



**Australian Government**  

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**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA21/09757

Date and time of decision: 30 September 2021 10:24:00  
M Anderton, Reviewer

**Decision**

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

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

## Background to the review

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### Visa application

1. The applicant is a Tamil Sri Lankan citizen, who lived in India since he was [a child] and who arrived in Australia by boat in May 2013.
2. On 30 August 2017 he applied for a safe haven enterprise visa. His claims revolved around his fear of harm from the Sri Lankan authorities due to his Tamil ethnicity, imputed or actual political opinion, Hindu religion, his mental health problems, his connection to his Liberation Tamil Tigers Eelam (LTTE) brother and other brother who supports the Naam Tamilar Katchi party, and as a failed asylum seeker.
3. On 23 August 2021 the delegate for the Minister for Immigration refused the visa. The delegate accepted the applicant's claims about his brothers but did not accept that the applicant faced a real chance of serious harm upon return to Sri Lanka or that complementary protection obligations were owed.

### Information before the IAA

4. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
5. The applicant provided a statement and medical evidence to the IAA. The medical documents were before the delegate and not new information. The statement reiterated his claims. The statement included new information that while in India he had attempted suicide.
6. I consider the applicant could have provided this information to the delegate as he was asked about his mental health and provided medical evidence about his mental health, including documentation from India. Section 473DD(b)(i) is not satisfied. It is credible personal information. However, I am not satisfied that it would have affected the consideration of the applicant's claims as the applicant was not being returned to India and the circumstances and timing of the past suicide attempt were not clear or that it would have affected the consideration of the applicant's claims. Further, more recent evidence of the applicant's mental health was before the delegate and considered. Further, no exceptional circumstances were provided, and none were apparent to me. I am not satisfied there are exceptional circumstances to consider the information. I am not satisfied as s474DD(b)(ii) or (a).
7. I have not considered the information.

### Applicant's claims for protection

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8. The applicant's claims can be summarised as follows:
  - In 1983, the family home was destroyed and since then family was displaced living in various places in the North of Sri Lanka due to conflict.
  - In 1985 the applicant's older brother, S was arrested as a suspect for a bomb attack and tortured. As a result, S joined the LTTE in 1987.

- In 1988 after further fighting between the LTTE and government, their home was again destroyed, and they took refuge at a church. The LTTE took the second brother by force to join them. However, the parents told the LTTE they already had one son in the LTTE so they should not have another one. The parents brought the second son home and they decided to move to India for their safety in 1990.
- If the applicant's brother was to return to Sri Lanka, he would be harmed because of his LTTE association. Because the applicant is related to him, he would also be harmed. The applicant did not tell anyone about his brother in previous interviews because he was fearful, he would be put in gaol, if he said his brother was in the LTTE. The applicant has panic attacks and psychological problems which made him fearful of what would happen to him. He was treated in India also.
- Even with the change in government in Sri Lanka he fears he will be arrested and interrogated and tortured because his brother was in the LTTE. He gets panic attacks when he sees violence and he is scared that he may see violence which will cause serious problems for his mental health.
- None of his family have returned to Sri Lanka and he would have nowhere to go and find it difficult to find employment to support himself because he is a Tamil. He has no family or other connections in Sri Lanka and would be targeted because of his brother's LTTE involvement. He would be treated poorly as a Tamil and face discrimination even if he was relocated to another area. There are still many problems for Tamils in Sri Lanka. He has seen on the internet that Hindu temples are being destroyed and replaced with Buddhist temples and because of this the police have power to arrest people who are suspected LTTE or members of their family. He has seen on the news Tamil students clashed with Sinhalese students at Jaffna university. He also saw two Tamil students shot dead for speeding. Army camps still exist, and some Tamils cannot access their own land. He is fearful because he does not have appropriate security and will be killed.
- His personal information was released by the Australian government and fearful Sri Lankan authorities accessed it and would discover he had sought asylum, which would mean they would be suspicious and think he was involved with the LTTE and target and persecute him.
- Because of his psychological condition, he feels he would be more adversely affected if he was returned.
- He lived as a refugee in India in a small room. If returned to India, he would be arrested and put into a special camp.
- Conditions were not good, he was constantly monitored and had to sign in and out of the camp. They could not move around the camp at night. Their movement was restricted when politicians travelled near the camp or there were elections. He was not allowed to work. They were given minimal facilities.
- He studied at the camp till grade [level]. Then went to school outside the camp and they were treated differently as the they were refugees. As a result, he was unable to concentrate on his studies. When he was in year [level] he relieved himself in the jungle as there was no toilet outside where he was playing. Three senior boys held him down and acted as homosexuals, sexually and physically assaulting him. He fell and cut [himself] and needed stitches. He now associates blood and violence with this incident. He told a doctor about them. He was no longer able to study after that and stopped going to school. He believes it happened to him as he is a Sri Lanka Tamil.

- The applicant's brother was accused of theft and taken away by Q branch and beaten. The applicant was fearful he would be accused and beaten for something he did not do. The brother was working for a political leader from a Tamil party in India, putting up posters for Hero's day celebration. As he was working with an organisation against the Sri Lankan government the applicant fears that he would be subject to the same treatment. They also look very similar so Indian authorities may confuse them.

## **Refugee assessment**

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9. 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**

10. 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.
11. Based on the applicant's birth certificate and refugee card evidence, I accept that he is a Sri Lankan citizen and find the receiving country in Sri Lanka. I have assessed his claims against Sri Lanka, not India.
12. I accept also that the applicant has lived in India since he was [a child] as his family left Sri Lanka during the conflict. I accept his family had been displaced due to the conflict. I accept the applicant is a Tamil Hindu.
13. The applicant's claims revolved around his fear of harm from authorities due to his connection to his LTTE brother, S and another brother, M, who was a supporter of the Naam Tamilar Katchi party in India. He feared he would be questioned about his family and face problems because of his brothers' LTTE and political party support. The applicant also claimed to suffer from mental problems such that his condition worsened if exposed to violence or abuse or threats. He also feared stigma due to his mental illness and had no connections in Sri Lanka.

14. The delegate, noting the applicant did not provide a detailed account, accepted the applicant's claims regarding his brothers' LTTE and political party support. The delegate considered the lack of detail was because the applicant was recalling information about S that was prior to his birth and the applicant was not himself involved in M's activities.
15. However, S returned to live with the family since 2004 so I find it difficult to believe that the applicant would not have more information about S' LTTE involvement, and in particular given it formed a key part of his claims. Similarly, the applicant and M were adults and lived in India together and I find it difficult to believe that he would not have known or found out more about M's activities given the claims formed a key part of his claims. I have some doubts about the LTTE claims and political party support because the applicant provided little meaningful detail about his brothers' involvement, despite being given many opportunities and he had not raised M's political party support in his arrival interview. I note the applicant's explanation that he was scared he would be taken into custody if he disclosed the information. I note also the applicant had not disclosed his mental health issues initially either.
16. Nonetheless, given the country information that many Tamils joined the LTTE at the relevant time I am prepared to accept that the applicant's older brother S joined the LTTE in 1987 (after he had been beaten by authorities) and that he was a fighter with them until he left (due to his own mental health problems) and returned to the family in India in 2004. I note at the arrival interview the applicant indicated his brother was high level, but at the protection interview when asked for details of S's LTTE involvement, little was given, other than he was a fighter, joined in 1987, ceased with the LTTE as he returned to India in 2004 as he had mental health issues in Sri Lanka. I do not accept S was high profile LTTE. I find he was low level LTTE between 1987 and possibly 2002 (given the ceasefire was in 2002) or 2004, when he returned to India.
17. However, I do not accept the applicant faces a real chance of harm upon return due to his connection to his brothers. S's LTTE involvement commenced before the applicant was born and ceased many years ago (in 2004). While I accept S was a LTTE fighter, his involvement was remote in time and in the context that many Tamils had some connection to the LTTE during the conflict. There was no evidence that S had come to authorities attention since he joined the LTTE or that he was wanted or targeted. Further, S had been in India since 2004 and no longer involved with the LTTE after that. I note also country information indicates that a ceasefire between the Sri Lankan Government and the LTTE was signed in 2002 and in effect until 2005. While the conflict recommenced, it finally ceased in May 2009.
18. I accept also on the benefit of the doubt that the applicant's other brother M is a member and supporter of the Naam Tamilar Katchi party. The applicant said the party supported the LTTE.
19. Country information indicates that the Naam Tamilar Katchi (NTK) is a Tamil Nationalist political party in Tamil Nadu, India which commenced in 2010. The chief coordinator of the party is Senthamizhan Seeman. The party supports the independence of Tamil Eelam and Seeman has spoken against the perceived injustices perpetrated against Eelam Tamils by Sri Lanka including the Sinhalisation and colonisation of the Tamil homeland. Seeman has himself faced charges, including those under the National Security Act, but he stated it was not secessionist party.
20. While the applicant's statement indicated that M was 'working with a political leader, Seeman putting up posters on hero's day', there was no other evidence of any direct

involvement with S. Further, while the applicant claimed M was beaten when he put up flags for Hero's day, this was not claimed in his statement. Rather, the applicant had stated that M was suspected of stealing an item at the camp and was beaten by Q branch. Given the differences in account I have doubt that M's brother was beaten for putting up flags.

21. At the protection interview, the applicant claimed M put up posters and on Hero's day put up flags in the camp and continued to support the party. When asked if he did anything else, the applicant said M attended public meetings. The applicant stated at protection interview that M did not have any role or position in the party.
22. While the delegate accepted that M was a supporter of the party's chief coordinator and found the interactions with Seeman were limited, I do not accept the evidence supports that M was in any directly interacting or supporting Seeman himself. The applicant's evidence at the protection interview did not indicate this was the case. The evidence was that he put up posters and flags, but it was not that he had any direct involvement or interaction with leader of the party in that or any other regard. Having listened to the protection interview, I do not accept that M worked with or had any direct involvement with the party leader. The applicant did not mention this at the protection interview, despite being given opportunities to explain M's activities and role. Further, if he were directly involved with the leader, I find it difficult to believe that would not have been one of the things mentioned at interview, when asked for details of M's activities. Further, I consider the statement mentions the political leader Seeman as a way of identifying the party that M supported, as the name of the party was not mentioned in the statement. I do not accept M had any direct involvement with Seeman. I find M's support for the party was low level and not significant or prominent.
23. Even if M was beaten for his political activities, he was able to continue his activities without arrest or other harm. I note the country information about interest in proscribed Tamil groups in the diaspora. However, there were no claims or evidence the political party that M supported (Naam Tamilar Katchi) is a proscribed. Further, M was low level and only involved in putting up posters and flags and did not hold a party position or have a specific role. I do not consider that M was a high-profile supporter. Further, I note the applicant was not involved in any such activities and he faced no harm and was not targeted due to M's activities. Further, I do not accept that applicant will be mistaken for his brother.
24. The applicant also confirmed he himself had not participated in any such activities or faced any consequences as a result of his brother's activities.
25. Given the low level M's activities, and that the applicant is not involved in any such activities or political activity or interested, I do not accept that the applicant will be perceived as anti-government or adverse interest to authorities upon return. I do not consider the connection and M's low level profile and activities means authorities will be suspicious of the applicant or that he faces a real chance of harm.
26. Even if the applicant is questioned about his family and authorities are aware of their activities, I do not accept that the applicant faces a real chance of harm on the basis of his connection to his brothers. As discussed above M's activities are low level, in India and the applicant has nothing to do with them. Further, S was low profile LTTE and ceased being LTTE many years ago, before the conflict ended. S has lived in India since 2004 also. Further, the applicant was not even born when S joined the LTTE. And the applicant has lived in India since he was [a child]. I do not accept that he will be perceived as a threat to the Sri Lankan state or anti-government. The Sri Lankan authorities have sophisticated intelligence and

interested in those who advocate for a Tamil separatist state, re-emergence of the LTTE or threaten the security of the single State. I do not accept the applicant or due to his connection to his brothers is or will be perceived as such or of any adverse interest to authorities upon return.

27. Further, I do not accept that his long absence from Sri Lanka and residence as a refugee in Tamil Nadu raises his profile or means he may be of interest to authorities. The applicant left Sri Lanka as a [a child] with his family in the context of conflict, like many thousands did. He also has refugee documents which evidence his stay in India. Further, county information indicates that many Sri Lankans who fled to Tamil Nadu, have returned without harm.
28. I do not accept that he will be perceived (or has an actual) with an adverse political opinion, anti-government, Tamil separatist, pro-LTTE or of adverse interest to authorities or to Sinhalese or Muslims or to anyone.

#### *Mental health*

29. The applicant provided medical evidence about his mental health treatment. The psychiatrist letter dated 18 November 2018 indicated that the applicant had been under the doctors' care since March 2018. It stated the applicant showed symptoms of obsessive-compulsive features and intrusive post traumatic symptoms which have affected his mood resulting in depression and anxiety. The letter stated continued psychiatric help may alleviate some of the symptoms. The applicant was on Anafranil 25mg. He washed his hands frequently and checked things. There was also unresolved grief in respect of the death of his brother in law. The psychiatrist had arranged to see him monthly. The social worker letter dated 10 June 2021 stated the applicant was referred by the GP in October 2019 with worsening depression and OCD in the context of trauma experienced in India, delays in the visa process and death of his brother in law in Australia in 2014, and was referred to a psychiatrist. The social worker had commenced CBT supportive counselling once a month. The applicant also provided notes about his mental health treatment in 2005/2007 in India, which indicated OCD and feelings of depression.
30. I accept the applicant has a mental illness and has received treatment for it in India and in Australia. The applicant explained he became unwell and received treatment after he was sexually assaulted in India at school, by the senior boys. While he completed the O level exams afterwards, he found it difficult to continue as a result of the assault and ceased his study. The applicant claimed as a result of his mental illness he was vulnerable to observing violence and became scared when he watched violent things on the news and his condition worsened.
31. I accept that the applicant had been diagnosed with OCD, which has affected his mood and lead to depression and anxiety, and he was traumatised by his brother in law's accidental death in 2014 and its aftermath. I accept he has received treatment from a psychiatrist in 2018 and social work counsellor. At the protection interview the applicant indicated he was due to see the psychiatrist again, but the appointment had been cancelled as the doctor was ill. The applicant indicated he was on medication for the next 5 years, though he had stopped taking it for a few months when he was upset about his unexpected brother in law's death in Australia in 2014.
32. The applicant claimed to fear stigma for his mental illness and a vulnerability to observing violence or threats which worsened his mental health. The social worker letter stated the applicant was at real risk of harm to his physical and emotional well-being if he is deported to

Sri Lanka or India. The psychiatrist letter requested kind consideration of his application as the applicant reports there will be a threat to his life in Sri Lanka and has no papers to return to India and there is nothing for him there.

33. Country information indicates Sri Lanka's health care system has a long record of strong performance and investment in it has increased since the end of the war. There is universal free public health care, though regional disparities exist in quality and facilities (urban and rural). According to DFAT report the Sri Lankan government has improved access to mental health services and is a government priority, with cadres of mental health workers, training and programs rolled out in the Northern province. There are district hospitals and NGOs who provide psychosocial support, including in Tamil populated areas. Despite the improvements there remain ongoing challenges in accessing mental health care. Mental illness is not widely discussed in Sri Lankan society and carries stigma at the community level which deters individuals from seeking treatment. According to the UK Home office, National Institute of Mental Health (NIMH) provide comprehensive treatment for people with all ranges of mental health problems. The hospital covers a 50km radius and has 72 psychiatric nurses within the community. The NIMH indicated that, at the time of the Fact-Finding Mission team visit, there was no waiting list for their services. In addition to providing care for those with mental health issues, the hospital also ran an outreach programme, a National Mental Health Helpline which is open 24/7 with trained nurses and doctors and a mental unit open to the general public to help reduce the stigma of mental health within the community. The UK Home office also reported all psychiatry clinics are open for all the citizens in Sri Lanka. In 2015 there were between 71 or 80 consultant psychiatrists across the country and inpatient services were available in 22 of 25 districts, with district and outpatient and outreach clinics throughout the country.
34. While the mental health facilities and access may not be to Australian standards in Sri Lanka, I do not accept that the applicant would not have access to services or medication if needed. I note Sri Lanka has a universal public free health system. Mental health services have improved and expanded, including in the north and east. Further, I do not accept that he would be denied medical services for any s5J reasons.
35. I am not persuaded that the applicant has a greater aversion to violence or threats as this was not described or discussed in his medical records. Further, it was evident the applicant watched and read about violence and incidents as he described reading about or watching some on the internet or news at the protection interview (eg. Jaffna students shot). However, I acknowledge the applicant was subjected to a sexual assault in India as a schoolboy and he suffers from OCD, anxiety and depression for which he has received treatment in India and Australia.
36. In any event, even considering his mental health and claimed violence vulnerabilities I do not accept that the applicant faces a real chance of violence, threats or harm upon return to Sri Lanka or observing same, as I do not accept that the applicant is or will be of adverse interest to authorities or anyone. As discussed above, I do not accept that his connection to his brothers puts him at risk of any harm. I do not accept that he faces a real chance of harm from authorities or any threat to his life for any reason.
37. I do not accept that the social workers assertion that if returned the applicant faces risk of harm to his physical and emotional well-being if he is deported to Sri Lanka. While I acknowledge the applicant does not want to return to Sri Lanka and would prefer to remain in Australia and return may cause him some distress and adjustment difficulties, it does not



involve systematic and discriminatory conduct. Further, I do not accept that amounts to serious harm.

38. While I acknowledge he may not have the support of family or connections in Sri Lanka, he has the benefit of further treatment in Australia. Further, I note the applicant did not have connections in Australia, other than his brother in law, who unfortunately passed away in 2014. While I acknowledge that adjustment to Sri Lanka, given his absence and mental health vulnerability and lack of connections may be difficult, I do not accept it amounts to serious harm. Even if the applicant faces stigma due to his mental illness, I do not accept that it amounts to serious harm.
39. I have considered the country information about treatment of Tamils in Sri Lanka. It is evident from the country information and I acknowledge and accept that during the conflict and shortly thereafter Tamils suffered disproportionately. However, since the end of the conflict and particularly since Sirisena came to power in 2015, the situation for Tamils has improved considerably.
40. I note Rajapaksa came to power in November 2019 and the country information about the regression of accountability and reconciliation measures and the Tamil concern about the change of government to the Rajapakasas, particularly given their involvement in the conflict.
41. I note the applicant's concerns about unequal treatment and discrimination of Tamils. He referred to Sinhalese wanting Tamils out of the country, Hindu temples being replaced with Buddhist ones, Easter Sunday attacks on Tamils in churches, two Jaffna university Tamil students being shot accused of speeding and Tamils not being able to speak out and difference in language.
42. According to the US Department of State Tamils reported suffering long-standing systematic discrimination in university education, government employment, housing, health services, language laws, and procedures for naturalization of non-citizens. The report also noted the government implemented confidence building measures to address grievances of the Tamil community, including promoting social integration, securing language rights for all and supporting a healing process within war affected communities and non-recurrence of violence. DFAT assessed, that non-Muslim Sri Lankans, including Tamils, face a low risk of official or societal discrimination based on ethnicity or caste, including in their ability to access education, employment or housing.
43. Tamils are the second largest ethnic group in Sri Lanka and according to the DFAT report they have gained a substantial level of political influence, and their inclusion in political dialogue has increased since the change of government in 2015. Government ministers encouraged overseas Tamils to return to Sri Lanka also. I do not accept Sinhalese want Tamils out of the country. Further, the Easter Sunday attacks targeted Christians, and the authorities responded with increased security measures and arrests or the perpetrators, who were Muslim, were killed. I note country information about Buddhist temples being built in Hindu areas, but do not accept that they have replaced them. Further, I note country information that Hindus account for a majority of the population in the Northern Province and practise their faith freely there and elsewhere in Sri Lanka. I am not satisfied in the evidence that the applicant could not practise his religion. or that he faces a real chance of harm on the basis of his religion. Further, I note the applicant has been educated, has found employment previously. I do not accept that he would not be able to find employment to support himself.

44. I note the UK Home Office report states that while there is some discrimination towards Tamils, they do not suffer persecution simply for their Tamil ethnicity.
45. On the evidence, I am not satisfied that the applicant faces a real chance of discrimination upon return.
46. I note country information in the delegate's decision that there had been reports of increased monitoring, harassment and assaults of Tamils since the November 2019 election. However, these relate to journalists, activists, high profile politicians or former LTTE. The US State Department report states that Tamils in the north and East reported security forces monitored and harassed members of the community especially activists, journalists, commemorating the LTTE and former or suspected former LTTE members. However, I do not accept the applicant has such a profile or will have one upon return, even considering his connection to his brothers.
47. Even having regard to the current political situation with the Rajapaksa's return to power, I am not satisfied that the applicant faces a real chance of harm as a Tamil male or on account of his past experiences, connection to his brothers (S and M), his time spent in Tamil Nadu or Australia or his Hindu religion.
48. The present government has been in power now for well over a year and the evidence before me does not support a return to civil conflict or harm to someone with the applicant's profile and circumstances, including as a young single Tamil male from the north, who went to Tamil Nadu for many years, whose family was displaced and given his brothers connections.
49. Even in the current situation and political landscape, I do not accept the applicant faces a real chance of harm from the authorities.
50. Even considering the applicant's mental illness, possible stigma or discrimination, adjustment difficulties and lack of connections upon return, I do not accept that it amounts to serious harm. The applicant has been treated for his illness, could access services in Sri Lanka if needed, he is well educated, speaks Tamil, has employment experience in construction and retail and has navigated the Australian system without connections for many years.
51. I do not accept the applicant faces a real chance of arrest, torture, threats or interrogation. Having regard to the country information and the applicant's circumstances/experiences in India and Sri Lanka and connection to his brothers, I am not satisfied that the applicant faces a real chance of harm upon return to Sri Lanka from authorities for any reason. Further, having regard to his circumstances (mental health vulnerabilities, possible stigma, adjustment difficulties, lack of Sri Lankan connections) I do not accept that the applicant faces a real chance of persecution upon return from authorities, Sinhalese or Muslims or anyone.

*Failed asylum seeker and illegal departee, data breach*

52. I accept the applicant will return as a failed asylum seeker on a temporary travel document and he was subject to the immigration data breach. The data breach did not disclose any asylum reason claims. In any event, if returned on a temporary travel document by Australian authorities, Sri Lankan authorities will be aware he applied for asylum in any event.
53. Country information in the DFAT and UK Home office reports indicates he would face questioning and an investigative process to confirm his identity at the airport as a returning asylum seeker on a temporary travel document.

54. The DFAT reports indicate that thousands of Tamils have been returned to Sri Lanka since the end of the Sri Lankan civil war, including from Australia and Tamil Nadu, after claiming asylum. Although there have been reported instances of returnees being harmed in the past, the information before me indicates those were people with substantial links to the LTTE or outstanding warrants. As discussed above, I do not accept the applicant has substantial LTTE connections or is subject to outstanding warrants. Further, even considering the applicant's connection to his brothers, I do not consider that the applicant would be perceived as LTTE or anti-government, Tamil separatist or of adverse interest or with any outstanding warrants. I do not accept that the applicant has such a profile or would be perceived as such. I have not accepted that he was or will be of interest to Sri Lankan authorities. I do not accept his connection to his brothers, the departure to and residence in Tamil Nadu raises the applicant's profile or means he faces a real chance of any harm or adverse interest. I do not accept that the authorities' knowledge that he is a failed asylum seeker raises his profile or that they would be suspicious and think he was involved with the LTTE and target and persecute him. I do not accept the authorities would perceive him of adverse interest.
55. Credible country information in the DFAT and UK Home Office reports and in review material before me indicates that there is no mistreatment of returnees upon arrival or questioning at the airport and all returnees are treated the same regardless of their ethnicity and religion. Even considering his mental health, I do not accept the applicant faces a real chance of harm upon arrival, being questioned or return home.
56. Even considering his time spent in India and Australia, I do not accept the applicant faces a real chance of harm as a failed asylum seeker or returnee, subject to the data breach.
57. I note the UNHCR told a January 2020 UK Home Office fact finding mission that high-profile ex-LTTE members would be subject to additional questioning at the airport. However, the Attorney General's Department and CID advise that former LTTE cadres would only be of interest if there was a pending criminal case against them because mere membership of the LTTE will not make someone of interest. This is also confirmed by an NGO. I do not accept the applicant faces additional questioning or interrogation as I do not accept he has or will have an adverse profile.
58. I note from the 2019 DFAT report some returnees, including returnees in the north and east with LTTE links, have been the subject of monitoring by the authorities. However, Sri Lankan authorities distinguish between 'low profile' and 'high profile' former LTTE members when assessing their potential security risk; 'low-profile' former LTTE members include former combatants, those employed in administrative or other roles, and those who may have provided a high level of non-military support to the LTTE during the war. As discussed above I do not accept the applicant has been or will be suspected as LTTE associated. Further, I have not accepted that the applicant's brother's LTTE links are significant, recent or of interest to authorities or raise the applicant's profile. Similarly, I do not accept his connection to M, the other brother raises the applicant's profile either or means he will be of adverse interest or interrogation or detention. Further, I do not accept he faces a real chance of monitoring or adverse interest upon return.
59. Further, DFAT is not aware of returnees, including failed asylum seekers, being treated in such a way that endangers their safety and security. Based on the country information and the applicant's circumstances, I do not accept the applicant faces a real chance of, mistreatment on arrival in Sri Lanka or during the questioning process to establish his identity and any criminal history. I have not accepted he was or will be of adverse interest to authorities or anyone. Further, I do not accept he faces a real chance of any harm upon

return to his home. Even considering his mental health vulnerabilities and family connections, I do not accept there is a real chance of any harm as a failed asylum seeker or returnee (including from Tamil Nadu), subject to the data breach.

60. While not claimed, I note the applicant departed Sri Lanka without a passport in 1990 with his family and therefore illegally, but he was a [child]. I note that many thousands fled Sri Lanka for Tamil Nadu as refugees in the past, as the applicant and his family did. Many have also returned to Sri Lanka since. Country information is that children under 12 (at the time of departure) are not subject to any illegal departure penalties and I do not consider the applicant faces any penalty or harm for that departure.
61. I have had regard to all of the evidence before me and the totality of the personal circumstances of the applicant and the recent political landscape. I am not satisfied the applicant has a well-founded fear of persecution from anyone for reason or combination of reasons in s.5J(1)(a), now or in the reasonably foreseeable future, if he returns to Sri Lanka.

### **Refugee: conclusion**

62. 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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63. 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**

64. 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.
65. 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.
66. As to treatment upon return as a failed asylum seeker or returnee, subject to data breach, I have not accepted that the applicant faces a real chance of any harm in that regard. Further, I am not satisfied, even having regard to his mental health vulnerabilities and family connections, that the applicant faces a real risk of significant harm as a failed asylum seeker, or returnee (including from Tamil Nadu) or subject to the data breach.

67. In relation to the applicant's mental illness, possible stigma or discrimination, adjustment difficulties and lack of connections upon return, I do not accept he faces a real risk of significant harm as defined from authorities, Sinhalese, Muslims or anyone. As discussed above, I consider he is well educated, has employment experience, speaks Tamil, has navigated a new country for many years without connection, has received treatment for his illness and could seek it again if required in Sri Lanka.
68. Further and in any event, I do not accept that any distress or adjustment difficulties, lack of connections he encounters upon return is due to any intention to inflict harm. Further as discussed above, I do not accept that it amounts to significant harm.
69. Further, I do not accept he could not access medical/mental services if needed. While I note the standard or access may not be the same as in Australia, the limitations on health care are not due to any intention to inflict harm (as defined) but limited resources.
70. Even considered cumulatively, I am not satisfied that the applicant would face significant harm as defined in section 36(2A) of the Act from anyone if he were to return to Sri Lanka.
71. In relation to the remainder of applicant's claims which I have accepted, I have found that the applicant does not have a real chance of harm on any of these bases. For the same reasons and applying the authority in *MIAC v SZQRB* [2013] FCAFC 33, I am not satisfied the applicant will face a real risk of any harm, including significant harm on any of those bases if removed to Sri Lanka.

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

72. 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.