



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

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA21/09212

Date and time of decision: 13 July 2021 10:03:00  
N Micallef, 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 stateless Tamil who was born in a Sri Lankan refugees camp in India to Sri Lankan refugee parents. He arrived in Australia [in] May 2013 as an unauthorised maritime arrival. On 27 June 2017 he lodged an application for a sub-class XE-790 Safe Haven Enterprise Visa (SHEV). The applicant claimed he cannot be returned to India or Sri Lanka as he has no citizenship in either India or Sri Lanka and raised claims to fear harm and persecution in both countries.
2. After interviewing the applicant by video conference on 5 May 2021 (the SHEV interview), a delegate of the Minister for Immigration (the delegate) refused to grant this visa on 1 June 2021. She found that the applicant was stateless and did not currently have Sri Lankan citizenship but that on her finding that his father was a Sri Lankan national, the applicant would be entitled to it and could apply through administrative process to become a Sri Lankan citizen. Consequently, the delegate assessed Sri Lanka as the receiving country. In refusing the visa application the delegate assessed that she was not satisfied that the applicant would face a real chance of serious harm or a real risk of significant harm in Sri Lanka.

### Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act) (the review material).
4. On 21 June 2021, the applicant provided a written submission to the IAA through his representative, addressing the delegate's decision assessing the applicant under Sri Lanka. The submission reiterated claims and information already before the delegate concerning ongoing discrimination and harm to Tamils and Tamil returnees in Sri Lanka, including under the return to government in Sri Lanka of the Rajapaksas and raised argument concerning whether he would in fact be able to obtain Sri Lankan citizenship. This is not new information. However, new information was raised in the submission, by quoting a paragraph from a report of a case described as the "UK Upper Tribunal (Immigration and Asylum Chamber) Appeal No: PA/09978/2016, PA/13288/2018" and which contained a criticism of the lack of attributed sources or their annexed interviews, and limited reference to *sur place* activities, in an Australian Department of Foreign Affairs and Trade (DFAT) report on Sri Lanka referred to by the delegate in her decision.<sup>1</sup> On the basis of the quoted paragraph it was submitted the DFAT report was significantly flawed and unreliable such that conclusions reliant upon that report were also flawed.
5. No copy of the UK case report was attached to the submission or forwarded to the IAA contrary to the requirements of the IAA *Practice Direction for Application, Representatives and Authorised Recipients*, which was provided to the applicant (whom I note is represented) upon referral of his matter to the IAA. As a paragraph devoid of the complete context of discussion in which the quotation about DFAT arose it is difficult to assess the weight of this new information or its consequence within the case report referred to. In these circumstances of non-compliance, I do not accept this new information. In any event, for reasons discussed below, I accept that the applicant is not currently a citizen of Sri Lanka and find that eligibility to apply for Sri Lankan citizenship is not sufficient under the Act to make Sri Lanka his receiving

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<sup>1</sup> Department of Foreign Affairs and Trade ("DFAT"), "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244 (DFAT Sri Lanka Report 2019)

country. I accept the claim that the applicant is not a citizen of Sri Lanka and have not had to consider the issue of his return to Sri Lanka. I am not satisfied that there are exceptional circumstances to justify considering the information. I have had regard to the submissions concerning citizenship.

6. The IAA has discretion to obtain relevant new information. As discussed later below, I find in this review that the applicant is stateless, and that as his country of former habitual residence, India is his receiving country. As the delegate assessed only Sri Lanka and referred no country information concerning India in the review material, I have obtained new information relevant to assessment of the applicant's claims raised against India. These are country reports on India from the United States Department of State (USDOS), DFAT and an article from Refugee Survey Quarterly (RSQ).<sup>2</sup> They are from credible open sources and address the situation for Sri Lankan Tamil refugees in India and returnee failed asylum seekers to India. For all those reasons I am satisfied that there are exceptional circumstances to justify considering that new information.
7. By letter dated 25 June 2021 the IAA provided copies of these reports to the applicant and his representative and invited him to respond with comment or new information on the reports, including on highlighted aspects of them which the IAA advised might indicate that a Tamil Sri Lankan refugee from India would not be imputed with any profile of adverse concern or political opinion merely on the basis of having left India; and that a Tamil Sri Lankan refugee in or returned to India would not face a real chance of serious harm or a real risk of significant harm. Through his representative the applicant provided his written submission in response on 6 July 2021. This submission reiterated claims and information already in the review material, and referred in support for those claims to aspects of the country information reports that had been provided to him, and provided comment on aspects of those reports highlighted in the IAA letter of invitation. This submission amounts to argument rather than new information and I have had regard to it in the review. To the extent that any comments addressing these reports might amount to new information, including for example that benefits provided to Sri Lankan Tamil refugees are meagre and subsistence level only, I am satisfied that they were not and could not have been provided before the delegate made her decision as notwithstanding that SHEV claims had been made against India and were discussed in the course of the SHEV interview, the delegate advised the applicant in that interview that her assessment would likely be against Sri Lanka and not India. In accordance with this notification, post-interview submissions and the first IAA submission addressed only Sri Lanka, indicating the applicant may have misapprehended that India might still be considered for his assessment. Moreover, these submissions and comments were in response to invitation from the IAA to comment on new material. I am satisfied for all these reasons that s.473DD(b)(i) is met. I am also satisfied for all the reasons expressed above that exceptional circumstances exist to justify consideration of such new information.

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

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

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<sup>2</sup> United States Department of State (USDOS), "Country Reports on Human Rights Practices for 2020 - India", 30 March 2021, 20210331112615 (USDOS India Report 2020); DFAT, "DFAT Country Information Report India", 10 December 2020, 20201210103716 (DFAT India Report 2020); C. Valatheeswaran and S. Irudaya Rajan, "Sri Lankan Tamil refugees in India: rehabilitation mechanisms, livelihood strategies, and lasting solutions", Refugee Survey Quarterly (RSQ), 1 June 2011, CIS20828 (RSQ Sri Lankan Refugees Report)

- He is a Tamil and a Christian, of Sri Lankan descent, who was born in a Sri Lankan refugees camp in [Location], Tamil Nadu, India in [Year 1]. His birth was not registered with any Sri Lankan authorities and he is not entitled to Indian citizenship. He is stateless.
  - In [Year 0] his parents and relatives fled to India from the civil war in Sri Lanka, where his father had been detained and tortured by the Sri Lankan Army (SLA) suspected of LTTE involvement. His father had assisted the LTTE with provision of goods. The Sri Lankan authorities targeted the applicant's family – his paternal uncle returned to Sri Lanka in 1995 but was arrested and interrogated by police. The police later shot and killed his uncle.
  - In India, as a Sri Lankan refugee he was subjected to abuse and persecution from Indian locals and the Indian authorities. School classmates and teachers abused him with insults, and he was mistreated with bullying punishments for transgressions of Indian students. The police would not assist when he and some other refugees were beaten and held captive by local villagers on false accusations of stealing their money. He was often questioned or mistreated by the police when stopped or asked for identification. He was regularly detained by the Indian Q branch police at the refugee camp for many hours to be questioned about support of or smuggling for the LTTE.
  - In [Year 2] he [worked] for [Mr A], a lawyer and [Officer holder] of the MDMK political party, which supports Tamils. Because he drove [Mr A] to political events Q Branch questioned him more intensively about being an LTTE supporter.
  - He participated in about two or three hunger strikes organised by the Refugee Camp Leader as a sign of support for Tamils in Sri Lanka.
  - He cannot return to India as he has no citizenship rights there and it is not possible to return there as he has no legal right of residence or return. His refugee rights will have been taken away and he will have no support or ability to work or live in the refugee camp and will not be permitted to travel anywhere in India. He will be imputed to be an LTTE supporter because he left India. He will be imputed to be an MDMK supporter. He is Tamil and a member of the particular social group of Sri Lankan refugees in India, or of young men in India of Sri Lankan descent. He will be targeted by the Indian police and security forces and local Indian people on those grounds and will be persecuted, abused or beaten and mistreated.
  - He cannot go to Sri Lanka as he has no citizenship there and no means or guarantee of obtaining it. He has never been there and has no friends or family or relatives there or any means of support or shelter there. He fears persecution and harm in Sri Lanka due to Tamil ethnicity, and because of his father's LTTE involvement, for which his family were targeted in Sri Lanka. He will be closely monitored, arrested, interrogated and killed by the police in Sri Lanka as his uncle was. He will be harmed because of imputed political opinion as an MDMK supporter; and being a member of the particular social group of Sri Lankan refugees in India, or of young men in India of Sri Lankan descent.
9. In the SHEV interview the delegate raised that the applicant had been affected by a leak of personal information by the then Department of Immigration and Border Protection (DIBP) in 2014 (the Data Breach). The applicant expressed concern that people or countries could have seen his asylum claims and will have gathered information about him on his return and would torture him and he would be unable to deny those details.

10. In post-interview submissions the applicant's representative raised concern about the impact of Covid-19 on the availability or possibility of any repatriation or citizenship processes to India or Sri Lanka.

## Factual findings

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### *Origins, Identity and Ethnicity*

11. The applicant has consistently maintained his claimed identity and origins as a Tamil, born as a refugee in [Location], Tamil Nadu, India in [Year], where he grew up in a Sri Lankan refugees camp with his family, as Sri Lankan refugees. He claims that he has no Indian citizenship nor any rights to it. He has not acquired Sri Lankan citizenship as his birth was never registered with the Sri Lankan authorities. He raised claims against both Sri Lanka and India in the visa application.
12. The applicant stated that his family lived in [Town]. This is in Sri Lanka's Northern Province, where the LTTE had influence and control in the war. He gave very vague evidence, (even considering it was his father's claimed history) that his father was forced to assist the LTTE by "*providing goods and things like that*" during the war and was later detained and mistreated by the SLA in 1987, on suspicion of LTTE involvement. Many Tamils, particularly in the north and east reported being monitored, harassed, arrested or detained by security forces during the war, and many Tamils in the areas of LTTE control were forced to interact with them; moreover suspicions, harassment and arrests by security forces were sometimes based on discriminatory imputation of LTTE support based only on ethnicity, with discriminatory application of arrest powers.<sup>3</sup> There is no claim or evidence before me that the father was a combatant or LTTE member. His father was subsequently released after intercession of the local priest. The applicant's SHEV interview evidence was that after that there was fighting, and the family were afraid, and these were the reasons for all the family and relatives leaving for India. Noting that his father was released merely on the request of the local priest rather than being kept in lengthy detention or charged or prosecuted, that there is no indication the father was then re-arrested or questioned again before they left Sri Lanka, and the applicant's SHEV interview evidence that the prompt for departure was the outbreak of further fighting, if his father had any forced interaction of support for LTTE I do not accept that it was any more than minor and I do not accept the father had an adverse profile of ongoing security concern with the Sri Lankan authorities or those working with them, for LTTE support or any reason. The applicant's family were able to register and live in India as refugees and there is no claim or evidence before me that the father was ever questioned or detained in India by the Q Branch or any Indian officials for any LTTE activities, despite screening procedures for such links for Sri Lankan Tamil refugee arrivals and their monitoring in the camps.<sup>4</sup> The applicant claimed, as indicative of his father and family being targeted by the Sri Lankan authorities, that when his paternal uncle returned to Sri Lanka in 1995 he was arrested and questioned by police, who later that year shot and killed him. This claim was not supported by the applicant's SHEV interview evidence which, in contradiction, was that his uncle was shot and killed during the fighting in Sri Lanka - and I note that he had returned during the ongoing conflict, during which many thousands of civilians were killed. I do not accept that his uncle's death in the war time or any possible questioning of him by authorities in that era was because of any adverse profile of the applicant's father, rather than merely reflective of the experiences of many Tamils in the Northern Province in that period. I note it is now more than [Number] years since the applicant's father left Sri Lanka, and 25 since his uncle died. I note the applicant was never

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<sup>3</sup>DFAT Sri Lanka Report 2019

<sup>4</sup> RSQ Sri Lankan Refugees Report

in Sri Lanka. I do not accept that the applicant's father was of any ongoing adverse interest to any Sri Lankan authorities or those working with them, or that his uncle or the family were targeted in Sri Lanka as claimed.

13. Many thousands of Sri Lankan Tamils, including those displaced from their homes by the conflict, left Sri Lanka to escape the civil war between the LTTE and Sri Lankan Government and sought refuge in Tamil Nadu in India.<sup>5</sup> I accept that the applicant's family and relatives were amongst these many, displaced from their home in [Town], and went to India by boat in [Year 0]. The applicant's claims of being born in India to Tamil Sri Lankan refugee parents were supported by his evidence with a Tamil interpreter, and documentary evidence, including the translation of the applicant's mother's certificate of her birth in Sri Lanka, the Sri Lanka Refugees Identity card booklet for the applicant, his father and brother, and the residential address of his parents in the applicant's Indian birth certificate and the applicant's Tamil Nadu school documents. I am satisfied that minor spelling variations in his and his father's names are due to transliteration. I accept the applicant's identity as claimed, and noted by the delegate concerning spelling, and that he is a [Age]-year-old male of Tamil ethnicity, born in India. I accept that he lived in a Sri Lankan refugee camp in [Location], Tamil Nadu until he came to Australia in 2013 and that he never returned to Sri Lanka. I accept that apart from his paternal uncle who returned to Sri Lanka, his family and relatives all remained living in Tamil Nadu in refugee camps.

#### *Receiving Country*

14. The question of the applicant's "receiving country", and his nationality and citizenship is contentious. The applicant claimed that he has no rights to citizenship in India and his birth in India was never registered with Sri Lankan authorities for Sri Lankan citizenship. The delegate assessed Sri Lanka to be the receiving country on the basis of the applicant's eligibility to apply for citizenship there, which ability the applicant challenged. The applicant and his representative have pressed that the applicant is stateless. Under s.5(1) of the Act, the "receiving country" of a person with no nationality is the country of their former habitual residence, regardless of whether it would be possible to return them to that country.
15. The applicant's Sri Lankan parentage raised prospect of his Sri Lankan nationality. I consider the evidence before me indicates that both the applicant's parents are Sri Lankan nationals. This despite the increasing denial, and what I consider obfuscation, in the applicant's evidence. This ranged from initially claiming, both at arrival and in his SHEV application and signed Statutory Declaration attached to it (SHEV statement), that they were both Sri Lankan citizens to increasingly over the course of his accounts denying it - insisting that because his father had no citizenship documents he was therefore not a Sri Lankan citizen, to then moving from earlier evidence in his SHEV interview that they had both been born in Sri Lanka to stating, after being told that Sri Lanka would likely be assessed as his receiving country, that he was not sure of their birth and suggesting his mother may have been an Indian Tamil. I do not consider those claims were "mistakes" and I consider this reflected poorly on his credibility.
16. The Tamil Nadu-issued Sri Lanka Refugees identity card booklet (ID booklet) for the applicant, his father and brother, was clearly formally his father's, as the Titled recorded "Head of Family" for them, and addressed, at that section, his father's identification and arrival details in [Year 0]. It recorded "Sri Lankan citizen" at those details. The ID booklet also recorded the applicant's father's "Sri Lankan Identity Card No:.. "(and gave the number). Country information indicates that Sri Lankan National Identity Cards (NICs) issued before 2016 have

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<sup>5</sup> DFAT Sri Lanka Report 2019; RSQ Sri Lankan Refugees Report

nine numbers, ending in “v” for Sri Lankans eligible to vote, or “x” for those not (eg aged 16-18), and I note the nine-digit number given for the applicant’s father accords with that and ends in “v”.<sup>6</sup> And moreover, that NICs are only issued to Sri Lankan citizens who have registered under the Registration of Persons Act (1968), which is obligatory for all citizens; and is a pre-requisite for issue of a Sri Lankan passport. Stateless people cannot obtain an NIC and those Indian Tamils in Sri Lanka who are not also Sri Lankan citizens are issued other forms of identification. I am satisfied and find the applicant’s father was a Sri Lankan citizen.

17. The applicant’s mother’s translation Sri Lankan birth certificate indicated she was born in Vavunya District, Sri Lanka to parents both born in Sri Lanka (as acknowledged in the post-interview submission to the delegate), her father being a “Sri Lankan Tamil” and her mother an “Indian Tamil”. The certificate records that her father was born in Sri Lanka in 1944 and that his father was born in [City], which is in Sri Lanka.<sup>7</sup> I am satisfied on the evidence of her birth certificate that the applicant’s mother was a Sri Lankan citizen by descent, by birth in Sri Lanka from a Sri Lankan-born father who was a citizen by descent from his Sri Lankan born father, in accordance with the *Citizenship Act (Sri Lanka)*, sections 4(1), 5(1) and 28.<sup>8</sup>
18. I find on the evidence before me that his father and his mother were Sri Lankan-born citizens of Sri Lanka. The Sri Lankan *Citizenship Act* equates Sri Lankan citizenship with Sri Lankan nationality at section 3. On the evidence before me the applicant’s parents continued to live as Sri Lankan refugees and there is no claim or evidence before me that either of them became Indian citizens before his birth. I find they did not.
19. A child born abroad to at least one Sri Lankan citizen parent can acquire recognition as a Sri Lankan citizen by descent if the birth is registered in prescribed manner with the Sri Lankan consular office in the country of birth or with the office of the Minister in Sri Lanka.<sup>9</sup> The applicant asserted that his parents had never registered his birth with the Sri Lankan authorities.
20. The delegate found that the applicant would be able to register his birth with, apply for and obtain from the Sri Lankan authorities his Sri Lankan citizenship. I accept this may be possible on the country information before me, although I note DFAT indicates that for persons over the age of 21 (as the applicant is), such a process can only be applied for in Sri Lanka, and the applicant disputes he has the relevant documentation to apply.<sup>10</sup> Although DFAT refers to documentation required, some of which appears to be available to the applicant in the documentary evidence before me and reports that the Sri Lankan government assists in providing re-issuance of identity documents to IDPs and refugee returnees which might assist him obtaining parents’ documents he claims not to have; nevertheless, there is no evidence before me to support that the pre-condition to any application process - registration of his birth with the proper Sri Lankan authorities - has ever been completed and I accept it has not been. I disagree with the delegate’s assessment that eligibility to obtain Sri Lankan citizenship suffices for Sri Lanka to be assessed as the applicant’s receiving country concerning his protection claims. I am not satisfied that eligibility for citizenship is sufficient for the purposes of the visa criteria in s.36 of the Act having regard to the provisions of ss.5H and 5J and the

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<sup>6</sup> DFAT Sri Lanka Report 2019; Country Information Report No. 1000/96.', CX21120

<sup>7</sup> See Map, United Kingdom Home Office (“UKHO”), “Report of a Home Office fact-finding mission to Sri Lanka”, 20 January 2020, 20200123162928 (UKHO FFM Report 2020)

<sup>8</sup> Lawnet - Government of Sri Lanka, “Citizenship Act (Sri Lanka)”, 1 January 2003, CIS27689

<sup>9</sup> Lawnet - Government of Sri Lanka, “Citizenship Act (Sri Lanka)”, 1 January 2003, CIS27689 (see s.5(2)); DFAT Sri Lanka Report 2019

<sup>10</sup> DFAT Sri Lanka Report 2019; United States Department of State (USDOS), “Country Reports on Human Rights Practices for 2020 - India”, 30 March 2021, 20210331112615 (USDOS India Human Rights Report 2020)

definition of “receiving country” in s.5(1). I accept the applicant does not presently have recognised status as a Sri Lankan citizen.

21. I accept that a child born to Sri Lankan refugee parents in India is not, on account of mere birth there, entitled to Indian citizenship, which requires birth to an Indian citizen parent; and that on the present country reporting before me there is no pathway to Indian citizenship for such persons in the applicant’s circumstances.<sup>11</sup> Although India accepted and provided for Tamil refugees from Sri Lanka during the civil war, this was not under any formal framework of adopting any Refugee Convention or national refugee protection legislation. No evidence before me indicates that the applicant or either of his parents had or have acquired Indian citizenship (and I note his claim that his parents lived in India as Sri Lankan refugees, not Indian citizens), or that the applicant is or has become a citizen of India or any other country, or has or is eligible for any visa for return to India or to any other country. I accept that he is not an Indian citizen. I accept that although the applicant was born and lived his whole life before coming to Australia in India, he has no rights to return to India, or to acquire citizenship in India, nor concerning any other country.
22. I accept that the applicant is currently stateless. Having regard to the definition of “receiving country” in s.5(1) of the Act, I find that, as his country of former habitual residence, India is the applicant’s receiving country for the purposes of this review, regardless of whether or not it would be possible to return him to that country. Accordingly, I assess the applicant’s protection claims against India.
23. I accept the applicant grew up in the Sri Lankan refugee camp in [Location]. I accept that he went to the local school in [Location] and left school during Year [Number], and thereafter worked at various labour jobs including [job task 1] and [job task 2]. I also accept that his parents separated when he was young, and his father died in September 2020. His mother, older brother and younger half-brother remain living in Tamil Nadu, his mother in Madras and his older brother in [Location]. Noting the applicant had lived only in [Location], where he went to school and later as an adult was employed and had his social networks, I find he would return to that area if returned to India.

#### *Reasons for Leaving India*

24. At his first interview after arriving in Australia, the Enhanced Screening interview of 13 May 2013, the applicant claimed his reasons for leaving India to come to Australia were because of lack of official status there as a Sri Lankan, and restrictions upon him as a refugee, including concerning freedom of movement and buying property there. He stated he had never been harmed or mistreated there and indicated he had no other reasons for coming to Australia. He was assessed accordingly as suitable for removal, not having raised any claims of harm to raise consideration of Australia’s protection obligations. Subsequently, in the 2014 Unauthorised Maritime Arrival & Induction Interview of 20 May 2014 (Arrival interview), the applicant then raised some claims now relied upon for his SHEV application, namely that he was harassed by local officials in India as a refugee, and that he was frequently detained and interrogated by the Indian Q Branch police for [working] for the MDMK political party and participating in pro-Sri Lankan Tamil protests and hunger strikes, and feared that he would be arrested and imprisoned in India for this and feared the general persecution of refugees who are treated badly. In his SHEV application he further raised that he was frequently interrogated by Q

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<sup>11</sup> DFAT Sri Lanka Report 2019; DFAT, “DFAT Country Information Report, Sri Lanka”, 24 January 2017, CISED50AD105 (DFAT Sri Lanka Report 2017); USDOS India Human Rights Report 2020; DFAT, “DFAT Country Information Report India”, 10 December 2020, 20201210103716 (DFAT India Report 2020)



Branch for suspected LTTE support or smuggling and about his movements, and that he faced discrimination such as incidents of school bullying and regular abuse from local communities with insults like “dog” and regular harassment from officials including identity checks and being stopped and questioned by police and hit or slapped, weekly, as a refugee, and an incident once when he and his co-workers were detained for two days and assaulted by local villagers because their employer stole money from those locals, but the police did nothing to help because they were refugees. He claimed that when he was a child, a relative was beaten by police after being arrested on false accusation of stealing a camera, and later committed suicide.

25. The applicant’s claims of the restrictive life of a Sri Lankan refugee are broadly consistent with the country information.<sup>12</sup> I accept that Sri Lankan refugees in India lack the full freedoms allowed by Indian citizenship and have restricted opportunities of employment choice and movement, their rights and benefits being permitted only in Tamil Nadu. I accept that most Sri Lankan refugees in Tamil Nadu live in refugee camps, which are regulated by the authorities and police, although a fairly significant proportion, about a third of Sri Lankan refugees, also live outside the camps in local community.<sup>13</sup>
26. The country information noted that Sri Lankan refugees in camps in Tamil Nadu are provided with government-provided housing, monthly financial assistance, food rations, free clothing and utensils at regular periods, free access to government services including health and hospital care and education. And, albeit that the RSQ report noted that some infrastructure facilities can be poor and the applicant claimed assistance was meagre and subsistence level only, nevertheless the RSQ article also reported in 2010 there had been increased Tamil Nadu Government spending on refugee welfare and improved living conditions, and I note the applicant was supported and housed as a refugee and was able to undertake education in India to through Year [Number]. He was steadily employed in various [job task 1] and [job task 2] jobs after leaving school and was able to obtain a driving licence.
27. The applicant stated in the SHEV interview that there was racial tension in India and the refugees suffered because of having no rights and were subjected to verbal abuse and degrading treatment, even when police were just calling out to them. I acknowledge there have been reports of instances of discrimination, including in employment opportunity with many refugees finding only casual labour employment and in terms of exploitation in work practices or inadequate payment, or assaults or fraud or resentment of refugees including for stealing from locals.<sup>14</sup> USDOS reported urban refugees mostly worked in the informal sector or in occupations such as street vending, where they suffered for police extortion, non-payment of wages, and exploitation.<sup>15</sup> However, I note that the USDOS report was reporting on refugees in India generally, which also includes unregistered refugees in India including those who do not have recognised work rights, such as Muslim Rohingyas. Sri Lankan refugees are permitted to work in Tamil Nadu. The USDOS report noted that undocumented refugees (which the applicant was and is not, noting the Indian documentation he provided) were vulnerable to abuse; however, I note it particularly described Rohingya migrants as experiencing detention or problems of documentation or rhetoric of return to Burma.

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<sup>12</sup> C. Valatheeswaran and S. Irudaya Rajan, “Sri Lankan Tamil refugees in India: rehabilitation mechanisms, livelihood strategies, and lasting solutions”, Refugee Survey Quarterly (RSQ), 1 June 2011, CIS20828 (RSQ Sri Lankan Refugees Report); USDOS India Human Rights Report 2020; DFAT India Report 2020

<sup>13</sup> DFAT India Report 2020

<sup>14</sup> RSQ Sri Lankan Refugees Report; USDOS India Human Rights Report 2020

<sup>15</sup> USDOS India Human Rights Report 2020

28. I also note that the RSQ report noted that social links and integration and networks between camp residents and local communities supported refugees in job opportunities, and that many Sri Lankan camp refugees have become part of the local community. Local NGOs interact with the Sri Lankan refugees to provide vocational training and support for starting small businesses and finding employment in the private sector. The applicant claimed that Sri Lankan refugees cannot buy property; nevertheless, the RSQ report noted that many have bought land and houses close to the camps through their friendship networks and mingle with the local community through their social connectedness, employment and education. Both RSQ and DFAT also observed that many Sri Lankan refugees, including non-camp residents have set up successful businesses.<sup>16</sup> I note that the applicant was able to be gainfully employed in India and I am not satisfied on the evidence before me that he was generally exploited in his employment.
29. I accept possibility of instances of school bullying or children name-calling or episodes of school punishment perceived to be undeserved as a child, and that the applicant may have experienced occasional incidents of official or societal discrimination such as derogatory language and resented the restrictive camp limitations upon him. Nevertheless, I consider the applicant's claims of constant abuse and degradation including from teachers, locals in the street and being physically assaulted whenever police stopped him in the street or asked for identification, on the basis of being a Sri Lankan refugee, to be exaggeration and not credible. I accept that surveillance and restriction of movement of Sri Lankan refugees tightened after the assassination of Indian Prime Minister Rajiv Gandhi in 1991; however, the applicant was an infant then, and in 2010 the RSQ article reported there had been progressive easing of monitoring and restrictions on refugees reduced to requirement only that police permission to leave camp is required, with requirement for camp residents to enter details in the register with camp security of where going and departure/return times, with no time limits imposed for work purposes; although refugees can be summoned back to the camps by police and kept in for several days particularly at sensitive political times such as elections.<sup>17</sup> The RSQ report noted that many refugees also work outside the camps, including in the bigger urban centres where they travel to stay for longer work periods, returning only for the monthly cash dole. Moreover, Entry to the refugee camps was restricted only to residents<sup>18</sup> and I am not satisfied that police who did not recognise him asking to check the applicant's identification when returning from work late at night (as he described) was discrimination against him or mistreatment and not standard camp entry procedure. I am otherwise not satisfied on any evidence before me that he was visibly identifiable or distinguishable as a Sri Lankan refugee from mere appearance such that being asked for identification elsewhere by police who did not know or recognise him was discrimination against him as a Sri Lankan Tamil refugee or Sri Lankan male in India or for any reason. I do not accept that the applicant was physically assaulted by police asking for his identity.
30. I do not accept and am not satisfied that occasional incidents of official or societal discrimination the applicant experienced as a Sri Lankan Tamil refugee or the circumstances of being unable to apply for Indian citizenship and the limitations imposed for Sri Lanka Tamil refugees on full freedom of movement by camp restrictions and rules, or identity checks or requirement to live in Tamil Nadu for refugee benefits amounted to serious or significant harm for the applicant in India.

*Imputed Political Opinion – LTTE and/or MDMK Support*

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<sup>16</sup> RSQ Sri Lankan Refugees Report; DFAT Sri Lanka Report 2019

<sup>17</sup> RSQ Sri Lankan Refugees Report; USDOS India Human Rights Report 2020

<sup>18</sup> RSQ Sri Lankan Refugees Report

31. The applicant claimed he was frequently detained, sometimes made to wait there for many hours, all day, and interrogated by the Q Branch police and Crime Branch about being an LTTE supporter or smuggler, that the Q Branch came and interrogated all the young males including him about this weekly. In the SHEV interview he stated that this attention increased after he started work for the MDMK party in [Year 2] because the MDMK supported the LTTE and, as the [worker] for MDMK's [Mr A], he also personally attended the MDMK meetings and large gatherings and stood by the stage to assist the party members. He was taken away for questioning because of this and the regular questioning carried on until he left India for Australia, including every time he left for and returned from work he was constantly harassed and questioned by Q Branch about where he was going, what he was doing, who he was helping.
32. I acknowledge that the Indian police, including Q Branch, monitored the Sri Lankan refugee population for LTTE militants and smugglers, including at arrivals screening, and ongoing monitoring of the movements of the refugee camp residents.<sup>19</sup> The LTTE were banned in India.<sup>20</sup> People suspected of such activity could be detained in 'special camps' or jails. There is no claim or evidence before me that the applicant was an LTTE supporter or smuggler and I find he was not. There is no indication before me his father or any other relative was suspected by Q Branch or Indian authorities of LTTE links. As a camp resident born and raised, attending the local school until about [Age], under the surveillance of police and the camp movement register, I am satisfied the Indian authorities would have been aware of the applicant's movements and circumstances and that he was not involved in LTTE support or smuggling. Whilst I accept camp security monitored the external movement of camp residents, I am not satisfied that country information before me supports the applicant's claims that the Q Branch or any other police or authorities regularly or weekly interrogated young male camp residents, or residents of the applicant's profile, as LTTE suspects and smugglers or regularly harassed them with lengthy detentions awaiting such accusation or questioning and I do not find this claim credible.
33. The applicant's evidence was shifting and escalated from the SHEV statement written claims that MDMK supported Tamils to later SHEV interview evidence that they supported the LTTE. He provided no corroborative evidence to support his claims that the MDMK is a political party that supports, or in [Year 2] was supporting, the LTTE, banned in India as I have noted (and which group I note also was already by then defeated and were no longer a force in Sri Lanka),<sup>21</sup> or that it was promoting any LTTE or Sri Lankan Tamil separatist agenda. Country information before me does not indicate that the MDMK was one of many local and overseas Tamil groups previously or currently proscribed by the Sri Lankan Government as a terrorist organisation for their support of the LTTE.<sup>22</sup> There is no country information before me to indicate that MDMK were a banned or suspect party in India or Tamil Nadu, or of any concern for pro-LTTE activism or that [Mr A] or any other MDMK meeting participants were ever also detained or interrogated by Q Branch police or other Indian authorities for attendance or activities at MDMK meetings that the applicant claimed he was taken away and questioned for being at, or that any Indian or Tamil Nadu authorities or police otherwise had any adverse interest in or concern about the MDMK party or its members or leaders.
34. Moreover, the handwritten reference letter provided purportedly from [Mr A], referred to this person, by the letterhead, as "[Mr A], Advocate". It merely attested to the applicant having

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<sup>19</sup> RSQ Sri Lankan Refugees Report

<sup>20</sup> Ibid.

<sup>21</sup> DFAT Sri Lanka Report 2019

<sup>22</sup> United Kingdom Home Office (UKHO) "Country Policy and Information Note Sri Lanka: Tamil Separatism", May 2020, 20200527172009 (UKHO Tamil Separatism Report 2020)

been [employed] from April to November [Year 2]. It makes no mention of and lends no support to the claim that [Mr A] was a politician, or involved in the MDMK party, or was its [Office holder], or that the applicant drove him to or attended any political meetings of that party or that the applicant thereby came to adverse attention for interrogation of Q Branch or any other police or Indian authorities. These matters all raise considerable doubt about the credibility of the claims.

35. Other aspects of the applicant's evidence that were unpersuasive included that his response to being asked why he only left India in 2013, three years after he claimed to have ceased work for [Mr A] and which had caused him to be questioned by the authorities, was because after that he faced other problems – he and his friends were beaten and prevented from escaping by the villagers for someone else's crime because they were Sri Lankan refugees. However, this claimed incident, concerning his employer on a job having absconded with villagers' money for which the villagers then turned to the work crew, was claimed in the SHEV statement to have occurred a couple of years before he claimed to have worked for the MDMK politician. I find this is a considerable time difference and, considering the very different circumstances of the claimed incidents I am not satisfied would be matters easily confused as to their sequence if they had actually occurred.
36. Moreover, the applicant's claims of attending refugee camp demonstrations of day-long hunger strikes was also shifting and escalating, varying from written claims of attending two or three, to his SHEV interview evidence that he attended many. His evidence about them was vague, asserting only that the purpose was to show "*support for Tamils in Sri Lanka*". I consider his evidence that these were organised by the Camp Leader and with police permission, to be inconsistent and incompatible with his claims that he was then thereafter detained and interrogated for suspected LTTE support by Q Branch or Crime Branch from his attendance, noting also there is no claim or evidence that these activities were pro-LTTE or pro-Tamil separatism in Sri Lanka, nor that the Camp Leader or any other participants were detained or interrogated by police or Indian authorities for attending these. I have considerable doubt about the credibility of the applicant's claimed attendance at any such hunger strike demonstrations or that he came to adverse attention of any Indian police or authorities because of it.
37. If the applicant was indeed considered to be an LTTE suspect or to be involved in any LTTE or smuggling activities or pro-LTTE MDMK activities for any reason I consider it implausible that the Indian police, Q or Crime branch, would merely keep questioning and keep releasing him regularly for several years rather than refuse him to leave the camp, or arrest or detain him in a 'special camp'.
38. Overall, I do not find the applicant's evidence persuasive.
39. I note also that the applicant's evidence when he arrived in Australia was that he had *not been harmed or mistreated in India* in contradiction to all these later claims. When the delegate put this to the applicant, the effect of his response was to deny that he had not raised harm or mistreatment at the Enhanced Screening interview – he stated he had told 'them' that his problems in India were to do with being arrested in India, and that then subsequently (inferring the later Arrival interview) *they asked for* all his problems so he elaborated and gave all the details. I am mindful of caution in assessing inconsistencies or omissions from early screening or arrival interviews, including of the varying circumstances of asylum seekers newly arrived in unfamiliar terrain, cross-cultural communication issues and that these interviews are not a forum for a full exploration of all protection claims. Nevertheless, I note that this interview was not immediately upon the applicant's arrival but occurred over a week after his

reception into Australia, and I also note that the purpose of an Enhanced Screening interview, as evident from its title and assessment exercise, is to evaluate whether a person has any claims of fear of harm for any reason that might engage any of Australia's protection obligations, for potential later further consideration of such status, to count against removal from Australia. I am satisfied the record indicates that questions of whether any such claims or fears of harm existed and why he left India were canvassed with the applicant. Noting the potential for removal from Australia, I find it difficult to believe that if the applicant had faced mistreatment or frequent detention and interrogation by Indian Q Branch or other Indian authorities for suspected LTTE support, being an MDMK [worker] or at all for any reason, or constant abuse from locals including being captured for two days and beaten, that any of these harms and his fear of arrest and imprisonment on return now claimed would not have been mentioned in any way at all as a reason to leave India or fear return there, even taking into account the cautions I have noted. Moreover, if the applicant had raised any of the claims he now relies upon, of harm or mistreatment or being frequently detained and interrogated by Indian police authorities for suspected LTTE or MDMK support, or that he was or might be imputed with opinions of LTTE or MDMK support for any reason, or that he had been locked up and beaten by local villagers for two days, I am satisfied that they would have been recorded for the assessment exercise.

40. I am not satisfied the applicant has given a credible account of his circumstances in India. I do not accept the applicant's claims that he was suspected by the Q Branch or Crime Branch or any other police or Indian authorities as being an LTTE supporter or smuggler, or was otherwise of any adverse interest or concern to any of them for any actual or imputed political opinion or as a Tamil Sri Lankan refugee, a young male Sri Lankan, or for any other reason. I do not accept the claims that the applicant was detained or interrogated by Q Branch or Crime Branch or any other Indian authorities for these claimed reasons. I have reservations about the claimed [work], but even may it be that the applicant worked briefly as a [worker] for a person named [Mr A] I do not accept that this involved the applicant in any association with or work for the MDMK or any MDMK leaders, nor that the applicant was imputed by the Indian police or authorities with any such political association or support from this employment or was ever thereby detained or questioned about any such association or imputed political support for any party or cause by any authorities. I do not accept that the applicant participated in any hunger-strike demonstrations in India. I do not accept that the applicant was of any adverse interest or concern to the Q Branch or Crime Branch or any other Indian police or other authorities or persons associated with them for any reason when he left India.
41. I also do not accept the claim that the applicant and some colleagues were detained and beaten for two days by vigilante villagers. It may be that a relative committed suicide two decades ago after being arrested by police for theft. He may have been assaulted by them. However, I am not satisfied that that person's particular circumstances are indicative of the experience that the applicant would or will face in India on return or in the reasonably foreseeable future.
42. I accept that, like all refugee camp residents, the applicant was required to report his movements external from the camp and what they involved, when going to work; however, on the information before me this was the standard requirement for all camp residents and I do not accept it was because the applicant was personally or particularly suspected of LTTE or MDMK involvement or support or smuggling and I do not accept that he was questioned about such matters when recording his departures, nor that he was mistreated in any way when he did so. I am not satisfied that such reporting measures consisted of or amounted to serious harm or significant harm.

43. I accept that the applicant was affected by the Data Breach, an inadvertent disclosure of personal information on the Department’s website in February 2014. The delegate noted, and I accept, that the accessible information included the following information regarding the applicant: name, date of birth, nationality, unauthorised maritime arrival status and detention status. I accept that there is a chance, even if low, that Indian authorities may have accessed the information on the website in that breach.
44. In answering questions on the SHEV application form the applicant recorded that he is a Christian, clarified as Catholic in the SHEV interview. I accept this. The applicant raised no protection claims against India concerning his religion or faith practice in the SHEV statement or in any material before me. The only concern he mentioned in the SHEV interview was the bombings of Christian churches in Sri Lanka two years ago, but which he attributed to Sinhalese anti-Tamil sentiment. Whilst Hindu nationalism has been rising in India and churches have been targeted in the past, I am not satisfied the applicant fears harm in India for these reasons, or that claims on the basis of his limited religious profile arise on the material before me. I have not considered this aspect of his profile any further.

### **Refugee assessment**

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45. 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**

46. 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.
47. The applicant maintained that it would not be possible for him to return to India as he was a refugee non-citizen who departed unlawfully with no rights of re-entry and in submissions to the delegate queried what the impact of Covid-19 would be on those matters and any travel

requirements. I accept that the applicant has no citizenship rights in India nor any legal rights of residency or return. However, I am satisfied that having an actual right to enter and reside in a person's former habitual residence is not relevant for the purposes of determining a person's refugee status. I am not satisfied that the bare and undetailed query concerning Covid-19 amounts to a claim of harm or claim of fear of harm. There is no indication in any material before me that, and none has been provided by the applicant, to suggest that any conditions or public health measures that might be in place concerning or affecting travel or logistical arrangements for travel or repatriation between India and Australia in the reasonably foreseeable future amount to or would lead to serious harm to the applicant for the essential and significant reason of any ground described in s.5J(1) of the Act.

48. The applicant claimed he would be imputed to be an LTTE supporter because he left India. For reasons discussed above, I do not accept that the applicant was imputed with any pro-LTTE or pro-MDMK political opinion in India or otherwise had any profile of adverse interest or concern to the Indian Q Branch, Crime Branch or any other Indian police or authorities, when he departed India. There is no claim or evidence before me of any conduct of the applicant in Australia that would give rise to any such imputations or adverse concern in the reasonably foreseeable future and I am not satisfied he would be imputed with any such opinions or adverse profile on return. There is no indication in any country information before me, and the applicant has not provided any, to support that departing from India, as the applicant did, even by smuggler boat, or even when also applying for asylum in Australia, even for a person with the applicant's profile does or would cause any Indian authorities to impute him to be an LTTE supporter or to have any other profile of adverse political opinion or concern to Indian authorities or police. I do not accept that the applicant will be an imputed LTTE supporter, or MDMK supporter, or imputed with any profile of adverse concern on return to India by Q Branch police or any Indian authorities or any other persons due to his departure from India or for any other reason, even noting his profile as a Sri Lankan Tamil refugee or a Tamil young man of Sri Lankan descent who is stateless. Moreover, the country information before me does not support that Sri Lankan Tamil refugees who leave India, as the applicant did, or who are returned after failing to secure asylum in Australia, face mistreatment or harm for those reasons. In its India Report, DFAT noted it was not aware of any evidence of mistreatment of returnees, including failed asylum seekers, to India by Indian authorities.<sup>23</sup> I do not accept that he would be targeted by any Indian police or other authorities or persons, or killed, tortured, beaten, persecuted or abused for leaving India as he did. I am not satisfied that by his departure from India or being returned there as a failed asylum seeker from Australia the applicant would face a real chance of any harm in India in the reasonably foreseeable future, even noting that he is a Sri Lankan Tamil refugee or a Tamil young man of Sri Lankan descent and who is stateless.
49. The applicant expressed concern to the delegate that other people or countries may have seen the details of his asylum claims in the Data Breach; and despite her assurance that no details concerning any protection claims were leaked he said even just the names and date of birth details were sufficient for the authorities to gather information on him and come to know the details of his claims for asylum and he could consequently face problems and may be tortured.
50. Even if any Indian authorities saw the applicant's identity details in the Data Breach, I am not satisfied any persons or authorities would know from that any more than that the applicant was in Australian immigration detention at that time. I am not satisfied on any information before me that any details or information concerning protection claims were publicly accessible and I do not accept that any Indian authorities or other persons would know any

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<sup>23</sup> DFAT India Report 2020

details of the applicant's asylum claims from the Data Breach, or gather such information about him. I note the applicant was not of any adverse interest or concern to any Indian authorities when he left India, and I note further the lack of any centralised population registration system in India and limited capacity of Indian authorities to track its inhabitants given inadequate surveillance systems.<sup>24</sup> Whilst the information in the Data Breach, might allow Indian authorities to infer from his presence here that he had departed India and had sought or would seek asylum in Australia, such an inference would be available in any event from the circumstances of the applicant's return after failing to secure asylum here, which circumstance I find would not result in or lead to a real chance of harm for the applicant. I am not satisfied that there is any real chance that the Data Breach would change or elevate that assessment. I do not accept that the applicant faces a real chance of being tortured or any other form of harm because of the Data Breach or any other harm or problems, and I am otherwise not satisfied that as a result of the Data Breach the applicant would face a real chance of any harm from any state or non-state actors in India in the reasonably foreseeable future.

51. I accept that Sri Lankan Tamil refugees in India lack the full freedoms allowed by Indian citizenship, with restrictions on full freedom of movement and their rights and benefits being permitted only in Tamil Nadu. As discussed in detail above, the country information indicates that the Indian government recognised refugees from Sri Lanka and that the national and Tamil Nadu governments provide them access to basic services including housing, education, healthcare and police and court protection, with monthly cash and in-kind assistance, and that there had been improvements and increased government spending on infrastructure and refugee welfare over recent years.<sup>25</sup>
52. The applicant claimed that he had lost all his rights for support in Sri Lanka, including the allowance, and submitted that he will be in mortal danger in India. DFAT reported that Indian registration for the Sri Lankan refugee camps closed in 2011.<sup>26</sup> USDOS observed that undocumented refugees were vulnerable to abuse and deportation. However, I note that Sri Lankan refugees are recognised and documented, as was the applicant who still has his Tamil Nadu identity documentation confirming his registration as a recognised refugee, including his Tamil Nadu birth certificate, his laminated personal Sri Lankan Refugee ID card, his Tamil Nadu driving licence and copy of his family Sri Lankan Refugee ID booklet. Moreover, India does not enforce returns of Sri Lankan refugees to Sri Lanka, which risk other undocumented migrant groups can be vulnerable to.<sup>27</sup>
53. I also note from country information that about a third of Sri Lankan refugees are "non-camp refugees", both registered and unregistered with police, who live in the communities outside the refugee camps, in rented housing or with friends and relatives, and who are not subject to camp restrictions and are often better off than those in the camps and often run successful businesses, buy land and housing outside the camps albeit through friendship networks, and are better integrated into the local Indian economy.<sup>28</sup> Non-camp refugees are required to register with the local police station and re-register if they move between police precincts, although not all do so.<sup>29</sup> Moreover, the Indian *Aadhaar*, or unique identification number document, on which access to public services is often based, and commonly used as a national

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<sup>24</sup> Ibid.

<sup>25</sup> RSQ Sri Lankan Refugees Report; USDOS India Human Rights Report 2020; DFAT India Report 2020; DFAT Sri Lanka Report 2019

<sup>26</sup> DFAT Sri Lanka Report 2019

<sup>27</sup> USDOS India Human Rights Report 2020

<sup>28</sup> DFAT India Report 2020; RSQ Sri Lankan Refugees Report; DFAT Sri Lanka Report 2019

<sup>29</sup> DFAT Sri Lanka Report 2019



identity card, is available to all persons after continued residence in India of 182 days (not just citizens), and does not require significant documentation, allowing accessibility for undocumented poorer citizens.<sup>30</sup>

54. As noted, the applicant is documented, with multiple identity documents from India including his birth certificate. He has immediate family still living in Tamil Nadu. Notwithstanding that I accept some refugees can face discrimination, such as incidents of verbal insults, abuse or exploitation in employment and those less educated can sometimes be limited to daily labour jobs in construction, I also note the applicant grew up there and formerly established his social and employment networks there. He was educated in the Indian system, had employment there from the time of leaving school to his departure to Australia, including outside the refugee camp, and has had further work experience in Australia where he has acquired restaurant cooking skills and experience. There is no indication before me of any personal impediment to the applicant's ability to be employed and support himself. His claims indicated he remained in regular contact with his family there, and there is nothing before me to suggest that the applicant would not have any familial support network of any nature if returned to Tamil Nadu. Even if the applicant were not able return to live in the refugee camp with its financial allowance and amenities, on the basis of his profile and the information detailed above, I am not satisfied that he would be denied access to or otherwise unable to obtain employment, shelter and sustenance and basic services on any return to India.
55. In addition to the limited rights referred to above, I accept that Sri Lankan refugees can be subjected to police identity checks, monitoring and reporting requirements particularly the refugee camp residents, and who may be required to remain in camp during sensitive political times such as elections. I am not satisfied that such restrictions or conditions amount to serious harm. I also accept there can be instances of societal or official discrimination. However, as discussed earlier, I do not accept the applicant's claims that he was physically abused or regularly verbally abused by community locals or by police, camp security or other officials or regularly detained for interrogation by them. Country reporting indicates that harassment by officials is more particularly of undocumented refugees, particularly more recently of Rohingyas.<sup>31</sup> There is no indication before me that any of his family are experiencing discrimination, mistreatment or any harm as Sri Lankan Tamil refugees in India. The USDOS report does not support claims that refugees are denied necessary protection from police or courts.
56. Whether as a camp or non-camp refugee, having regard to all the information before me I am not satisfied that the limitations, conditions and restrictions or discrimination the applicant might face as a Sri Lankan Tamil refugee in India or Tamil male of Sri Lankan descent in India, and who is stateless, would amount to or lead to the applicant being targeted or abused, beaten, mistreated or tortured by any Indian police, Q Branch, Crime Branch or other Indian authorities or any other persons or that he would otherwise be in mortal danger. I am not satisfied that there is a real chance the applicant would face serious harm or any threat to his capacity to subsist for those reasons, by any Indian police, Q Branch, Crime Branch or other Indian authorities or any other persons on return to India or in the reasonably foreseeable future.
57. Taking into account all of the evidence, submissions and country information before me, I have carefully considered the applicant's claims and assessed them individually and cumulatively. I am satisfied that the applicant does not have a well-founded fear of

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<sup>30</sup> DFAT India Report 2020; USDOS India Human Rights Report 2020

<sup>31</sup> DFAT India Report 2020; DFAT Sri Lanka Report 2019

persecution in India for any reason claimed or any combination of those reasons.

### **Refugee: conclusion**

58. 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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59. 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**

60. 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.

61. 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.

62. I accept that the applicant is stateless and that any return to India would be as a non-citizen. I note he does not and would not have any profile of adverse concern to any Indian police or other authorities or persons on return to India or in the reasonably foreseeable future. As more fully discussed earlier, I accept that in that circumstance and as a young Tamil male of Sri Lankan descent in India living as a Sri Lankan Tamil refugee the applicant experienced some official or societal discrimination in India and was subject to the movement restrictions, reporting and monitoring requirements as outlined in detail above. I accept he may again face such circumstances if returned to India; however, I am not satisfied that these restrictions, requirements and/or discrimination will amount, singularly or cumulatively, to a real risk that the applicant will suffer significant harm, as I am not satisfied that they consist of or that the applicant will face a real risk that he will be arbitrarily deprived of his life, have the death penalty carried out on him, or that he will be subjected to torture, or to cruel or inhuman or degrading treatment or punishment as defined in the Act.

63. Even if the applicant is not able to rejoin his refugee camp or reclaim the refugee camp residents' allowance or benefits, I find, as discussed above, that refugees, for which he still has his Tamil Nadu-issued identity documentation, are granted access to basic services, including

through the *Aadhar* card, that many Sri Lankan refugees live successfully outside the camps and he has his educational and work history and family networks previously established in India. I am not satisfied that the applicant will face a real risk of significant harm as defined on that basis.

64. I am not satisfied that any conditions or public health measures arising from Covid-19 that might be in place concerning or affecting travel or logistical arrangements for travel or repatriation between India and Australia in the reasonably foreseeable future would amount to or would lead to a real risk of significant harm to the applicant.
65. I have otherwise found that there is no real chance of the applicant facing harm in India for any reason claimed. Having regard to the same information and analysis, I find there is not a real risk that the applicant will suffer significant harm for any of those reasons if returned to India.

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

66. There are not substantial grounds for believing that, as a necessary and foreseeable consequence of being returned from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm. The applicant does not meet s.36(2)(aa).

#### **Decision**

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

## Applicable law

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### **Migration Act 1958**

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

In this Act, unless the contrary intention appears:

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**bogus document**, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly

...

**cruel or inhuman treatment or punishment** means an act or omission by which:

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature;

but does not include an act or omission:

- (c) that is not inconsistent with Article 7 of the Covenant; or
- (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

**degrading treatment or punishment** means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:

- (a) that is not inconsistent with Article 7 of the Covenant; or
- (b) that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

**receiving country**, in relation to a non-citizen, means:

- (a) a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or
- (b) if the non-citizen has no country of nationality—a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.

...

**torture** means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant;

but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

#### **5H Meaning of refugee**

(1) For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a refugee if the person:

- (a) in a case where the person has a nationality—is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or
- (b) in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Note: For the meaning of *well-founded fear of persecution*, see section 5J.

...

### 5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
  - (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
  - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
  - (c) the real chance of persecution relates to all areas of a receiving country.  
Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.  
Note: For effective protection measures, see section 5LA.
- (3) A person does not have a well-founded fear of persecution if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country, other than a modification that would:
  - (a) conflict with a characteristic that is fundamental to the person's identity or conscience; or
  - (b) conceal an innate or immutable characteristic of the person; or
  - (c) without limiting paragraph (a) or (b), require the person to do any of the following:
    - (i) alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith;
    - (ii) conceal his or her true race, ethnicity, nationality or country of origin;
    - (iii) alter his or her political beliefs or conceal his or her true political beliefs;
    - (iv) conceal a physical, psychological or intellectual disability;
    - (v) enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
    - (vi) alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.
- (4) If a person fears persecution for one or more of the reasons mentioned in paragraph (1)(a):
  - (a) that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and
  - (b) the persecution must involve serious harm to the person; and
  - (c) the persecution must involve systematic and discriminatory conduct.
- (5) Without limiting what is serious harm for the purposes of paragraph (4)(b), the following are instances of **serious harm** for the purposes of that paragraph:
  - (a) a threat to the person's life or liberty;
  - (b) significant physical harassment of the person;
  - (c) significant physical ill-treatment of the person;
  - (d) significant economic hardship that threatens the person's capacity to subsist;
  - (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
  - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.
- (6) In determining whether the person has a **well-founded fear of persecution** for one or more of the reasons mentioned in paragraph (1)(a), any conduct engaged in by the person in Australia is to be disregarded unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.

### 5K Membership of a particular social group consisting of family

For the purposes of the application of this Act and the regulations to a particular person (the **first person**), in determining whether the first person has a well-founded fear of persecution for the reason of membership of a particular social group that consists of the first person's family:

- (a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in paragraph 5J(1)(a); and
- (b) disregard any fear of persecution, or any persecution, that:
  - (i) the first person has ever experienced; or

- (ii) any other member or former member (whether alive or dead) of the family has ever experienced;

where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.

Note: Section 5G may be relevant for determining family relationships for the purposes of this section.

#### **5L Membership of a particular social group other than family**

For the purposes of the application of this Act and the regulations to a particular person, the person is to be treated as a member of a particular social group (other than the person's family) if:

- (a) a characteristic is shared by each member of the group; and
- (b) the person shares, or is perceived as sharing, the characteristic; and
- (c) any of the following apply:
  - (i) the characteristic is an innate or immutable characteristic;
  - (ii) the characteristic is so fundamental to a member's identity or conscience, the member should not be forced to renounce it;
  - (iii) the characteristic distinguishes the group from society; and
- (d) the characteristic is not a fear of persecution.

#### **5LA Effective protection measures**

- (1) For the purposes of the application of this Act and the regulations to a particular person, effective protection measures are available to the person in a receiving country if:
  - (a) protection against persecution could be provided to the person by:
    - (i) the relevant State; or
    - (ii) a party or organisation, including an international organisation, that controls the relevant State or a substantial part of the territory of the relevant State; and
  - (b) the relevant State, party or organisation mentioned in paragraph (a) is willing and able to offer such protection.
- (2) A relevant State, party or organisation mentioned in paragraph (1)(a) is taken to be able to offer protection against persecution to a person if:
  - (a) the person can access the protection; and
  - (b) the protection is durable; and
  - (c) in the case of protection provided by the relevant State—the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system.

...

#### **36 Protection visas – criteria provided for by this Act**

...

- (2) A criterion for a protection visa is that the applicant for the visa is:
  - (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee; or
  - (aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or
  - (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
    - (i) is mentioned in paragraph (a); and
    - (ii) holds a protection visa of the same class as that applied for by the applicant; or
  - (c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
    - (i) is mentioned in paragraph (aa); and
    - (ii) holds a protection visa of the same class as that applied for by the applicant.
- (2A) A non-citizen will suffer **significant harm** if:
  - (a) the non-citizen will be arbitrarily deprived of his or her life; or
  - (b) the death penalty will be carried out on the non-citizen; or
  - (c) the non-citizen will be subjected to torture; or
  - (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
  - (e) the non-citizen will be subjected to degrading treatment or punishment.

- (2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:
- (a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or
  - (b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or
  - (c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

...

*Protection obligations*

- (3) Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.
- (4) However, subsection (3) does not apply in relation to a country in respect of which:
- (a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or
  - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.
- (5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:
- (a) the country will return the non-citizen to another country; and
  - (b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.
- (5A) Also, subsection (3) does not apply in relation to a country if:
- (a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and
  - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country.

*Determining nationality*

- (6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.
- (7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.