



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

**Decision and Reasons**

**Referred application**

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INDIA

IAA reference: IAA21/09980

Date and time of decision: 22 November 2021 15:06:00

K Allen, 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 Hindu who was born in Tamil Nadu India to Sri Lankan refugee parents. On 20 June 2017 he lodged an application for a Safe Haven Enterprise Visa (SHEV).
2. On 24 September 2021 a delegate of the Minister for Immigration (the delegate) made a decision to refuse the grant of the visa on the basis that the applicant is not owed protection

### 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).
4. No further information has been obtained or received.

### Applicant's claims for protection

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5. The applicant's claims can be summarised as follows:
  - He was born in [year] in [Camp 1], Tamil Nadu in India to Tamil Hindu Sri Lankan refugees. He believes that he is stateless having not registered for Sri Lankan citizenship and not being eligible for Indian citizenship.
  - His family fled Sri Lanka in 1990 as a result of the civil war. The Sri Lankan Army (SLA) detained his father for two months on suspicion of supporting the Liberation Tigers of Tamil Eelam (LTTE) and his grandparents and uncle were killed in the war.
  - As a Sri Lankan refugee living in a refugee camp, he was subject to certain restrictions and monitoring; He was harassed by the Indian police, namely the 'Q Branch', who were primarily responsible for refugees from Sri Lanka.
  - In 2011, when he complained about conditions in the refugee camp, he was beaten by camp workers and interrogated by Q Branch officers.
  - In 2010 and 2011, he organised and participated in protest events in the refugee camp to raise awareness of the abuse of Tamils in Sri Lanka. Q Branch officers questioned him about his activities and beat him during their interrogations.
  - In 2012, he undertook campaigning for the Indian political party, Naam Thamilar. Members of opposition parties attacked him. Following this incident, two supporters of the party were killed and several days later, some men came to the refugee camp and warned his father that he must cease his campaigning for Naam Thamilar.
  - He left India because he was harassed by the authorities in the camp and endured discrimination as a stateless refugee.
  - He fears returning to India because of his political activities.
  - He fears returning to Sri Lanka for the reason of having an imputed political opinion as a supporter of the LTTE due to his Tamil ethnicity, family connections and political activity in India. He also does not have any family support in Sri Lanka.

6. The applicant attended his SHEV interview on 18 June 2021 and made the following claims:
  - The information he provided in his Arrival and SHEV interviews is not correct. The claims he made at his Enhanced Screening Interview on 15 May 2013 are correct.
  - He did not complain about conditions in the refugee camp in 2011 and was not beaten by camp workers and interrogated by Q Branch officers.
  - In 2010 he stood with other camp members for five minutes to pay tribute to the people who died in Sri Lanka and he observed one minute of silence. After that everyone went home. There were no repercussions.
  - He did not organise or participate in protests in 2010 and 2011 and he was not questioned and beaten by Q Branch as a result of protests or involvement in any movement.
  - He was not politically active in India and was not involved in the Naam Thamilar party and he was never harmed on the basis of any political activity.
  - He came to Australia to get citizenship because he did not want to live as a refugee anymore.
7. The Department received a post-interview submission from the applicant's migration agent on 29 June 2021. She made the following claims:
  - The applicant has a mental health disability and suffers from severe mental health issues.
  - A Discharge Summary from [Hospital 1] dated 20 November 2019 indicates that the applicant was admitted to a mental health facility.
  - The applicant's change of his protection claims in his protection interview may be because of ongoing trauma.
  - The applicant is not in a position to articulate his claims for protection and it is evident based on applicant's behaviour he does not understand the protection visa process and the significance of submitting all relevant claims to the Department.
  - The applicant is not a citizen of Sri Lanka but should he take up Sri Lankan citizenship, he may face serious harm if he is returned to Sri Lanka.
8. The delegate also considered advice which is in the referred material that some of the applicant's personal information was made available publicly in 2014 as a result of a Departmental data breach.

## **Factual findings**

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### **Identity and receiving country**

9. The applicant has consistently claimed that he was born in [year] in Tamil Nadu, India to parents of Sri Lankan heritage and citizenship. In his interviews with the Department he provided consistent and credible accounts of his day-to-day life in the refugee camp. He stated that his parents, [and specified family members] still live there. He attended school until [grade] and then worked as [an occupation 1]. He described some of the restrictions he faced in the camp, including the monthly checks on residents and having to return to the camp as set times after leaving the camp for work. In support of his narrative and claimed identity he provided a copy of his birth certificate issued in Tamil Nadu, his Sri Lankan refugee

identity card and a copy of his family refugee certificate. I am satisfied that the applicant has provided sufficient evidence of his identity which is consistent with his account of his life and I accept his identity is as claimed and that he is of Tamil ethnicity and Hindu religion. I note he has not made any specific claims to fear harm on the basis of his religion should he be returned to India or Sri Lanka and I am satisfied that no such claims arise.

10. I also accept that the applicant was born outside of Sri Lanka to Sri Lankan citizen parents. The Sri Lankan Department of Immigration and Emigration website<sup>1</sup> indicates that children born outside Sri Lanka to Sri Lankan parents are able to apply for Sri Lankan citizenship. They are able to commence the administrative proceedings while in India through the Sri Lankan High Commission in Chennai, India or online. At interview the applicant confirmed that he was not registered for Sri Lankan citizenship and I accept this is the case. I note that the 'one year from birth' time frame of registering the child's citizenship<sup>2</sup> has lapsed as the applicant and his parents do not appear to have taken the steps to apply for Sri Lankan citizenship. I accept that should the applicant decide to commence citizenship application proceedings, it is likely that a fine will be imposed as a consequence of the delay. I accept that the applicant has not yet exercised his entitlement to Sri Lankan citizenship and as such he cannot be considered a national of Sri Lanka at the present time.
11. I also accept that, as the applicant was living as a refugee in India, he is not an Indian citizen in terms of the eligibility criteria in the *Indian Citizenship Act 1955*. The applicant does not appear to have right to Indian citizenship by reason of birth, descent, registration or naturalisation<sup>3</sup>.
12. Given the absence of an application for Sri Lankan citizenship on his behalf, his ineligibility to acquire Indian citizenship despite his birthplace and residence being Tamil Nadu, India owing to his status as a Sri Lankan refugee from India, I accept that the applicant is stateless for the purposes of this assessment. As I have found that the applicant is stateless, I have had regard to s.5H(1)(b) of the Act that the term 'country of former habitual residence' applies to a person who does not have a nationality, that is, a stateless person. I am satisfied that the applicant has only ever lived in India prior to travelling to Australia, and that it is his country of former habitual residence is therefore India. On this basis, I find that the applicant's receiving country is India and I will be assessing the applicant's claims for protection in relation to his former habitual residence, being India. Therefore, I have not had regard to the applicant's claims about harm that he may fear should he be returned to Sri Lanka.

### Profile of family

13. The applicant claims that his parents are Sri Lankan Tamil refugees from [District 1] in the Northern Province of Sri Lanka. In the statement of claims accompanying his SHEV application he stated that [District 1] was mainly occupied by the LTTE in the late 1980s. His father was suspected to be supporting the LTTE and was arrested and detained for two months. He was tortured and beaten to confess he was providing supplies to the LTTE in the [District 1]. His father was released after two months with a warning that he was being watched by the authorities. After his father was released, in 1989, he realized it was not safe for him and decided to flee Sri Lanka with his family to India by boat. After his parents had left the country, his grandparents were killed in 1990. The Sri Lankan authorities later killed his uncle

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<sup>1</sup> Department of Immigration and Emigration (Sri Lanka), "Citizenship Registration of Children born outside Sri Lanka", 16 October 2014, CX1B9ECAB6054 (quoted in COISS material considered by the delegate)

<sup>2</sup> Ibid.

<sup>3</sup> India: Act No. 57 of 1955, *Citizenship Act 1955*

in the course of looking for his father. He stated that another uncle was a member of the LTTE towards the end of the 1980s and he was killed by the SLA in 1990.

14. I have had regard to the DFAT report<sup>4</sup> that the majority-Tamil civilian populations of the areas controlled by the LTTE were required to interact with the LTTE as a matter of course. The LTTE was supported by foreign funding, primarily from the Tamil diaspora, and both voluntary and forced recruitment of Tamils. In this context I accept as plausible that the applicant's father was required to provide supplies to the LTTE when he lived in an LTTE controlled area. I also accept as plausible that the applicant had an uncle who was in the LTTE and that his father and other family members were detained on suspicion of involvement in the LTTE and mistreated. I accept that the applicant's father took his family to India to avoid this violence. The applicant did not raise a claim that his father was an LTTE member or cadre. In his SHEV interview, the applicant stated that his father continues to live in India. Given his father's current circumstances, including that he was not with the LTTE and he has lived in India since [birth], I am satisfied that the Indian authorities have not imputed an adverse political profile to him. Given that the applicant's father does not appear to be a person of interest to the Indian authorities for any LTTE association, I do not accept that the applicant would be imputed with an LTTE profile on his return to India due to his ethnicity and association with his family.

## **Mental health**

15. The applicant does not claim to have any mental health condition but this has been raised by his migration agent at his SHEV interview and in a post interview submission. During his SHEV interview the applicant resiled from a number of claims he made in his Arrival interview and statement of claims. In particular he stated that he had never been harmed in India by Q branch and he was not politically active in India and he did not leave India because of this. He stated that he left India because he did not want to live as a refugee. The delegate asked the applicant why he changed his claims and he responded that he had not ever made those claims, only that he did not want to live as a refugee. The delegate then asked the applicant's migration agent about the change and she confirmed that she read the applicant's claims back to him at the time he signed the statement of claims in 2017. The migration agent then raised the fact that the applicant had been admitted to hospital after a mental health episode in 2019 and she speculated that the change in his claims may be related to this event.
16. When this was raised in the SHEV interview, the delegate asked the applicant detailed questions about his admission to hospital in 2019 and whether he was ever diagnosed with a mental health condition. The applicant stated that he was admitted to hospital briefly but not diagnosed with a mental health condition. When asked, the applicant was able to provide a reasonably detailed account of his hospital stay including being admitted after his friends became concerned about him; undertaking blood tests; transferring out of the mental health unit; and the process of his discharge from hospital. The delegate then put Information to the applicant under s.57 of the Act advising that he had provided inconsistent information to the Department about his political activities in India. In response, the applicant reiterated his earlier testimony that he was not politically active in India and did not undertake any campaigning for the Naam Thamilar party or for the rights of Sri Lankan refugees in India.

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

17. The applicant's migration agent made a post interview submission on 29 June 2021 and provided a copy of the 2019 Discharge Summary from [Hospital 1]. The applicant's migration agent has submitted that the applicant has a mental health disability and suffers from severe mental health issues and that his condition may have caused him to change his testimony at interview. She claims he will suffer significant harm in the receiving country through societal discrimination and inadequate mental health resources.
18. The accompanying Discharge Summary states that the applicant was admitted to the facility in 2019 after he became intoxicated by alcohol and voiced delusional thoughts about a work colleague. The report notes that there was no clear evidence of psychosis on assessment and his mental state was monitored for 48 hours during the alcohol withdrawal period. He was diagnosed as having experienced an alcohol-related disorder and was discharged without medication. He was provided with contact details for a drug and alcohol clinic and it was noted that follow-up enquiries would be made with a GP and a mental health team. The letter does not indicate that the applicant was diagnosed with any ongoing mental health condition.
19. The applicant has denied having a mental health condition. The information before me does not corroborate that he was diagnosed with a mental health condition in 2019 or that he has had any mental health issues since then. The information before me indicates that the applicant was admitted to hospital after single alcohol-related event in 2019 and was discharged after a period of alcohol withdrawal monitoring once it was confirmed that he had no psychosis. The report does not indicate that this incident in 2019 would impact on the applicant's ability to make his claims in 2021. Having regard to the interview itself, the applicant was articulate and able to discuss what happened in 2019 and his experiences in India without apparent difficulty. He denied having a mental health condition and absolutely refuted the claims that he had previously made about any political activity or harm in India and he confirmed that his claims were consistent with those made in his screening interview in 2013. The applicant's migration has not provided any evidence to suggest that the applicant is unfit to make his own protection claims or that he currently has any impairment or disability or that he requires treatment for any medical condition.
20. Having considered the information before me, I do not accept that the applicant has a mental health condition or that his hospitalisation in 2019 impacted on his ability to make or discuss his claims in 2021. Accordingly, I do not accept the migration agent's submission that he will face societal discrimination on the basis of any mental health condition in India and I do not accept that he would require access to mental health resources in India.

### **Political activity in India**

21. In his statement of claims made in 2017 the applicant stated that he faced harm in India on the basis of his political activity and that he feared returning to India because of his political activities. Specifically he claimed that in 2010 and 2011 he organised and participated in protest events in the refugee camp to raise awareness of the abuse of Tamils in Sri Lanka. He claimed that because of this activity, Q Branch officers questioned him and beat him during their interrogations. He also claimed that in 2012, he undertook campaigning for the Indian political party, Naam Thamilar, and members of opposition parties attacked him. He claimed that following this incident, two supporters of the party were killed and several days later, some men came to the refugee camp and warned his father that he must cease his campaigning for Naam Thamilar. He claimed that he feared returning to India because of his political activities.

22. The applicant was interviewed by the Department shortly after his arrival in Australia [in] May 2013. In a transcript of that interview it records that he explained that his parents went to India to save their lives but they could not get citizenship. He was born in India, educated until [grade] and then worked for five years [doing occupation 1]. When asked his reasons for coming to Australia he asserted that he didn't have a single right India, even if he wanted to buy a motorbike he couldn't do it. After that interview the applicant was assessed as not having made claims that raise any fear of harm whether for a Refugees Convention reason or otherwise.
23. On 2 October 2013 the applicant provided the Department with additional claims and identity documents. He stated that they were treated as refugees in India, with no rights. He claimed he was not allowed to work, but he did so as a labourer. To leave the camp he had to get permission from a police officer. He added the new claim that one day he returned late to camp due to work, and when questioned why he was late, the officer accused him of recruiting people for a movement and he was beaten in front of his parents and other refugees. He was made to report daily to the police station and sign a document, and so he stopped going to work.
24. On 10 February 2014 the applicant was informed of the adverse finding from his screening interview that he had not raised any protection claims. On 14 February 2014 he provided further additional information to the Department. He made the new claim that he had complained about the rice and water in the camp and he was threatened by Q branch for raising grievances. He also claimed that he had participated in a protest and was verbally harassed and monitored as a Tamil LTTE sympathiser. He claimed that if he was returned to India he would be killed and beaten for leaving the country
25. The applicant expanded on these new claims in his 5 August 2014 Arrival interview and his statement of claims attached to his 20 June 2017 SHEV application. He said that if he was late to camp the Q branch would beat and threaten him. He also said that he worked for the Naam Thamilar party putting up posters and they were beaten by the opposition and handed over to Q branch. He claimed his life was threatened and that even a year after he came to Australia they kept going to his father and harassing him about his whereabouts. He also claimed that in about 2010 he took part in a fasting protest in [Camp 1] which was a memorial for the Tamils who died in the final conflict. He claimed he was one of the people to gather people from the camp to go to the meeting. Several days after this fast, he was called to come into the Q branch office where he was questioned and beaten. He claimed that in about 2011, he took part in a protest to raise awareness to the outside world about the abuse of Tamils in Sri Lanka. He believed his photo and identity may have been registered by the Indian authorities and passed onto the Sri Lankan authorities.
26. The delegate asked the applicant about his claims at his SHEV interview. As noted above the applicant resiled from the claims that he was involved in any political activity in the camp or that he was harmed on the basis of being suspected of being involved in the movement, that he worked for the Naam Thamilar party or that he was threatened on that basis, or that he was involved in protests in 2010 and 2011. He did say that in 2010 he participated in a minutes' silence for Tamils who lost their lives and that he was never identified or harmed on that basis. Given the applicant's statement that his claims made in his enhanced screening interview were accurate and that the claims made later were not, I consider it likely that the applicant had exaggerated his claims in order to seek protection and subsequently withdrew those claims. I do not accept that he was ever politically active in the camp or that he was ever harmed or threatened with harm on that basis by anyone including Q branch and the opposition party.

### **Treatment by Q Branch and conditions in the camp**

27. The applicant claimed that as a Sri Lankan refugee living in a refugee camp, he was subject to certain restrictions and monitoring. In his SHEV application statement of claims he had claimed he was harassed by the Indian police, namely the Q Branch. He claimed he was harassed and beaten when he was late back to camp; when he questioned conditions in the camp; and when he was involved in political activity. As noted above, the delegate asked the applicant about these claims in his SHEV interview. He stated that he had been questioned by Q branch when he returned to the camp late after finishing work. He denied ever being harmed by the Q branch as he had previously claimed and he said that he had not raised grievances or been politically active. The applicant was asked to describe the worst thing that the Q Branch did to him. In response, the applicant stated that he was questioned about his family history but he did not experience harm. Asked if anybody had ever threatened his life, the applicant stated that when elections are held in India the residents are restricted to the camp until the elections are over.
28. I have had regard to country information about Q Branch and conditions in the refugee camps<sup>5</sup>. It is reported that Q Branch officers are responsible for camp security and that they exert strict controls on the movements of the residents. In his SHEV interview the applicant spoke about being subject to regular identity checks and being subject to certain restrictions and having considered the country information, I accept the applicant's claims as plausible that he was subject to these checks and restrictions. However, as with his claims about his political activity, it appears that the applicant has withdrawn the claims about being subject to physical assaults at the hands of the Q Branch. Asked why he left India, the applicant stated that he could not acquire Indian citizenship and came to Australia in the hope of becoming an Australian citizen. I accept that the applicant has withdrawn his claims that he has ever been harmed by Q Branch or that he fears harm from Q Branch.

### **Illegal departure/Data breach/Failed asylum seeker**

29. I accept that the applicant departed India illegally by boat and there would be no record of any official departure. I accept that in 2014 the applicant received notification that some of his personal information was released publicly on the Department's website. He has not indicated that he is aware that anyone in India has accessed this information or that he fears harm on that basis. I accept that should the applicant be returned to India, he would be issued with a temporary travel document and I accept that, due to the circumstances of his return, the Indian authorities may be able to deduce that he is returning after failing to seek asylum in Australia separate to any data breach.

### **Refugee assessment**

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30. 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.

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<sup>5</sup> South Asia Human Rights Documentation Centre (SAHRDC), "Refugee protection in India", 1 October 1997, CX249019; The News Minute, "'Losing the will to live': The story of Bhaskaran & other Lankan Tamil refugees in 'special camps'", 17 September 2021, 20210921124013



## Well-founded fear of persecution

31. 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.
32. I accept that the applicant was born in India to Sri Lankan Tamil parents. I accept that he does not have a right to Indian citizenship and he has an unexercised right to Sri Lankan citizenship. As the applicant does not currently have citizenship of any country, I am satisfied that he is stateless for the purpose of this decision. I accept that he departed India illegally by boat because he was stateless and did not want to continue to live in India as a refugee. I accept that, as a refugee, the applicant had to live within certain restrictions in India due to his status but he was not harmed in India and was not a person of interest to the Indian authorities or anyone else at the time of his departure. I am satisfied that if he were to return to India he would be doing so as a failed asylum seeker. In assessing the applicant's claims, I have had regard to s.5(1) of the Act which defines 'receiving country' for a person with no nationality as: "a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country". The applicant has only ever resided in India prior to travelling to Australia. As such, irrespective of whether the applicant would be able to return to India, I have assessed whether the applicant would face a real chance of serious harm on return to India.
33. The applicant has indicated that if he were to return to India he would like to return to live with his parents and [family members] in Tamil Nadu. The applicant indicated that his parents [an family members] remain living in the Sri Lankan refugee camp in Tamil Nadu and that he is still in regular contact with them. I have had regard to whether the applicant would face a real chance of serious harm as a Sri Lankan refugee living in a refugee camp in Tamil Nadu, noting the applicant's comments about conditions for refugees.
34. Thousands of Sri Lankan Tamils fled to the state of Tamil Nadu during the 26-year Sri Lankan civil war. Of a total 300,000 who had travelled to India during the conflict, an estimated 100,000 Sri Lankan Tamil refugees remain living in camps dispersed throughout Tamil Nadu. The Canadian Refugee Board has reported about conditions for these Sri Lankan refugees<sup>6</sup>. This information in that report is now somewhat dated but the information before me does not suggest that conditions have significantly changed. Although India does not recognize the refugee status designations of the Office of the United Nations High Commissioner for

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<sup>6</sup> Canadian IRB: Immigration and Refugee Board of Canada, "Status of Sri Lankan Tamil refugees in India, including information on identity documents, citizenship, movement, employment, property, education, government aid, camp conditions and repatriation (2008 - January 2010)", 3 February 2010, OG1AC8B47181

Refugees, it "typically does not refole them either". Sri Lankans are not entitled to residence permits, but the government does issue Sri Lankans with identity documents. Sri Lankan refugees in Tamil Nadu are also issued a family card that includes a family photo, names of the family members, their age, relationship, gender, date of arrival in India, location of arrival, education, as well as their address in Sri Lanka. Sri Lankan refugees also have individual identity cards that carry their name and address, which are useful when authorities verify identification outside of the camp. Additionally, some Sri Lankan refugees are able to obtain a driver's licence if a designated camp authority approved it. Lastly, the Regional Director of JRS South Asia indicated that Sri Lankan refugees can obtain a refugee certificate, which is needed to return to Sri Lanka. The applicant has provided evidence that he was issued with documentation in India, including a birth certificate, refugee identity card and family certificate.

35. Sri Lankan refugees in Tamil Nadu can move freely in the neighbourhoods of the camps but are under police surveillance and must return for periodic roll calls about once a month. Restrictions on movement make it difficult for Sri Lankan refugees to work in other towns and as a result, many choose to work within the camps as painters and construction workers. Additionally, the government offers Sri Lankan refugees food subsidies and monthly cash and in-kind assistance from the Indian and Tamil Nadu governments. Ration cards must be presented in order to receive rice, sugar, kerosene, money and other yearly entitlements. Refugees can also access free medical treatment in government-recognized hospitals.
36. Conditions in the camps have been described as basic. However, on 27 August 2021 Chief Minister M.K. Stalin announced<sup>7</sup> a slew of schemes at a cost of ₹317.40 crores for the welfare of the Sri Lankan Tamils living in various camps in the state. These improvements include an increase in funding for basic requirements including electricity, toilets and drinking water, education, improvements to the livelihood of refugees and an increase in the monthly cash dole to the head of the family in camps. The Chief Minister also announced constitution of a committee to render appropriate help to Sri Lankan Tamils in camps and those living outside camps in order to facilitate permanent solutions such as citizenship and return to homeland.
37. While it is acknowledged that the applicant would not be eligible for Indian citizenship, if he were allowed to return to India as a refugee, I am satisfied that he would seek to return to the camp where his family still live. I am satisfied that, as a refugee, he would be eligible for rations and medical care as set out above. I am satisfied that he lived there successfully in the past working as [an occupation 1]. He has demonstrated independence and resilience during his time in Australia having worked for a number of years in [occupation 2] without familial assistance. According to his SHEV application and interview he has also found [occupation 1 and other] work. While I note that he had a mental health episode in 2019 as a result of alcohol intoxication, I am satisfied that he does not have any ongoing medical concerns. Given his past independence and employment history, and the assistance provided by the Indian government to refugees, I am satisfied that the applicant would be able to draw on these experiences to establish himself and to subsist in India.
38. Overall, while I accept refugees from Sri Lanka are subject to restrictions and monitoring by the Q Branch, the evidence before me does not suggest that the applicant was a person of interest to the authorities at the time of his departure from India. I accept that if the applicant were to return to India, he may be subject to similar restrictions and monitoring by the Q Branch. However, I find that any such restrictions and monitoring to which he is subject

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<sup>7</sup> The Hindi, "₹317 crores worth schemes for Sri Lankan Tamils in camps", 27 August 2021, 20210831150652

is due to his status as a Sri Lankan refugee in India and not because he held an adverse profile of interest with the Indian authorities or the Q Branch.

39. I accept that the applicant's father moved to India because he was a Tamil and he feared violence as a result of the civil war but note that he was not a member or cadre of the LTTE. The applicant does not claim that he or his other family members were harmed in the past in India on the basis of his father's profile and I am satisfied that the applicant does not claim to fear harm on the basis of his father's profile in the reasonably foreseeable future should he return to India. Nevertheless, I have considered whether the applicant would be imputed with being an LTTE member/supporter on his return to India on account of his Tamil ethnicity and the fact that his parents fled Sri Lanka for India during the civil war.
40. As set out above, the Indian government has provided shelter to Sri Lankan Tamil refugees, most of whom arrived in India during the war and in the post war period and the government does not typically have a policy of refoulment. I accept that the Indian government has treated Tamils associated with the LTTE with suspicion at times, including in the wake of the assassination of the Indian prime minister<sup>8</sup>. I also accept that there is reporting<sup>9</sup> that Indian authorities detain a small number of suspected LTTE members in so-called 'special camps', which function as de facto prisons, and from where authorities routinely attempt to deport detainees back to Sri Lanka. However, I am satisfied that the applicant and his family were not involved in fighting in the Sri Lankan civil war and were not members of the LTTE. I note that the applicant no longer claims to have been politically active or indicated that he would be politically active on his return to India or that he has any such profile with the Indian authorities. I also note that his mother, [and other family members] remain in India and he has not indicated that they have faced any harm. I am satisfied that the chance of the applicant facing harm in India on the basis of his father's profile, his Tamil ethnicity or his family originating in Sri Lanka to be no more than remote even when considered in combination with the factors set out above and below.
41. I accept that the applicant departed India illegally as he did not hold a valid travel document. I accept that on 31 January 2014 some of the applicant's personal information was inadvertently published on the Department's website for a short period of time. There is no information before me which indicates that the fact that the applicant travelled to Australia or made claims for protection would be of interest to the Indian government. I consider that the authorities may be aware of the applicant having sought asylum in Australia due to the manner of his return on a temporary travel document and separate to any data breach. The applicant has not claimed to fear harm as a result of the data breach and I am not satisfied he faces a real chance of harm because of the disclosure of some of his personal information on the Department's website in 2014.
42. I am not satisfied there is a real chance the applicant would be subjected to detention or other harm upon his return to India as a result of his illegal departure or as a failed asylum seeker. There are no credible reports before me, nor can I locate any to suggest that there is any mistreatment of returnees by Indian authorities, including people who departed illegally and failed asylum seekers or that there is any particular interest in returnees from Australia by officers of Q Branch. The applicant has not claimed that he was wanted for any crimes or that he was a person of interest to the authorities at the time he departed India such that he would face questioning or arrest on his return. Even if the applicant was questioned upon

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<sup>8</sup> Daily News Sri Lanka, "How Rajiv Gandhi's assassination changed politics in Tamil Nadu and Sri Lanka", 24 May 2021, 20210524150344

<sup>9</sup> Sreekumar Panicker Kodyath and Sheethal Padathu Veettil, "Invisible people: Suspected LTTE members in the special refugee camps of Tamil Nadu", Refugees Survey Quarterly, February 2017, 20191003141715

arrival in India to establish whether he is a person of interest, I am not satisfied that the applicant being questioned by Indian authorities would amount to harm.

43. I have considered all of the applicant's circumstances, both individually and cumulatively and I do not accept that the applicant would face a real chance of harm on his return to India as a Sri Lankan refugee. Further, I am not satisfied that that the applicant would be of any interest to the authorities or anyone else in India now or that he would face a real chance of any harm in the reasonably foreseeable future arising from his background and experiences in India or Australia as set out in his claims for protection or as a person returning to India after having departed illegally and spent time in and sought asylum in Australia or on the basis of any combination or accumulation of those factors.
44. The applicant does not have a well-founded fear of persecution within the meaning of s.5J.

#### **Refugee: conclusion**

45. 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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46. 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**

47. 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.
48. 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.
49. As set out above, I have found that the applicant would return to India without a profile of interest to the authorities and would not face a real chance of any harm on the basis of his background and experiences as set out in his claims for protection. Real chance and real risk involve the same standard<sup>10</sup>. On the same factual findings, I am similarly not satisfied that the applicant faces a real risk of suffering any harm, including significant harm on those grounds, should he be returned to India.

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<sup>10</sup> *MIAC v SZQRB* (2013) 210 FCR 505

**Complementary protection: conclusion**

50. 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.