father would simply have been told to come back each month for five months, and then have the reporting requirement reduced, in circumstances where he had failed to honour the undertaking. I have not accepted the applicant had a reporting requirement at the time he left Sri Lanka, such that authorities would have been alerted to the applicant's absence, and I do not accept these visits occurred, that the applicant was of interest to Sri Lankan authorities after he departed the country, that the applicant's step-father reported or signed as claimed, or that the applicant's family has been targeted by Sri Lankan authorities since his departure for any reason relating to the applicant.
30. The applicant claims to fear being harmed by the SLA and the CID if returned to Sri Lanka. He fears he will be detained and questioned, on the basis of his Tamil ethnicity, and for his participation in the LTTE and his family connection to the LTTE. Given the experiences I have accepted the applicant had in Sri Lanka, I can accept he may be distrustful of the current Sri Lankan government and subjectively fear being harmed by Sri Lankan authorities. However, there have been significant changes in Sri Lanka since the end of the conflict, over 12 years ago, and since the applicant departed for Australia in 2012. On the information before me, and for the reasons noted below, I am not satisfied the applicant would face a real chance of persecution for the reasons claimed if he returns to Sri Lanka.
31. Country information supports that during the civil conflict in Sri Lanka, and for several years after it ended in May 2009, more Tamils were targeted by Sri Lankan authorities than any other ethnic group. While LTTE members and supporters were targeted, there was also widespread, systematic, and discriminatory harm and mistreatment of Tamils with no connection to the LTTE, but who lived in areas formerly controlled by the LTTE during the civil war, in the north and east of the country, with LTTE support at times imputed on the basis of ethnicity. Although the LTTE were comprehensively defeated in 2009, DFAT, the UK Home Office, and the US Department of State confirm the Sri Lankan government remains sensitive to the potential re-emergence of the LTTE or other Tamil separatist groups. However, the Sri Lankan government's

present focus is to identify those who pose a threat to the country's unity, rather than identifying a person's past LTTE links.<sup>6</sup>

32. Tamils with previous connections to the LTTE are not generally of concern to the Sri Lankan government, and there is no longer a systematic practice of detaining those suspected of any involvement with the LTTE, and only those who have a significant role in post-conflict Tamil separatism, including in the Tamil diaspora, would be of interest to Sri Lankan authorities and at risk of detention and ill-treatment. The UK Home Office reported in its 2020 assessment, from a fact-finding mission to Sri Lanka, that if returning failed asylum seekers were found to have links to the LTTE they would likely face further questioning, but it would depend on the case. A non-governmental organisation worker advised the UK Home Office in October 2019 that although after the war whoever was connected to the LTTE would be arrested, sent to court and go through rehabilitation, now just having supported the LTTE is not enough to be arrested. The Attorney General's Department and the CID told the UK Home Office that former LTTE cadres would only be of interest if there was a pending criminal case against them, and that mere membership of the LTTE would not make someone of interest. In October 2019, a representative of the Northern Province community advised that after 2015 (when there was a change of government), there continued to be some surveillance and house visits of former LTTE cadres by intelligence services, however the style of enquiry was different to pre-2015 – they were polite and non-threatening.<sup>7</sup>
33. The UK Home Office and DFAT have 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. The country information does not indicate Tamils are currently at risk of persecution in Sri Lanka purely on account of their race, or that Tamil ethnicity of itself imputes LTTE membership or a pro-LTTE opinion, even when combined with other factors such as gender, age, marital status, or place of origin. DFAT understands close relatives of high-profile former LTTE members who are wanted by Sri Lankan authorities may be subject to monitoring.<sup>8</sup> The information before me does not support the applicant or any of his family members were high-profile LTTE members, or that they are wanted by Sri Lankan authorities, and I do not accept that to be the case, or that the applicant would experience monitoring for that reason. With regard to Tamils in the diaspora, the UK Home Office indicates the government of Sri Lanka does not regard the entire cohort as holding separatist views or of being politically active in any meaningful way,<sup>9</sup> and I do not accept the applicant would be imputed with such views simply for having spent time in Australia.
34. The security situation in Sri Lanka, particularly in the north and east, has improved significantly since the end of the civil war in May 2009, changing notably during the period of the former Sirisena government. The government exercises effective control over the entire country, including in the predominantly Tamil-populated north and east of the country. The *PTA* was enacted as a temporary measure in 1979 to counter terrorism, and during the war authorities detained more Tamils under the *PTA* than any other group. Although the *PTA* remains legally in force, it was effectively suspended between 2016 and 2018 following the government's

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<sup>6</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244; UK Home Office, 'Country Policy and Information Note Sri Lanka: Tamil Separatism', May 2020, 2020052717200; US Department of State, 'Country Reports on Human Rights Practices for 2020 - Sri Lanka', 30 March 2021, 20210401122412

<sup>7</sup> UK Home Office, 'Country Policy and Information Note Sri Lanka: Tamil Separatism', May 2020, 2020052717200

<sup>8</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244; UK Home Office, 'Country Policy and Information Note Sri Lanka: Tamil Separatism', May 2020, 2020052717200

<sup>9</sup> UK Home Office, 'Country Policy and Information Note. Sri Lanka - Tamil Separatism', Version 7.0, 17 June 2021, 20210624114752

commitment to repeal and replace it. It was however used to detain a large number of Muslims following the 2019 Easter Sunday attacks. Prior to those attacks authorities had made progress in processing persons detained under the *PTA*. Most Tamils detained under the *PTA* were sent to government-run rehabilitation centres. Sri Lankan Government statistics from March 2019 indicated 12,191 former LTTE members had completed rehabilitation, and only one rehabilitation centre for former LTTE members remained operational at that time, which housed one former LTTE member. Official sources told DFAT the rehabilitation centre would remain open for the foreseeable future, and may be used for non-rehabilitated LTTE members that come to the attention of authorities, and other purposes.<sup>10</sup> There are no recent reports of rehabilitation being imposed on any former LTTE members or supporters who have returned from Australia. In 2020 the UK Home Office reported that although those connected with the LTTE were ordered to go through a rehabilitation process after the war, now just having supported the LTTE is not enough for a returning asylum seeker to be arrested. The Bureau of the Commissioner General of Rehabilitation reported to the UK Home Office in October 2019, that the rehabilitation process for former LTTE is voluntary, and the last rehabilitee was reintegrated into society two months earlier.<sup>11</sup>

35. I acknowledge DFAT's assessment that repeal and replacement of the *PTA* is unlikely in the near term,<sup>12</sup> and that it is likely the *PTA* will be utilised in future when there are security concerns, such as the 2019 Easter Sunday terrorist attacks. Notably the focus at that time was clearly on the Muslim community and the apprehension of terrorists, rather than being directed at Tamils. I consider the previously reported low (to zero) number of persons in rehabilitation in relation to LTTE involvement reflects there is no longer a systematic practice of detaining those suspected of any involvement with the LTTE, and only those with a significant links to the LTTE, or those involved in post-conflict separatist activities, are now at risk of detention under the *PTA*, or being sent for rehabilitation.
36. In 2019 DFAT reported the military maintains a significant presence in the north, particularly in the Jaffna Peninsula, but that most military personnel are confined to the Security Forces Cantonment on Jaffna Peninsula and smaller surrounding military camps, and military involvement in civilian life has decreased.<sup>13</sup> Both DFAT and the UK Home Office report that the checkpoints reinstated temporarily after the Easter attacks are no longer in operation, the emergency regulations have lapsed, the heightened security has eased, and the military is much less visible.<sup>14</sup> The military were deployed to maintain public order after the presidential election in late 2019, and in responding to the COVID-19 pandemic, including preventing memorial events for those who died during the war.<sup>15</sup> I accept there is a continued military presence in the north and east of Sri Lanka, and that there may be heightened security in response to specific incidents of concern, such as the April 2019 incidents, or the COVID-19 pandemic, and that Tamils may be fearful that past patterns of human rights violations could be repeated. It is not apparent to me the applicant has attended memorial events for those who died during the conflict, or that he intends to do so on return to Sri Lanka, and I am not satisfied he would, such that he would be at risk of harm for that reason. Considering the

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<sup>10</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

<sup>11</sup> UK Home Office, 'Report of a Home Office fact-finding mission to Sri Lanka', 20 January 2020, 20200123162928

<sup>12</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

<sup>13</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

<sup>14</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244; UK Home Office, 'Report of a Home Office fact-finding mission to Sri Lanka', 20 January 2020, 20200123162928

<sup>15</sup> International Business Times, 'Sri Lanka President Gotabaya Rajapaksa deploys armed forces to maintain public order', 26 November 2019, 20191231114452; INFORM Human Rights Documentation Centre, 'Repression of Dissent in Sri Lanka: 1st - 31st May 2020', 29 June 2020, 20200702160949

evidence overall, and in the context of the country information, I am not satisfied the ongoing military presence in the north and the east, is indicative of a risk of harm to this applicant.

37. I acknowledge there have been some ongoing reports of human rights abuses against Tamil since the end of the conflict, including abductions, arbitrary arrest and detention, and mistreatment amounting to torture. The reported incidents mostly occurring several years ago under the *PTA* and the *Emergency Regulations*, and related to people who were considered a threat to national security due to their links to the LTTE, or because of anti-government activism, including involvement in separatist activities in the diaspora. Both DFAT and the UK Home Office report the number of such occurrences, including against former LTTE members, has significantly reduced since the end of the conflict, the number of torture complaints has reduced, and they assess that Sri Lankans face a low risk of mistreatment by either military, intelligence or police forces that can amount to torture. The UK Home Office assesses that even those with a connection to the LTTE are not at risk unless they have, or are perceived to have had a significant role in it, or if they are perceived to be active in post-conflict Tamil separatism, and thus a threat to the state, and this is also DFAT's assessment.<sup>16</sup>
38. In November 2019 Gotabaya Rajapaksa was elected president of Sri Lanka. Gotabaya is the brother of Mahinda Rajapaksa, who was president from 2005 to 2015, and who was appointed prime minister shortly after the 2019 election. As the former powerful war-time secretary of defence under his brother Mahinda Rajapaksa (who served as president from 2005 to 2015), Gotabaya Rajapaksa was a key figure in the war against the LTTE, in which the UN says war crimes and crimes against humanity were allegedly committed by state forces under his control. The Rajapaksa government went on to win an overwhelming victory in the August 2020 parliamentary election in Sri Lanka. Commentators have expressed concerns about the return of the Rajapaksas to power, including regarding the centralisation of powers, and that planned constitutional reforms and expansion of presidential powers augurs an acceleration of a highly repressive and authoritarian era. There are also criticisms about the appointment of military officials to key government positions (some of whom served during the former Rajapaksa era and who have been implicated in human rights violations in the final stages of the war), the lack of progress on reforms promised by the previous Sirisena government, including delayed delivery of human rights and reconciliation commitments and the government being slow to implement transitional justice mechanisms, and regarding restrictions on memorialisation events for Tamils who died in the war and harassment of Tamils in the context of these events, and mistreatment of Tamils involved in searching for the truth about those who have disappeared in Sri Lanka. DFAT reports that although there has been some progress, for example with the establishment of offices for Missing Persons and Reparations, implementation of the government's transnational justice and reconciliation commitments has been slow and uneven to date. Minimal progress has been made on accountability for abuses committed during the war, including by military, paramilitary, police and other security-sector officials, and against the Tamil community.<sup>17</sup>
39. Despite the concerns noted above, the situation for Tamils has improved significantly since the applicant departed Sri Lanka, and since the end of the conflict. DFAT assesses that non-Muslim

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<sup>16</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244; UK Home Office, 'Report of a Home Office fact-finding mission to Sri Lanka', 20 January 2020, 20200123162928; UK Home Office, 'Country Policy and Information Note Sri Lanka: Tamil Separatism', May 2020, 2020052717200

<sup>17</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244; International Truth and Justice Project/Journalists for Democracy in Sri Lanka, 'Sri Lanka: and the crackdown begins', January 2020, 2020011414253; Office of the High Commissioner for Human Rights (OHCHR), Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka, 18 February 2020, 20200221140652; Aljazeera, 'Sri Lanka: Economy, human rights key challenges facing Rajapaksas', 19 August 2020, 20200819205836

Sri Lankans, including Tamils, face a low risk of official or societal discrimination based on ethnicity or caste, including in their ability to access education, employment or housing [with low risk indicating DFAT is aware of incidents but has insufficient evidence to conclude they form a pattern]. DFAT further assesses that there is no official discrimination on the basis of ethnicity in public sector employment, but that the under-representation of Tamils is largely the result of language constraints and disrupted education because of the war. Similarly, the 2020 UK Home Office fact-finding mission report, which includes information from a wide range of informed sources, including Sri Lankan government officials, journalists, and non-governmental organisations, indicates that since the end of the civil war the focus of the Sri Lankan government has changed, there have been improvements in the general feeling of personal freedom in the country, and although there remains some discrimination towards Tamils, along with other minorities, most Tamils do not suffer persecution simply for being Tamil.<sup>18</sup> I am not satisfied any discrimination the applicant may experience as a Tamil would amount to serious harm.

40. I accept Sri Lankan Tamils may have concerns about the return to power of members of the Rajapaksa family. I also accept the present government is more authoritarian than the previous Sirisena government, it is unsympathetic to continuing post-war reconciliation efforts, or Tamils' calls for greater cultural recognition and political representation, and there is unlikely to be accountability for human rights abuses during the war under the regime. Despite the concerns, I am satisfied the situation for Tamils in Sri Lanka is vastly different than under the previous Rajapaksa regime. The present Rajapaksa government has been in power since November 2019, over 24 months, and the evidence before me does not support there has been a return to the practices of the previous Rajapaksa government during the war, or that Tamils in general have been directly targeted or discriminated against, or that there is an intention to do so.
41. Considering my findings in the context of the country information, I am not satisfied the applicant would be imputed with being an LTTE member, or with having pro-LTTE or anti-government opinions for any reason, including because his father was an LTTE member who was detained for rehabilitation, or as a result of any support he or other family members may have provided to the LTTE, such that he would be of adverse interest. I am not satisfied there is more than an extremely remote chance the applicant would be subject to investigation, monitoring, harassment, or be detained or sent for rehabilitation, including in the unlikely event Sri Lankan authorities were aware of the support I have accepted he provided to the LTTE, or as a result of any past experiences he or his family had with authorities in Sri Lanka. Further, I am not satisfied the change in government has resulted in a deterioration of conditions for Tamils generally in Sri Lanka, or more specifically that the risk for a person such as the applicant has increased or would increase in the reasonably foreseeable future. I am not satisfied the applicant faces a real chance of harm from the present government, or any other person or group in Sri Lanka in the reasonably foreseeable future, or that he would be of interest to Sri Lankan authorities on return, or that he would face a real chance of harm on return as a result of his Tamil ethnicity, or for any actual or imputed political opinion as a result of his or his family member's involvement with the LTTE.
42. The delegate considered the chance of the applicant facing harm for being a failed Tamil asylum seeker who departed illegally. I accept the applicant's consistent evidence that he left Sri Lanka illegally by boat, without using a passport, and travelled to Australia.

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<sup>18</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244; UK Home Office, 'Report of a Home Office fact-finding mission to Sri Lanka', 20 January 2020, 20200123162928

43. Sri Lankans without passports can re-enter the country on temporary travel documents.<sup>19</sup> I consider it highly likely as a result of the manner of his return, using such documents, the applicant will be identified as an asylum seeker returning from Australia who departed Sri Lanka illegally. DFAT reports that most returnees, including those from Australia, are questioned upon return (usually at the airport) and, where an illegal departure is suspected, they can be charged under the Immigrants & Emigrants Act (I&E Act). DFAT understands such people are processed by police located at the airport. The process often involves interviewing returning passengers, confirming their identity, contacting police in their claimed hometown, contacting claimed neighbours and family, and checking criminal and court records, and would identify someone trying to conceal a criminal or terrorist background, or trying to avoid court orders or arrest warrants.<sup>20</sup> I am not satisfied the applicant has a profile that would be of interest for those reasons.
44. At the earliest available opportunity after investigations are completed, police transport individuals charged with departing Sri Lanka illegally to the closest Magistrate's Court. The Court makes a determination as to the next steps for each individual. Should a magistrate not be available, for example because of a weekend or public holiday, those charged may be detained at the airport for up to two days. Although DFAT describes this as occurring in a 'holding cell', the UK Home Office observed returnees sat in a 'waiting area or room' off the CID office at the airport, and that there was access to bathrooms, a prayer room, food and water, and the airport has a medical facility available to all passengers if required. The IOM provides support for returnees during the arrivals process, and unlike in the past, has not seen intense questioning in the last few years.<sup>21</sup>
45. The information before me does not indicate returnees are subject to mistreatment at the airport, and all returnees are treated according to standard procedures irrespective of ethnicity and religion. However, I am satisfied the applicant would be questioned and detained for a short period of time at the airport, before being transferred to the court for the matter of his illegal departure to be dealt with. Country information indicates those who plead guilty receive a small fine for departing Sri Lanka illegally, which can be paid by instalments, and they are allowed to leave. Sri Lanka's Attorney-General's Department, which is responsible for the conduct of prosecutions, claims that no returnee who was merely a passenger on a people smuggling venture has been given a custodial sentence for departing Sri Lanka illegally.<sup>22</sup>
46. Given the applicant departed Sri Lanka illegally, I consider it highly likely he would plead guilty to that offence, and I find that he would, and that he may receive a fine, and will be allowed to leave. I am not satisfied the applicant would be mistreated during processing at the airport, or that the processes he will experience on return, including being questioned, detained for a short period at the airport, and being fined, amounts to serious harm for this applicant. I do not accept the applicant would be imprisoned as a result of his illegal departure. On a separate basis, I am satisfied the I&E Act provisions relating to illegal departure are not discriminatory on their face, and they are not discriminatory in intent or implemented in a discriminatory manner. I find that the investigation, detention, prosecution or punishment of the applicant under the I&E Act for illegal departure would not be the result of systematic and discriminatory conduct, and does not amount to persecution within the meaning of s.5J(4).

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<sup>19</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

<sup>20</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

<sup>21</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244; UK Home Office, 'Report of a Home Office fact-finding mission to Sri Lanka', 20 January 2020, 20200123162928

<sup>22</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244



47. Those who plead not guilty to an illegal departure are usually granted bail on the basis of personal surety or guarantee by a family member, and are subject to discretionary bail conditions, which can involve monthly reporting to police at the returnee's expense over a protracted period of time. The usual result is a fine.<sup>23</sup> As I am not satisfied the applicant would plead not guilty I am also not satisfied a guarantor would be required. In any event, the penalties and processes associated with pleading not guilty to an illegal departure are equally non-discriminatory, and I am not satisfied they amount to persecution were the applicant to plead not guilty.
48. Thousands of Sri Lankans have returned from Australia and other western countries after unsuccessfully seeking asylum, and Sri Lankan authorities are reported to have said they are welcome to return. It is not an offence to seek asylum outside Sri Lanka, and independent sources told the UK Home Office that even those who have been absent from Sri Lanka for a number of years are not questioned on those grounds. There is no information before me to support that such returnees are targeted merely for seeking protection, for being failed asylum seekers, or for having been absent from their home area for an extended period of time. Reports to the UK Home Office indicate that simply having supported the LTTE is now not enough for a person to be arrested, and the former LTTE cadres would only be of interest if there was a pending criminal case against them, and even mere membership of the LTTE would not make someone of interest.<sup>24</sup>
49. I have not accepted the applicant was an LTTE member, but I have accepted he provided assistance to the LTTE operating heavy machinery and doing translation work. I am not satisfied he would be of interest because of that assistance, or because his step-father attended rehabilitation for suspected LTTE involvement. I am not satisfied the applicant's profile is such that he would be of interest on return, including as a returning asylum seeker from a Western country, or for having spent a significant period of time in Australia (a country with a large Tamil population), or as a result of any previous treatment he experience from authorities, including harassment and questioning about connections to the LTTE. I am also not satisfied authorities would assume he was an LTTE member, or impute him with LTTE connections, or otherwise impute him with anti-government opinions, for any reason, including because he departed illegally, sought asylum in Australia, and has spent time living in Australia.
50. The UK Home Office report that monitoring on return is possible if a person is deemed to have done something against the government. DFAT also reports that some returnees, including those with suspected LTTE links in the north and east, have been the subject of monitoring including home visits and phone calls from the CID. DFAT understands most returnees, including returning asylum seekers, are not actively monitored on an ongoing basis. DFAT is unable to verify whether the monitoring that does occur is specific to former LTTE cadres, but is not aware of returnees being treated in a way that endangers their safety and security. Tamils who had failed to secure asylum in Australia and since returned to the Northern Province told DFAT they had no protection concerns and had not been harassed or monitored by authorities. Similarly, the UK Home Office report indicates security was not identified as a major issue by a sample of returning asylum seekers questioned by the UNHCR.<sup>25</sup> Considering the applicant's profile in the context of the country information, I am not satisfied he would

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<sup>23</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

<sup>24</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244; UK Home Office, 'Report of a Home Office fact-finding mission to Sri Lanka', 20 January 2020, 20200123162928

<sup>25</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244; UK Home Office, 'Report of a Home Office fact-finding mission to Sri Lanka', 20 January 2020, 20200123162928

experience monitoring or interrogation on return to his home area in the reasonably foreseeable future.

51. DFAT reports that failed asylum seekers can face practical challenges to successful return to Sri Lanka, including difficulty finding suitable employment and reliable housing, but do not experience societal discrimination for seeking asylum elsewhere. Some returnees have also reported social stigma upon return to their communities, with some communities resenting the support provided to refugee returnees.<sup>26</sup>
52. The applicant was born and always resided in the Northern Province of Sri Lanka, and I am satisfied he will return to that area, where his wife and children and other family members continue to reside. Considering the applicant's profile in the context of the country information, I am not satisfied he would experience harassment, monitoring or interrogation in Sri Lanka, including on return to the Northern Province, in the reasonably foreseeable future for any reason, or that he would be denied access to basic services, such that his capacity to subsist or earn a livelihood would be threatened. The applicant previously worked in self-employment operating heavy machinery and in cultivation in Sri Lanka, and in his SHEV application he indicated that from 2016 until the date of lodging, in May 2017, that he was working [in] Australia. On the information before me I am not satisfied the applicant would be unable to find and maintain work in Sri Lanka. The applicant is a young man, who has demonstrated resilience and resourcefulness in finding work in Australia. In the SHEV application he indicated he is in daily contact with his family in Sri Lanka, and I am satisfied he will have the support of his family initially on return to Sri Lanka, that they will be able to provide him with accommodation on arrival, and that he will be able to re-establish himself in the Northern Province, find and maintain employment and accommodation, and be able to support himself.
53. I accept it is possible the applicant may encounter some challenges re-integrating to society and may experience some social stigma. I am not satisfied any social stigma or reintegration difficulties he may experience rises to the level of serious harm for this applicant, whether considered separately or together. I am not satisfied the applicant faces a real chance of persecution in Sri Lanka, as a result of his illegal departure, or for being a returning failed asylum seeker.
54. In all the circumstances, I am not satisfied the applicant faces a real chance of persecution, now or in the reasonably foreseeable future, for any of the reasons claimed, even when those reasons are considered together. I am not satisfied the applicant has a well-founded fear of persecution within the meaning of s.5J.

#### **Refugee: conclusion**

55. 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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56. 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

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<sup>26</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

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**

57. 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.
58. The expressions 'torture', 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' are in turn defined in s.5(1) of the Act.
59. I accept on return to Sri Lanka it is likely the applicant will be subject to administrative processes, he may be detained for a short period of time, questioned and subject to penalties as a consequence of his illegal departure from Sri Lanka. I have not accepted the applicant was of adverse interest to authorities when he departed Sri Lanka, or that he would be a person of interest to the authorities on return for any reason, or that there is a real risk he would be mistreated during processing at the airport or any associated brief period of detention. I also accept the applicant may face some challenges re-integrating into Sri Lankan society, he may face some discrimination as a Tamil, and social stigma as an asylum seeker. Although experiencing social stigma and discrimination may be hurtful, and it may be stressful to undergo the processes associated with arriving in and re-establishing himself in Sri Lanka, I am not satisfied such treatment, including being fined in relation to his illegal departure, would amount to significant harm, as defined in the Act, for this applicant, and including considering these matters cumulatively.
60. I have otherwise found there is not a real chance the applicant will face any harm on return to Sri Lanka for the reasons claimed, now or in the reasonably foreseeable future. For the same reasons, I am also not satisfied there is a real risk of any harm on return, including significant harm.

### **Complementary protection: conclusion**

61. 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:

...

***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.