



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

**Decision and Reasons**

**Referred application**

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INDIA

IAA reference: IAA20/08491

Date and time of decision: 27 July 2020 17:06:00

L Hill, 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 stateless. He arrived in Australia in April 2013 and applied for a Safe Haven Enterprise Visa (protection visa) on 22 May 2017. A delegate of the Minister for Immigration (the delegate) refused to grant the visa on 11 June 2020.

### Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
3. The IAA received an email from a Solicitor at on 3 July 2020. The email enclosed an IAA submission, IAA New Information Submission and attachments '1-8'. She states that the assistance provided in compiling the enclosed material was on a one-off basis and that all correspondence in this matter should be directly with the applicant.
4. The IAA submission dated 3 July 2020 (first IAA submission) contains discussion on why the applicant does not agree with the delegate's decision and outlines material facts which he the applicant believes were overlooked which I have considered in this review. It also repeats large portions of his claims. This is not new information.
5. In the first IAA submission, the representative contends that the delegate erred in finding that the applicant was a Sri Lankan citizen and has reiterated the applicant's claims that he is stateless. Various extracts from country information articles and reports (Attachments '2-8') have been referred to in support. Attachment '1' is a statement prepared by the applicant (first IAA statement) and a letter from the Organisation for Eelam Refugees Rehabilitation (OfERR). Similar to the submission, a large portion of the first IAA statement addresses the delegate's finding that the applicant is a Sri Lankan citizen. He has also reiterated and provided the OfERR letter in support of his fears of harm on return to Sri Lanka. For the reasons given below, I have found that the applicant is an Indian national and as such his fears on return to Sri Lanka are not material. I am not satisfied there are exceptional circumstances to justify considering this new information.
6. The first IAA submission and first IAA statement also reiterates and addresses the applicant's fear of harm on return to India. The 2019 US Department of State report<sup>1</sup> (which I have obtained as new information below) and a Red Flag<sup>2</sup> article have been referred to in support. The Red Flag article refers to an identifiable individual who sought to leave India without valid travel documents. I am satisfied that it is credible personal information which was not previously known and, had it been known, may have affected the consideration of the applicant's claims. Furthermore, on its face the information may support the applicant's claims regarding his fear of harm on return to India. I am satisfied that there are exceptional circumstances to justify considering this information and that s.473DD(b)(ii) is met.
7. In the first IAA statement the applicant has requested an interview. The submission provides argument in support of this request. It has been contended that if the IAA is inclined to make any negative findings there are particular compelling circumstances which mean that the IAA should exercise its discretion under s.473DC(3) and invite the applicant to give oral evidence

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<sup>1</sup> US Department of State, "Country Reports on Human Rights Practices for 2019 – India", 10 March 2020, 20200312122934.

<sup>2</sup> Red Flag, "Inside an Indian 'special camp': 'We will either get out of here, or we will die here'", 13 February 2020.

at interview. The representative has referred to case law and contended that in the circumstances of this review it would be legally unreasonable for the IAA not to exercise its discretion to seek information from the applicant at interview. In summary, it has been contended:

- the way the delegate's finding on the applicant's nationality was flawed and she did not consider various country information which strongly supports the applicant's claims of why his family became stateless;
  - in the event that the IAA makes a finding that the applicant is stateless, the IAA needs to consider the applicant's fear of harm in India, which would inevitably involve considering new information and dispositive issues;
  - in the event that the IAA considers the enclosed information is new information, the IAA needs to consider seeking interview evidence from the applicant to obtain information relating to its finding that the limbs in s.473DD are/are not met.
8. I have considered these arguments however I am not persuaded by them. For the reasons explained below. I have listened to the protection visa interview and the applicant was asked at least twice why he feared returning to India. The applicant provided a response. He also addressed this specific issue in his protection visa and his first IAA statement. As discussed below, the IAA also wrote to him and gave him an opportunity to comment on country information relating to his citizenship status in India. In response, a second IAA submission and statement has been provided which amongst other issues specifically addresses his fear of harm in India. I am satisfied that he has had a number of opportunities to address his fear of harm in India.
9. The representative has also provided a 'New Information submission' which specifically addresses why the new information referred to in the first IAA submission, statement and country information should be considered by the IAA under s.473DD. It is not apparent why the applicant's responses in relation to any s.473DD findings could not have been addressed in this written document. I am not satisfied that an interview is required on this basis.
10. Having regard to all the evidence, I am not satisfied in the circumstances of this application an interview is warranted.
11. I have obtained new information published in three reports on India published by Australian Department of Foreign Affairs and Trade (DFAT), US Department of State and UK Home Office.<sup>3</sup> In terms of the applicant's citizenship the delegate did not consider whether the applicant's birth in India meant that he was an Indian citizen and as such did not refer obtain country information specific to the issue. These reports address the issue of nationality/citizenship for persons in the applicant's situation, and conditions in India. In the circumstances I am satisfied there are exceptional circumstances to justify the consideration of this new information.
12. On 7 July 2020, the IAA invited the applicant to comment/provide new information on the country information that was not before the delegate relating to the acquisition of Indian citizenship for certain individuals at time of birth. In response to this invitation, on 21 July 2020, the applicant's representative again stated that the assistance provided was on a one-off basis and that all correspondence in this matter should be directly with the applicant. The email enclosed a second IAA submission and attachments '1-4' (including a second statement form

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<sup>3</sup> Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report India 17 October 2018", 17 October 2018, CIS7B839419830; UK Home Office, "Country Background Note: India", 1 January 2019, 20190125180755 and US Department of State, "Country Reports on Human Rights Practices for 2019 – India", 10 March 2020, 20200312122934.

the applicant). These have been provided in response to the IAA's invitation to comment. The information that is the subject of the invitation was not raised by the delegate previously and I am satisfied that this new information provided in response, was not and could not have been provided to the Minister before the delegate made her decision. It specifically addresses the dispositive issue before me relating to the applicant's citizenship. I am satisfied that there are exceptional circumstances to justify considering this information and that s.473DD(b)(i) is met.

13. In the second IAA statement, the applicant states that he is not a lawyer and is unqualified to respond to the legal implications of the Indian Citizenship Act 1955 and its various amendments and that he intends to seek advice from a qualified Indian lawyer on citizenship issues. He intends to forward written documentation that may result to the IAA as soon as possible. The issue relating to his acquisition of Indian citizenship at the time of his birth were put to him in the IAA invitation to comment within the prescribed period. As discussed above, a second IAA submission and attachments which includes a second IAA statement have been provided in response. He was assisted to prepare his response by a solicitor and registered migration agent from a specialist refugee legal service. Other than his broad statement that he intends to seek advice, no further information about when or who he is going to contact to get this advice has been provided. No further correspondence has been received in the week since that response was given. Considering all of these matters, in the circumstances of this case I have decided to proceed to a decision on the basis of the material before me.

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

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14. The applicant's claims can be summarised as follows:
  - He was born in [Town 1] in [District 1] in the Indian state of Tamil Nadu in India. He is a Hindu Tamil. He is stateless.
  - Sometime between 1947 and 1950, his maternal and paternal grandfathers, who are Indian citizens, moved to Sri Lanka to work. In Sri Lanka, his grandfathers married and had children. Both his mother and father were born in Sri Lanka however they were not recognised as Sri Lankan citizens.
  - In 1985, his parents decided to leave Sri Lanka. The war was escalating and they feared for their safety. His family travelled to India and went to the [Camp 1] Refugee Camp in [District 1] in Tamil Nadu.
  - Sometime between 1986 and 1987, he and his family moved back to Sri Lanka. They thought the war was easing and wanted to return. They travelled illegally to Sri Lanka by boat and settled in [a named town] in [District 2] in Northern Province.
  - In Sri Lanka, his father was arrested, detained, questioned and tortured by the Sri Lankan Army (SLA) because his mother's sister's son (cousin) was a member of the LTTE. The SLA would also attend the family home. They would ask for his cousin and threaten his family. They thought his family was a part of the LTTE and wanted information. His father continued to suffer both physical and mental problems as a result of the torture he was subjected to by the SLA.
  - In 1990, his family moved back to India because the war was escalating and the problems his family were facing with the SLA. His parents were worried he and his brother might be assumed to be LTTE supporters or soldiers. At this time, his uncle was arrested and interrogated. He believes it was because his uncle had assisted his family with their travel back to India by boat and thought his uncle was connected with the LTTE. They do not

know if he is alive or not. He has made an application with the Red Cross to trace his uncle's whereabouts.

- In India, his family returned to the [Camp 1] Refugee Camp where he had been born. They later moved to [another] Refugee Camp in [a named] district before moving to [Camp 2].
  - He and his family had no rights in India. They had to get permission from the police to leave the Refugee Camp and report on return. They police would question and threaten them. The police from Q Branch would call them dogs and abuse them. They would have to follow their orders and they would sometimes threaten and harm them. They could not complain and were treated as second class citizens. They could not study freely and not get a drivers licence.
  - He saw in an Indian newspaper that Australia welcomed refugees. He had always been a refugee with no rights or recognition and he felt in Australia he would have rights and decided to flee for Australia. A friend in another camp told him that another friend was going to Australia. Arrangements were made and he departed India by boat to travel to Australia in 2013.
  - Since his arrival in Australia his family in India has been targeted.
15. The applicant claims if he is forced to return to Sri Lanka he will not be allowed to enter as he is not recognised as a citizen and has no rights. If fears if he is allowed to enter Sri Lanka he will be harmed by the Sri Lankan authorities because he is Tamil, his family's connections with supporters or members of the LTTE and his profile as a failed asylum seeker from a western country who has been affected by the Department of Immigration's data breach. He will also be unable to find housing, shelter or access medical assistance. He has no family in Sri Lanka.
16. The applicant claims he is unable to return to India as he has no rights in India. He is not recognised as a citizen and would be detained, interrogated and placed back into a refugee camp or prison. He will also be harmed by the Indian authorities including Q Branch because he left India illegally and his profile as a Sri Lankan refugee who has been affected by the Department of Immigration's data breach.
17. It has also been contended that should the applicant return to India he will suffer serious harm from the Indian authorities or other Indian nationals on account of his lack of nationality and/or imputed nationality as a Sri Lankan, his membership of a particular social group, Tamil refugees in India and his actual/imputed political opinion against the Indian government because of his status as a Tamil refugee, the release of his personal information through the Department of Immigration's data breach, his illegal departure and asylum claims in Australia.

## **Refugee assessment**

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18. 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**

19. 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.
20. The applicant claimed that he was born in the Indian state of Tamil Nadu in India on [date]. A copy of his birth certificate corroborates this. It states he was born in [Camp 1] in [District 1] in the Indian state of Tamil Nadu in India on [that date].
21. Various contemporary sources including Department of Foreign Affairs and Trade, US Department of State and UK Home Office<sup>4</sup> report that according to Indian citizenship laws, any person born in India on or after 26 January 1950, but before 1 July 1987, obtained Indian citizenship by birth.
22. On 7 July 2020, the IAA invited the applicant to comment /provide new information on the country information that indicated as an individual born in India on or after January 1950 but before July 1987, the applicant was a citizen of India by virtue of his birth. On 21 July 2020, a response comprising of a second IAA submission and statement (Attachment '1') and supporting country information (Attachments '2-4') was provided. In summary, these documents provide a number of reasons, discussed separately below, as why the applicant is not an Indian citizen and is stateless.
23. The applicant claimed that his birth certificate is not that of an Indian citizen. His birth was registered on a separate register from citizens. It specifically categorises him as a child of Sri Lankan refugees. The red stamp on the original states, "Sri Lankan Refugee" and notes his place of birth as "[Camp 1]", which is a refugee camp. In 1996, his mother made verbal enquiries with Q Branch regarding the status of her family and him. They told her the "Sri Lankan refugee" stamp on his birth certificate confirmed he was a refugee and a non-citizen. It has been further contended in the second IAA submission that the country information referring to the inconsistency and unreliability of Birth Certificates issued in India and that many Tamils born in India were not given birth certificates broadly supports the applicant's claim that his birth certificate is not that of an Indian citizen and that it may not be seen as evidence of such.
24. It is not in dispute that the applicant's birth certificate bears the stamp "Sri Lanka Refugee" and in the absence of an English translation, I am prepared to accept that "[Camp 1]" is listed as the place of birth. However it remains the case that other than the applicant's assertions, no supporting/documents or evidence including any country information has been provided which supports the assertion that there are two separate birth registers in India, one for

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<sup>4</sup> DFAT, "DFAT Country Information Report India 17 October 2018", 17 October 2018, CIS7B839419830; UK Home Office, "Country Background Note: India", 1 January 2019, 20190125180755 and US Department of State, "Country Reports on Human Rights Practices for 2019 – India", 10 March 2020, 20200312122934.

citizens and one for children of Sri Lankan refugees. Nor does the country information before me suggest this.

25. The applicant's Birth Certificate states it was issued by the Government of Tamil Nadu and that the information contained in it has been taken from the original record of birth, which is in the register for [Town 1] of the district of Ramanthapuram of the State Tamil Nadu. I am not satisfied that the details of his birth certificate are unreliable. The birth certificate does not state, nor am I satisfied that it be implied that his record of birth has been record in a separate register from citizens. Finally, other than the applicant's assertions, there is no evidentiary basis to his claims regarding his mother's verbal enquiries with the authorities, and I am not satisfied that such claims are true.
26. The applicant also claimed that his past treatment in India and Sri Lanka means he cannot be an Indian citizen. He has been treated as a Sri Lankan refugee since birth by the Indian authorities and has not been acknowledged as a citizen and suffered severe discrimination. In 1987, he was forcibly deported from India to Sri Lanka as a returned refugee. When he lived in Sri Lanka he was never treated as an Indian citizen. He claimed that his place and date of birth have never been recognised as qualifying him as an Indian citizen; this is a fact of life whatever the interpretation of the law may be. In the second IAA submission it has been further contended that his claims that he has been and was never granted Indian citizenship are strongly corroborated by the numerous identity documents provided by the applicant to the Department, including his Sri Lankan refugee identity card, civil supply card as well as two Sri Lankan refugees family identity card issued by the government of Tamil Nadu, India.
27. I accept that a number of documents identify the applicant and his family as registered Sri Lankan refugees in India; and it is not in dispute that his parents, who were born in Sri Lanka and fled to India during the civil conflict, and like many others were registered as Sri Lankan refugees and so were their children; however I am of the view that these arguments have limited weight when considered against the various sources of information before me relating to the citizenship laws of India and the details of the applicant's birth certificate.
28. In the second IAA submission, it has been contended that some country information,<sup>5</sup> suggests that the process of obtaining citizenship in India under the legislation is not a consistent or streamlined one. I have considered the country information provided. It relates to individuals of Tibetan descent. Furthermore, as noted by the representative, a judgment of the Delhi High Court found that the nationality of Tibetans born in India between 1950 and 1987 cannot be questioned under the Citizenship Act. In response, the Ministry of Home Affairs issued a policy that Tibetan refugees born in India between 26 January 1950 and 1 July 1987 were to be issued with passport and treated as Indian citizens by birth. I am not satisfied that the country information substantiates that the process of obtaining citizenship in India under the relevant legislative provision is arbitrary and inconsistent for individuals with the applicant's profile. Nor am I satisfied that birth certificates such as that held by the applicant may not be considered as evidence that an individual is a citizen or that individuals with the applicant's profile are excluded from citizenship. I find these contentions lack merit.
29. The applicant has claimed that he does not have a right to become an Indian citizen and even if he did he has no realistic means of applying for that status. He does not believe he is able to apply for Indian citizenship in Australia because of the nature of the available documentation. Even if he was theoretically able to do so, he would be too afraid to proceed because of the

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<sup>5</sup> Immigration Board of Canada, "India: The Delhi High Court decision of 22 September 2016, on the rights of Tibetans to citizenship and access to passports, including implementation (August 2016-April 2017)", 12 May 2017 and US Department of State, "Country Reports on Human Rights Practices for 2019 – India", 10 March 2020, 20200312122934.

harassment his parents have long suffered from Q Branch. He believes his parents would be removed from refugee camp records, their benefits terminate and they would be taken into detention and suffer custodial torture and that given their age and health this would lead to permanent injury or death.

30. The difficulty with these arguments is that the Indian citizenship laws are clear in respect of persons such the applicant. He is a citizen by right of birth; it not a case of obtaining it by application in the sense suggested. I do not accept he will not be recognised as such. The applicant is in possession of a birth certificate issued by the Government of Tamil Nadu which states he was born in India on [date]. An application of the Indian Citizenship Act 1955<sup>6</sup> to the applicant's particular circumstances very clearly indicates that citizenship was conferred at the time of his birth in India. The country information before me does not substantiate his claims that he needs to apply for Indian citizenship or that his parents will be mistreated.
31. I have considered the two articles<sup>7</sup> provided in support of the contention that Tamil refugees who live in refugee camps in India are denied citizenship and remain stateless. Both articles report that amendments to Indian citizenship laws have resulted in the denial of Indian citizenship to some individuals, however neither article deals directly with the circumstances of this particular applicant. The first of these articles simply refers to Eelam Tamil refugees who have resided in India for several decades being denied citizenship by operation of a 2019 Citizenship Amendment Bill. Neither article makes reference to persons born in India born in India on or after 26 January 1950, but before 1 July 1987 (who are recognised as citizens by birth), nor do they suggest that citizenship will be stripped from such persons. I am not satisfied that they assist in the assessment of this case.
32. Finally, it has been contended that given the general refusal to grant citizenship to Sri Lankan refugees, its reluctance of recognising some people from minority groups as citizens, it is conceivable that the applicant was never considered an Indian citizen by the Indian authorities due to his birth certificate stamped as Sri Lankan refugee and despite being born there, and that it is not implausible that the applicant is denied citizenship and lived in India as a Sri Lankan refugee as claimed. I have addressed the applicant's past experiences in India below, however it remains that an application of the citizenship laws of India to the particular circumstances of this applicant indicate that he was conferred Indian citizenship at the time of his birth.
33. In light of the information before me, I do not accept the applicant is stateless. Instead, I am satisfied that the applicant is an Indian citizen. Furthermore, given the evidence before me including the citizenship laws of Sri Lanka, I am not satisfied that the applicant is a national of Sri Lanka. I am satisfied that India is the receiving country for the purpose of this assessment.
34. Throughout the protection visa application process, the applicant stated that he feared returning to Sri Lanka. However, as I have concluded that the applicant is an Indian citizen and it follows that the issues as to why he cannot return to Sri Lanka do not arise in this case. I am not satisfied that the applicant has the right to enter or reside in Sri Lanka. Further, there is no claim or evidence before me to indicate that the claimed events in Sri Lanka, or the reasons why he fears returning there, have any bearing on whether the applicant faces a real chance of serious harm or a real risk of significant harm upon return to India, and I am not satisfied that it does.

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<sup>6</sup> India: Act No. 57 of 1955, Citizenship Act 1955.

<sup>7</sup> Tamil Guardian, "Eelam Tamil refugees denied citizenship by India's Citizenship Amendment Bill", 14 December 2019 and Reliefweb, "Forgotten people: Upcountry Tamils from Sri Lanka living in refugee camps in India", 15 September 2004.

35. In summary, the applicant claimed that when residing in India he and his family had no rights because they were Sri Lankan Tamil refugees. They had to get permission from the police to leave the Refugee Camp and report on return. The police would question and threaten them. The police from Q Branch would call them dogs and abuse them. They would have to follow their orders and sometimes threaten and harm them. They could not complain and were treated as second class citizens. They could not study freely and not get a drivers licence.
36. DFAT reports that according to the UNHCR, there are approximately 210,000 refugees and asylum seekers of various origins residing in India. Anecdotal evidence suggests the actual number of refugees and asylum seekers resident in India is likely to be higher. The majority of Sri Lankan Tamil refugees (approximately 60,000) reside in 107 camps administered by the Tamil Nadu Government. The remainder live in host communities outside the camps.<sup>8</sup>
37. As noted by the representative, the US Department of State report confirms that India hosts a large refugee population. It also reports that in relation to the broader treatment of refugees and asylum seekers in India, Indian courts protect refugees and asylum seekers in accordance with the Constitution, while the country allowed recognised refugees and asylum seekers access to housing, primary and secondary education, health care, and the courts, access varied by state and by population. Refugees were able to use public services, although access became more complicated during the year because many refugees were unable to acquire the digitized national identity (Aadhaar) card necessary to use some services. In cases where refugees were denied access, it was often due to a lack of knowledge of refugee rights by the service provider. In many cases UNHCR was able to intervene successfully and advocate for refugee access.<sup>9</sup>
38. Consistent with the country information above, I accept that in the past when the applicant lived in the refugee camp with his parents, he was considered to be a child of Sri Lankan refugees and that if they wanted to move, they were required to register their move with the local police, and on the occasions they were questioned, verbally abused and threatened by the police. I accept that he and his parents believed that they could not complain about this treatment.
39. However, I do not accept that the applicant continued to be subjected to such treatment when he was not in the refugee camp, during the prolonged periods when he stated he was studying and working in Chennai. Nor do I accept that he could not study freely or gain a driver licence as he has claimed. His own evidence contradicts such claims. He has been able to access and gain an advanced level of education. He obtained three Diplomas, an Advanced Diploma, a Bachelors degree and one year of a Master's degree all while in India. The institution addresses for these courses are listed as Chennai. While studying he was also gainfully employed in various [occupation] roles. He lists the addresses for his various employers as Chennai. He own evidence is that he was working and studying in Chennai up until the date of his departure for Australia. The various maps and their scales in the referred materials indicate that the refugee camp where his parents reside is located at least [distance] from Chennai. I do not accept that he was living in the refugee camp for the various periods that he states that he was studying and working in Chennai. Rather, I am satisfied that during these periods he resided in Chennai. Furthermore, I am of the view that his advanced level of education is not commensurate with his claims that he could not study freely, and other than his assertions, he has not provided any documents or evidence to substantiate that he had tried to get a driver licence and was unable to. I do not accept these claims.

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<sup>8</sup> DFAT, "DFAT Country Information Report India", 17 October 2018, CIS7B839419830.

<sup>9</sup> US Department of State, "Country Reports on Human Rights Practices for 2019 – India", 10 March 2020, 20200312122934.

40. Other than the examples above, it is not apparent on the information before me what other rights he was deprived of when residing in India. This aspect of his claims is extremely vague, and I am unpersuaded that his various statements relating to his ability to undertake an advanced level of education and employment roles in Chennai undermines his claims that he did not have any rights.
41. The applicant claimed that since his departure from India the Q Branch have repeatedly approached and harassed his family members including his brother and asked about him. They wanted to know what information they had about him and if he had any intention on coming back to India. His family members were told that they must inform Q Branch if he returns. They have made it clear to his parents that unless he surrenders to them they will hunt him down and things will be worse for him and his family if they have to do so. He believes Q Branch have done this because they are angry with him as he left India without their knowledge and concerned that he had talked badly about them.
42. I am not satisfied on the evidence before me that the applicant was of any interest or concern to the Indian authorities at the time of his departure in 2013. Leaving aside his mode of departure, he has not claimed to have undertaken any activities in Australia which would have brought him to the attention of the Indian authorities. He has not presented nor do the various sources indicate that individuals with his history or profile who departed illegally would garner such attention from the authorities including Q Branch. As discussed below, I accept the applicant's details were inadvertently published on the Department of Immigration's website for a short period in 2014 and that as a result, the Indian authorities may infer that the applicant had sought asylum in Australia. However, there is no information in the various sources before me which suggests that as claimed persons with the applicant's profile who have left India illegally and sought asylum are considered as having spoken badly and sought by the Indian authorities for having so I am not satisfied that the Indian authorities, including Q Branch, have approached and harassed his family members and sought his whereabouts and details on this basis. More than six years have passed since the data breach, and there is no other credible evidence before me to suggest that the Indian authorities would be interested in seeking the applicant and asking for his return for any other reason. Furthermore, I note that it was not until the protection visa interview, and when he was asked whether the Indian had enquired about his whereabouts with his family, that the applicant provided these claims. He did not previously mention these seemingly significant claims in his protection visa statement.
43. In light of the foregoing, I do not accept that the applicant's family were approached and harassed and his details or whereabouts have been sought by the Indian authorities including by Q Branch. Nor do I accept that his family members have been told that they must inform the Indian authorities when he returns and that he must surrender to him. I am satisfied that he has contrived these aspects of his claims to enhance his claims for protection.
44. In summary, the applicant has contended that he fears if he is forced to return to India he will immediately come to the attention of the Indian authorities and placed under the control of Q Branch. He will be questioned by the Q Branch and the police about his departure. They will also question him about his personal information which was leaked by the Australian government. He will be detained and mistreated because the Indian authorities consider him to be a Sri Lankan refugee. He is not recognised as a citizen. He has no rights in India. He does not have a right to make a complaint about the mistreatment he will suffer at the hand of Q Branch or police.
45. The applicant claimed that as his parents were both refugees from Sri Lanka and he had born in refugee camp in India he is considered a Sri Lankan refugee. He will not be able to live a

proper life in India because he will always be treated as a refugee. Everyone knows he was born in a refugee camp and will consider him to be a Sri Lankan refugee.

46. It was also contended in the IAA submissions that should the applicant return to India he will suffer serious harm from the Indian authorities or other Indian nationals on account of his lack of nationality and/or imputed nationality as a Sri Lankan, his membership of a particular social groups, Tamil refugees in India and his actual/imputed political opinion against the Indian government because of his status as a Tamil refugee, the release of his personal information arising from the Department of Immigration's data breach, his illegal departure and asylum claims in Australia.
47. Information before me indicates that returnees to India use an existing passport, a newly issued passport, or an emergency certificate, issued through an Indian diplomatic mission. Documents are signed on the basis of a confirmed identity. In most cases, this is a straightforward process, but significant delays have been reported where the identity of the client could not be confirmed to the satisfaction of the passport officer in the Indian mission. The Indian Ministry of External Affairs has confirmed that identities are referred to the police authorities in the location of claimed origin of the returnee. This process is not always reliable, and significant delays have occurred in isolated cases.<sup>10</sup>
48. I am satisfied that the applicant is an Indian citizen. His citizenship was conferred at the time of birth. He possesses a copy of his birth certificate issued by the Government of Tamil Nadu which confirms his place and date of birth. Various sources<sup>11</sup> before me indicate that Indian citizens by birth are entitled to an Indian passport. I am not satisfied that the applicant's identity could not easily be confirmed or that he could not obtain an Indian passport or an emergency certificate.
49. I do not accept that the applicant will be perceived to lack nationality and/or perceived to be a national of Sri Lanka or a Tamil/Sri Lankan refugee and harmed on return. He has not claimed to have participated in any type of political or anti-Indian government groups, organisations or activities in India or Australia. He has not presented and nor is there any independent information before me which suggests that individuals in the applicant's position and background are imputed with an opinion or profile or considered to be against the Indian government and harmed on return. I am not satisfied that the applicant will be imputed with any type of profile arising from his or his families past circumstances.
50. The applicant claimed that on return to India he will not be able to live a proper life. I disagree. I am satisfied the applicant is an Indian citizen who will not be prevented from returning to India and that there is not a real chance he will be imputed with any type of profile arising from his or his family's past circumstances. His own evidence indicates that in the past he has been able to study at a tertiary level and gain and maintain skilled employment in Chennai where he resided independently of his family and the camps. I am not satisfied that there is a real chance he would not be able to obtain accommodation and work. Given the particular circumstances of this applicant, I am not satisfied that there is a real chance of him being subjected to discrimination or economic harm, or denied the capacity to earn a livelihood, or to access basic services in ways which will threaten his capacity to subsist should he return to India. I do not accept that the applicant faces a real chance of harm because of his or his family's

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<sup>10</sup> DFAT, "DFAT Country Information Report India", 17 October 2018, CIS7B839419830.

<sup>11</sup> Immigration Board of Canada, "India: The Delhi High Court decision of 22 September 2016, on the rights of Tibetans to citizenship and access to passports, including implementation (August 2016-April 2017)", 12 May 2017 and DFAT, "DFAT Country Information Report India", 17 October 2018, CIS7B839419830.

background or ethnicity or because of his political opinion should he return to India. Nor do not accept that he will not be able to live a proper life on return.

51. I accept the applicant left India illegally. I accept he has applied for asylum and would be returning to Sri Lanka after his asylum application has failed and residence in Australia for an extended period. I also accept that, although I consider it unlikely, the applicant's details may have been obtained by the Indian authorities as a result of the Department of Immigration's data breach in 2014 and that he may be identifiable as having sought protection in Australia. Information disclosed about persons subject to this data breach included: the applicant's name; date of birth; nationality; gender, the reason for and location of his detention; and whether he had any family members in detention.
52. I have considered the information in the Red Flag article<sup>12</sup> while it reports more generally on the situation for Eelam Tamils or Sri Lankan Tamils refugees in India it also reports on the charging, release on bail and detention of an individual for conspiring to leave India without valid travel documents in 2014. However, it does not indicate if the individual concerned was an Indian citizen nor does it provide specific details about his case. Furthermore, the individual concerned was arrested in 2014, and as such the circumstances of this case are at least six years old and there is no information before me to indicate that the same circumstances would apply now or to Indian citizens. More significantly, the information before me does not support that individuals with the applicant's profile are mistreated by Indian authorities for leaving in a similar manner, and I consider that if they were this would be more broadly reported on. Nor is there any information before me which suggest that individuals including those who departed illegally and have spent time outside of India in western country such as Australia and sought asylum unsuccessfully including individuals who are Tamil or whose parents are Sri Lankan refugees or who were born in a refugee camp and who were subject to the Department of Immigration's data breach are imputed with an adverse opinion or profile and harmed on return.
53. I am not satisfied that, as an asylum seeker with his background who departed illegally, resided in Australia for an extended period and whose details were released on the Department's website, the applicant faces a real chance of persecution on his return to India, now or in the reasonably foreseeable future.
54. In the second IAA statement, the applicant has claimed that he recently become aware that he would face an increased risk of being deported to Sri Lanka on return to India. This results from recent legislation applicable to stateless people like himself. The National Register of Citizens requires Indian residents to prove citizenship by providing full documentation. The law was implemented in Assam state and previously recognised citizens were declared stateless. This law will be applied in Tamil Nadu after the pandemic subsidies, aimed at making Tamil refugees from Sri Lanka stateless, so they can be deported. As a non-citizen with questionable documentation, this increases his risk of deportation to Sri Lanka.
55. I have found that that in contrast to his and his representative's contentions, he is an Indian citizen by birth. He is not stateless. He is not a national of Sri Lanka. Furthermore, the applicant's claims that the laws referred to will be applied to individuals in Tamil Nadu or even to individuals with his profile or background is mere speculation, and I do not accept these claims. In light of the information before me, I am not satisfied that there is a real chance the applicant, with his history and profile, he will be deported to Sri Lanka on return to India.

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<sup>12</sup> Red Flag, "Inside an Indian 'special camp': 'We will either get out of here, or we will die here'", 13 February 2020.

56. I am not satisfied the applicant has a well-founded fear of persecution.

### **Refugee: conclusion**

57. 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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58. 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**

59. 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.

60. 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.

61. I have found that the applicant does not face a real chance of harm for any of the reasons claimed now or in the reasonably foreseeable future. As 'real risk' involves the same standard as 'real chance', I am also not satisfied that the applicant faces a real risk of significant harm on these bases.

### **Complementary protection: conclusion**

62. 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.