



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

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA20/08742

Date and time of decision: 8 December 2020 11:06:00  
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 Tamil, Hindu from Vavuniya in the Northern Province of Sri Lanka. On 13 June 2017 he lodged an application for a Safe Haven Enterprise Visa (SHEV).
2. On 30 October 2020 a delegate of the Minister for Immigration made a decision to refuse the grant of the visa on the basis that the applicant was 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 Vavuniya in Sri Lanka in [Year]. He is of Tamil ethnicity and Hindu religion. He departed Sri Lanka as a young child with his family and lived most of his life in a refugee camp in India where he married in 2008 and had a son in 2009 and a daughter in 2011. His family remains in India.
  - From his birth until he was approximately [Age] years old, he lived with his parents, [brother] and [sisters] in [a] village in Vavuniya. Their house was located near a Sri Lankan [military] Base.
  - The war escalated so he and his family fled to India illegally by boat and lived in a refugee camp [for] approximately two years.
  - When the fighting had decreased in Vavuniya, they went back to live in [Village] in 1987 or [1988].
  - He was too young to support the Liberation Tigers of Tamil Eelam (LTTE), but his father used to help them, although he is not sure of the extent of his involvement.
  - In 1990, the conflict escalated again and the army captured a lot Tamil people for questioning about their involvement with the LTTE. His father was captured and held for about three months.
  - Very soon after his father's release, he and his family fled to India by boat and his father was admitted to a hospital in India. His father later died in 1995 due to [Medical condition].
  - Some years later, he met the people that his father used to meet with in Sri Lanka in India. They told him they had been involved with the LTTE.
  - His cousin assisted the LTTE as [an Occupation 1]. His other cousin assisted them in other ways. His aunt's brother was a leader of the LTTE in that district. None of these people are still alive. They were killed during the war.

- In about 1999, when he was [Age], his brother left the refugee camp. The Q branch of the Indian police used to conduct weekly headcounts of each family and discovered that his brother was not there. He was asked questions about his brother and beaten regularly for some months. His brother returned about six months later having left the camp for work.
- He continued to be summonsed to Q branch while he was in the camp. He believes it was because there was an LTTE presence in the camp and his brother was friends with some of these men. Accordingly, he and his family were imputed to be supporters of the LTTE in India.
- He decided to flee India in 2012 as he was unable to cope with the constant harassment inflicted by Q Branch. He left his wife and children in India.
- Since he left the country his wife told him that she was beaten by a Q branch officer who wanted to find out where he had gone. His sister's family was also investigated and his brother-in-law was detained for one week.
- At the beginning of 2015, his other sister went back to Sri Lanka to sell their family home in [Village]. She did not return and has not contacted her family or her husband and children. He fears she must be dead. He fears she was killed because of their father's involvement in the LTTE.
- He fears that if he is returned to Sri Lanka, he will be subjected to serious harm and possibly killed by the Sri Lankan authorities because of his father's involvement with the LTTE.
- He also fears he will be harmed as failed asylum seeker and that he will be detained on arrival and not released because he has resided outside of Sri Lanka for 30 years.

## Factual findings

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### Identity

6. The applicant claims to fear harm as a result of his cumulative profile including as a Tamil man from a former LTTE controlled area in the Northern Province of Sri Lanka. He claims he was born in Vavuniya in [Year]. In support of that claim he provided a copy of his birth certificate and translation. The applicant claims he is of Tamil ethnicity and he conducted his interviews with the Department in Tamil. I accept that the applicant is of Tamil ethnicity. The applicant has provided some detail about the location of his home in [Village] in Vavuniya and the presence of armed Tamils and the Sri Lankan armed forces. I am mindful that the applicant claims to have departed Sri Lanka at a young age and spent most of his life in a refugee camp in India so I place little weight on his recollections about life in Sri Lanka. Having regard to both his documentation and account of his life, I accept that the applicant was born in Vavuniya and I accept I accept that the Northern Province was an area under LTTE occupation during the Sri Lankan civil war. I am satisfied that the applicant is a Sri Lankan national and that Sri Lanka is the receiving country for the purpose of the application. There is no information before me to suggest that the applicant has a right to enter and reside in any country other than Sri Lanka and I am satisfied he does not.
7. The applicant claims that he moved to India when he was about [Age] years old where he lived as a Sri Lankan refugee in a refugee camp with his family. In support of that claim he provided Indian Sri Lankan refugee identity documents and a marriage certificate noting he was married in India in 2008. I accept that the applicant moved to India when he was about [Age] years old,

where he lived as a refugee. Based on his account and supporting documentation I also accept that the applicant's immediate family, wife and children remain living in India along with his siblings. I accept that his parents both died of medical conditions in India, his father in 1995 and his mother in 2016. I accept that on his return to Sri Lanka the applicant would have no immediate family living there and that he would be returning as a Sri Lankan citizen after some thirty years of absence from the country.

8. The applicant has advised that he is a Hindu. I am willing to accept that this is the case but note that the applicant has not made any claims in relation to his religion and this was not considered by the delegate. I have not had regard to his religion further in making this decision.

#### **Family association with the LTTE**

9. The applicant claims to fear harm on his return to Sri Lanka on the basis of his father's association with the LTTE. He has also claimed that he had other family members who were associated with the LTTE. The applicant has provided very little information about his father's claimed involvement with the LTTE and what he has provided is quite speculative. In his arrival interview the applicant stated that his father may have helped the LTTE and that the reason they moved to India in 1990 was because the Sri Lankan Army (SLA) kept detaining his father and beating him up.
10. In his SHEV application he stated that he was told by his mother that on one occasion in approximately 1985, officers from the Sri Lankan [military] base near his home were playing with him and asked him some questions about some men who had visited his house that day. He told the officers that the men gave him chocolates and that one of the men was carrying a gun. He did not claim to have been harmed. He stated that when the war escalated, he and his family fled to India illegally by boat and lived in a refugee camp [for] approximately two years. He claimed that when the fighting had decreased in Vavuniya, they went back to live in [Village] in 1987 or [1988].
11. The applicant stated that he was too young to support the LTTE, but his father used to help them, although he is not sure of his involvement. In 1990, the conflict escalated again and the SLA captured a lot Tamil people for questioning about their involvement with the LTTE. His father was captured and held for about three months. He was beaten during his detention and then returned to the applicant's grandmother's house. He claimed that he and his family fled to India by boat very soon afterwards where they remained. He claimed that some years later he met the people that his father used to meet with in Sri Lanka in India and they told him that they had been involved with the LTTE. He did not claim that they told him that his father had been involved with the LTTE.
12. In addition to his father's possible association with the LTTE, the applicant claims his cousin assisted the LTTE as [an Occupation 1]; his other cousin assisted them in other ways; and his aunt's brother was a leader of the LTTE in their district. He claims that none of these people are still alive as they were killed during the war. He did not provide any information in support of these claims or indicate that he had any firsthand knowledge of these matters.
13. In his SHEV interview the applicant was unable to provide any further information or evidence in support of his father's claimed association with the LTTE. He stated that his father worked in Sri Lanka as [an Occupation 2]. The applicant was a teenager when his father died, he has older siblings and his mother was alive until 2016. I consider that if the applicant's father was involved with the LTTE he would have been able to obtain further information about the involvement from his father, mother, siblings or the men he met in the camp who knew him.

He has not provided any information about how his father may have helped the LTTE or whether in fact he was even an LTTE member. It would appear from his account that the family moved to India, like many families, to avoid the escalation of conflict in Sri Lanka.

14. I have had regard to country information about the involvement of Tamils in LTTE controlled areas during the war and the treatment of Tamils by the Sri Lankan authorities. DFAT reports<sup>1</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. In that context I accept that the applicant's father had some dealings with the LTTE and may have been required to provide services for them. I also accept that the applicant may have had cousins and other relatives that worked with the LTTE during the war as would many Tamils in the Northern Province. I note that the applicant was never personally involved with the LTTE particularly given his young age and he has never faced harm on that basis.
15. The applicant claims that his father was detained by the SLA during the war and beaten up before being returned to his family. DFAT reports<sup>2</sup> that many Tamils, particularly in the north and east, reported being monitored, harassed, arrested or detained by security forces during the war. While LTTE members and supporters were almost all Tamil, security forces also imputed LTTE support based on ethnicity, and emergency regulations were, at times, applied in a discriminatory manner. On this basis I accept as plausible that the applicant's father was detained, questioned and beaten during the war. I consider that if the authorities formed the view that the applicant's father was involved with the LTTE and presented a security threat, then given the escalation of the conflict at that time, he would have been arrested and not released back into the community.
16. Overall, I accept that the applicant's father and cousins would have interacted with the LTTE during the war and they would have been required to provide assistance to the LTTE when asked. I also accept as plausible that a relative of the applicant's aunt was an LTTE cadre who was killed in the war; however, I only have limited information before me about that claim. I do not accept that the applicant's father was an LTTE member or cadre or that he had any kind of significant LTTE profile in Sri Lanka beyond that of other Tamil males living in LTTE controlled areas during the war. Accordingly, I do not accept that the applicant would hold an LTTE profile in Sri Lanka as his father's son.

### **Treatment by Q branch**

17. The applicant has made various claims about his treatment by the Q branch of the Indian police and about the restrictions on the lives of people living in refugee camps in India. In particular he claims that he and his family were imputed to be supporters of the LTTE in India because his brother had friends there that were in the LTTE. He claims he decided to flee India in 2012 as he was unable to cope with the constant harassment inflicted by Q-Branch. He left his wife and children behind with his family. He claims that since he left the country his wife told him that she was beaten by a Q branch officer who wanted to find out where he had gone and his sister's family was also investigated by Q branch.
18. The applicant does not claim to have ever been politically active nor does he claim that he ever participated in any pro-LTTE activity in India. He has not claimed that the Q branch have provided any information about him and his family to the authorities in Sri Lanka. In all these

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<sup>1</sup> Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244, 3.55

<sup>2</sup> Ibid, 3.10

circumstances, I do not accept that his treatment in India has any bearing on his return to Sri Lanka. As I have found that the applicant is not an Indian national and cannot return to India, I have not assessed his claims against India.

### **Missing sister**

19. The applicant claims that at the beginning of 2015, one of his sisters went back to Sri Lanka to sell their family home in [Village]. She did not return and has not contacted her family or her husband and children. He fears she must be dead. He fears she was killed because of their father's involvement in the LTTE. He claims that he fears that if he is returned to Sri Lanka, he will be subjected to serious harm and possibly killed by the Sri Lankan authorities because of his father's involvement with the LTTE like his sister.
20. In his SHEV interview the applicant was questioned in some detail about what happened to his sister as it appeared that it was the main reason he feared returning to Sri Lanka. When asked why she returned to Sri Lanka in 2015, the applicant initially advised that she returned to obtain a Sri Lankan passport so that she could go overseas and she had to return illegally by boat. He also said that there was some property that she wanted to sell to pay for their mother's medical treatment. When asked why his sister did not get a passport from the Sri Lankan consulate in Chennai, the applicant replied that if she did that, she would not have been allowed to remain living in the refugee camp. The delegate put to the applicant that when he arrived in Australia, he provided different information about his sister in his screening interview. It was put to him for a response that he had said that his sister returned to Sri Lanka in 2006 to sell the family property and now he is claiming it was 2015, noting that he advised that she was living in India during his arrival interview. In response the applicant stated that she did go to Sri Lanka in 2006 and she was questioned and there was a white van problem so she went back to India. He did not elaborate on this any further and he did not mention it in his SHEV application. He advised that she returned to Sri Lanka again in 2015 when she needed money for their mother's medical treatment.
21. The delegate put to the applicant that, if it was unsafe for his sister in Sri Lanka, the family could have hired a solicitor in Sri Lanka to handle the sale of the family property for them. He said that they could not hire one and that they didn't have that education or knowledge to locate one using the phone or internet. The delegate put to the applicant that it was surprising that she could do the land sale herself including the advertising, sale and conveyancing with no education. He said that she just went there to sort it out. When questioned the applicant could not provide any evidence to support that his sister returned to Sri Lanka to sell the family property. He said that she took all the relevant documentation including the deed and her father's identity card and that she left no copies. He said that when she did not return, he did not know what happened to the property, he thinks it was registered in his father's name when he was alive but he is not sure. He did not provide any information from his sister's husband about this matter in spite of being in contact with him and remitting money to him recently in 2020 for his children. I consider that the applicant's explanation about his sister's return to India for the sale of the property was extremely vague and unsupported. I consider that it did occur; it would have been open to him to obtain and provide more information about what occurred.
22. The delegate asked the applicant what measures had been taken by the family to find his sister. He was unable to provide a specific response to that question. He said that he did not make any enquiries. The delegate asked if anyone in the family has tried to investigate his sister's disappearance he responded that he doesn't know anyone in Sri Lanka to find out and that his siblings don't know anything, He said her husband called all the people he knows and can't

find information about her. The delegate asked if they had any confirmation that his sister made it to Sri Lanka. He responded she had called their mother from [Town]. When asked about missing persons reports the applicant advised that they had not reported her missing to the Sri Lankan authorities. He said they did a search in India and reported it but they did not know anyone in Sri Lanka to make a report to. He then stated that she may have been caught by the Indian authorities at sea. He claimed that because he is uneducated, he does not have knowledge to make missing persons enquiries. I note that the applicant does have a primary school education and had sufficient knowledge to make his way to Australia. He was also able to make contact with UNHCR in [Country] en route to Australia. In response to that line of questioning the applicant advised that he never reported the disappearance to the authorities or made any enquiry about the land because their mother died and he became unwell and mentally distressed. He thought he would let her husband pursue it.

23. I did not find the applicant's account of his sister's disappearance compelling or credible. He has provided no evidence to support this claim from the Indian authorities or from any of his family members or anyone else. He states that he is in contact with his family in India, including remitting money to his sister's children and yet he does not appear to know what has been done to find her and there appear to have been no attempts to contact the Sri Lankan authorities or any independent body like the Red Cross or the UNHCR in an effort to find her. His explanation for not reporting the matter himself was that he was mentally distressed after his mother died, yet she died in 2016 and his sister went missing in 2015. I do not find it plausible that the applicant and his family took such limited action to protect or look for his sister when she disappeared leaving her children. I do not accept the applicant's explanations for the lack of response by him and his family. Overall, I do not accept that the applicant's sister went missing in Sri Lanka in 2015 as claimed.

#### **Illegal departure, failed asylum seeker who has resided outside of Sri Lanka**

24. At his SHEV interview the applicant claimed that he departed Sri Lanka illegally when he was about [Age] years old and that he fears that if he returns, he will be harmed as failed asylum seeker. He claims he fears that he will be detained on arrival and not released because he has resided outside Sri Lanka for 30 years. He also fears he may be killed. Based on his accounts of his life I accept that the applicant does not hold a passport and that he departed Sri Lanka illegally and that he has lived outside of Sri Lanka for 30 years in both India and Australia where he has claimed asylum. I accept that if the applicant returns to Sri Lanka, he will likely do so on temporary travel documents and it will be evident from those documents that he is being returned after seeking asylum in Australia.
25. The delegate considered information that when the applicant was in detention in 2014, his personal information may have been made publicly available by the Department for a brief period of time. I consider that the applicant's status as an asylum seeker will be evident to the authorities on his return to Sri Lanka due to the manner of his return and separate to any data breach. The applicant did not claim to fear harm as a result of this data breach and I accordingly I have not considered this matter further.

#### **Refugee assessment**

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26. 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**

27. 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.
28. I accept that if the applicant were to return to Sri Lanka he would be doing so as a Tamil man originally from the Northern Province whose family interacted with the LTTE during the war. I do not accept that the applicant's father had any significant involvement with the LTTE beyond what would be typical of other Tamil males living in LTTE controlled areas during the war. I do not accept that the applicant's sister went missing in Sri Lanka in 2015 because her father was involved with the LTTE. I accept that on the applicant's return to Sri Lanka it may be evident to the Sri Lankan authorities that the applicant has been absent from the country for a significant period of time and that he is returning after living as a refugee in India and failing to obtain asylum in Australia.
29. DFAT reports<sup>3</sup> that Tamils constitute the largest ethnic minority in Sri Lanka, at 15.3 per cent of the population. Most Sri Lankans tend to live within their own ethnic communities, although different ethnic groups live within close proximity in major urban areas. DFAT reports that the Northern Province has a majority Tamil population. There is no restriction on movement and I am satisfied that it would be open to the applicant to return to the Tamil dominated Northern Province or to a more populated and diverse area such as Colombo. The Sri Lankan Constitution provides for race equality<sup>4</sup> and DFAT assesses there are currently no official laws or policies that discriminate on the basis of ethnicity or language and that Tamils face a low risk of official or societal discrimination on the basis of ethnicity including in their ability to access education, employment or housing. I note that even during the war, the applicant was able to attend school in Sri Lanka and his family owned their own home.
30. The most recent reporting from DFAT considered the improvements made under the Sirisena government, which was elected in January 2015, which are significant and indicative of a more positive future for Tamils. It found that this government prioritised human rights and reconciliation and made significant progress, including replacing military governors in the Northern and Eastern Provinces with civilians; returning some of the land held by the military

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<sup>3</sup> DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244 , 2.7

<sup>4</sup> Ibid, 3.1



since the conflict-era back to its former owners; and engaging constructively with the United Nations. DFAT reported that following its election, the Government also established an Office of National Unity and Reconciliation to develop a national policy on reconciliation and committed to establishing a range of offices to give effect to reconciliation measures such as an Office on Missing Persons; an Office for Reparations; a Truth, Justice, Reconciliation and Non-Recurrence Commission; and a Judicial Mechanism with a Special Counsel<sup>5</sup>. The report also found that there have been a number of symbolic changes in recent years in Sri Lanka, including changing the name of the day commemorating the end of the conflict from 'Victory Day' to 'War Heroes Remembrance Day' and giving official approval for memorial events to take place in the north and east. A local source told DFAT the atmosphere at war commemorations was 'constructive' and Tamils were increasingly comfortable marking such events.

31. The reporting before me also indicates that there have been significant improvements in the security situation since the applicant departed Sri Lanka including in the Northern Province<sup>6</sup>. The number of incidents of extrajudicial killings, disappearances and abductions for ransom, including incidents of violence involving former LTTE members, has significantly reduced since the end of the war and white van abductions and disappearances are no longer common. Overall, DFAT assesses that Sri Lankans face a low risk of mistreatment on a day-to-day basis.
32. I accept that several local and international organisations have alleged torture by Sri Lankan military, intelligence and police forces, mostly from the period immediately following the war and involving people with imputed links to the LTTE<sup>7</sup>. The 2015 OISL report found that 'victims of war-related torture perpetrated by Government forces...were generally Tamil, often arrested and detained in Government controlled areas...under the PTA (*Prevention of Terrorism Act*) and the Emergency Regulations'. The OISL documented 'particularly brutal use of torture by the Sri Lankan security forces' in the immediate post-war period, following the LTTE's surrender. DFAT reported that since 2015, the government reviewed some cases of persons still detained under the PTA and released some detainees, mostly Tamils. In 2019 DFAT reported that there was only one Tamil person still held in rehabilitation and noted that Tamils with links to the LTTE are generally able to lead their lives without concern for their security as a result of their past association with the LTTE. The indications are that the Sri Lankan government has moved away from the systematic program which operated after the civil war of identification and detention and rehabilitation of LTTE members which resulted in wide-spread abuse of the general Tamil civilian population and DFAT assessed that the risk of torture perpetrated by either military, intelligence or police forces has decreased since the end of the civil conflict and is no longer state-sponsored<sup>8</sup>. The UK Home Office reported<sup>9</sup>, that the government's present objective is to identify those who pose a threat to the government or a unified Sri Lanka, through involvement with Tamil separatist activities in the country or through links to the Tamil diaspora. Former LTTE leaders and former members suspected of committing serious criminal acts during the conflict are most at risk. I am satisfied that the applicant does not hold such a profile.

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<sup>5</sup> DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244, 2.43-2.50

<sup>6</sup> Ibid, 4.29

<sup>7</sup> The Permanent Mission of Sri Lanka to the United Nations and other International Organizations in Geneva, "Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment on his Mission to Sri Lanka, from 29 April to 7 May 2016", 2 March 2017, CISED50AD3588; United Nations (Unspecified), "Committee against Torture – Concluding observations on the fifth periodic report of Sri Lanka", 27 January 2017, 20191008141604; International Truth and Justice Project, "Joseph Camp", 16 March 2017, CISED50AD3592; International Truth and Justice Project, "Unstopped: 2016/17 Torture in Sri Lanka", 14 July 2017, CISED50AD4849

<sup>8</sup> DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244, 4.28

<sup>9</sup> UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil Separatism", May 2020, 20200527172009

33. I accept that there are credible reports that the police routinely mistreat suspects during criminal investigations, including as a way of extracting confessions and that mistreatment is common in prisons<sup>10</sup>. Mistreatment could range from a slap to the face to severe beatings, and, in some cases, may amount to torture. According to sources, mistreatment in prison, where it occurs, does not discriminate on ethnicity. While there are some reports of mistreatment of people in detention in certain circumstances, DFAT assesses that Sri Lankans face a low risk of torture overall. I do not accept and it is not claimed that the applicant is wanted for any outstanding criminal activity or that he is suspected of working with the LTTE and therefore I am not satisfied that he faces a real chance of detention and torture in the circumstances outlined above.
34. Overall, the UK Home Office and DFAT assess that simply being of Tamil ethnicity, or a Tamil from an area formerly under LTTE control, no longer gives rise to a need for international protection, the rationale being that almost every Tamil who resided in those areas during the conflict had some sort of connection with the LTTE. While I accept that there are reports of incidents of torture and other harm, I am not satisfied that they indicate that there is a real chance the applicant would be harmed should he return to Sri Lanka. The indications are that those who come to adverse attention are those suspected as being Tamil separatist activists or being of a security risk or journalists or activists. As noted above, I have not accepted the applicant was involved with the LTTE, nor do I accept he would be perceived as such.
35. In 2019 Gotabaya Rajapaksa was elected as the new President of Sri Lanka and Mahinda Rajapaksa was appointed as Prime Minister. There have been reports<sup>11</sup> that agencies and the general Tamil community have expressed concern about the return of the Rajapaksa family to power in Sri Lanka. I accept there is credible reporting of the brutality of the government of past President Mahinda Rajapaksa in which human rights abuses were committed both during the civil war and in the immediate aftermath. I note the commentary expressing concern as to the implications of the Rajapaksa led government on progress with human rights and the treatment of minority groups. I accept that since the election of President Rajapaksa, there have been developments that have discouraged members of the Tamil population in Sri Lanka and caused them to have concerns about the future particularly those that recall the treatment of Tamils during the civil war. However, the reporting before me does not support that Tamils are being persecuted for being Tamil or that they are increasingly being imputed with LTTE associations and harmed as a result of the change of government or that the Rajapaksa government will be singling out Tamils or Tamils with the applicant's background and profile for persecution.
36. It is now over ten years since the end of the civil war and, while progression on reconciliation may be much slower than expected, I am satisfied that conditions for Tamils have improved considerably since the end of the war. I am not satisfied that the applicant has or would be imputed with an LTTE membership and/or anti-government political opinion profile and I am not satisfied he would be detained, interrogated and tortured by the authorities should he return to Sri Lanka or face other harm from the authorities. Nor am I satisfied that there is a

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<sup>10</sup> DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244, 4.24

<sup>11</sup> Some recent commentary includes: South Asia Terrorism Portal, "Sri Lanka: Hardening Faultlines – Analysis", 11 June 2019, 20190611160309; International Business Times, "Sri Lanka President Gotabaya Rajapaksa deploys armed forces to maintain public order", 26 November 2019, 20191231114452; International Truth and Justice Project, Journalists for Democracy in Sri Lanka, "SRI LANKA: AND THE CRACKDOWN BEGINS", January 2020, 20200114142534; Eurasia Review, "Sri Lanka's 2020 Parliamentary Election Results – Analysis", 17 August 2020, 20200818104748; S. Rajaratnam School of International Studies (RSIS), "Sri Lanka Elections: Stronger Powers, At What Cost? – Analysis", 12 August 2020, 20200812104655; Human Rights Watch, "Fear returns to Sri Lanka after bombings", 10 May 2019, 20190513142002

real chance he would experience harm as a Tamil man from a former LTTE controlled area even considered in combination with the matters addressed below.

37. I accept that if the applicant was to be returned to Sri Lanka from Australia, he may be considered by the authorities to be a failed Tamil asylum seeker due to the manner of his return and the fact that he would be travelling on temporary travel documents. I also accept that there would be no record of the applicant having held a passport or having departed the country legally. I accept that the Sri Lankan authorities may be able to deduce that the applicant lived in India as a refugee and then travelled to Australia. I have reviewed the material before me in relation to the process of returning to Sri Lanka and I consider that the 2019 DFAT report and the 2020 UK Home Office report<sup>12</sup> provide the most recent description and evaluation of the process of returning to Sri Lanka. I have had regard to the fact that they have been prepared for the express purpose of assessing protection claims.
38. DFAT reports that between 2010-11 and 2018-19, 3,716 Sri Lankan nationals returned from the Australian community or were removed from Australian onshore immigration detention centres to their country or origin or a third country. Many others returned from the US, Canada, the UK and other European countries. Most returnees are Tamil. The government has consistently said that refugees are welcome to return to Sri Lanka and, in August 2016, released a 'National Policy on Durable Solutions for Conflict-Affected Displacement'. During a visit to Australia in February 2017, former Prime Minister Wickremesinghe stated publicly that failed asylum seekers from Australia would be welcomed back to Sri Lanka.
39. Both DFAT and the UK Home Office report that for returnees travelling on temporary travel documents, police undertake an investigative process to confirm identity. This would identify someone trying to conceal a criminal or terrorist background or trying to avoid court orders or arrest warrants. I am not satisfied that the applicant would hold one of these profiles of interest. The verification process often involves interviewing the returning passenger, contacting police in their claimed hometown, contacting claimed neighbours and family, and checking criminal and court records. All returnees are subject to these standard procedures, regardless of ethnicity and religion. The UK Home Office reports that the Chief Immigration Office where questioning takes place is situated opposite the immigration arrival desks. These open onto the arrivals' hall, with an area to wait outside. Toilets are nearby and there is access to food, water and a prayer room. Whilst the UK fact-finding team were there, interviews were taking place and the door to the offices were open. The fact-finding team were informed, and observed, that there are no holding cells. DFAT understands that no detainees are subject to mistreatment during processing at the airport. I am not satisfied that the applicant will come to any particular attention of the authorities as a result of this investigative process. I am not satisfied that he has any profile of interest to the Sri Lankan authorities beyond having departed the country illegally.
40. Where an illegal departure is suspected, returnees to Sri Lanka can be charged under the *Immigrants and Emigrants Act* (I&EA). DFAT reports<sup>13</sup> that the minimum age of criminal responsibility in Sri Lanka is 12 years. Under Sri Lankan law, anybody over the age of 12 at the time of their alleged offence is treated as an adult. Children over the age of 12 can therefore be charged with breaking the I&EA, so long as they were 12 or older at the time of the alleged offence. No charges are imposed against children under 12 years of age or those persons who were younger than 12 at the time of the alleged offence. I accept that the applicant was

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<sup>12</sup> DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244; UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928

<sup>13</sup> DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244, 5.40

approximately [Age] years old at the time of the offence and definitely younger than 12. Accordingly, I am satisfied that he would not face charges for his illegal departure from Sri Lanka and therefore he would be free to go.

41. DFAT has assessed that refugees and failed asylum seekers face practical challenges to a successful return to Sri Lanka due to the expenses incurred to undertake their outward journey, difficulty finding suitable employment and reliable housing and delays in obtaining official documentation. The applicant has advised that he worked in [an industry] in India and that in Australia he has found accommodation and successfully earned enough money to send regular remittances to his family members in India. He has not pointed to any conditions he has that would prevent him from finding work or accommodation in Sri Lanka. Additionally, the IOM provides eligible returnees with livelihood assistance and makes regular visits to monitor the welfare of returnees<sup>14</sup>.
42. DFAT understands that some returnees, including returnees in the north and east with suspected LTTE links, have been the subject of monitoring by the authorities, involving visits to returnees' homes and telephone calls by the Criminal Investigation Division. DFAT understands that most returnees, including failed asylum seekers, are not actively monitored on an ongoing basis. DFAT is unable to verify whether monitoring, where it occurs, is specific to former LTTE cadres. DFAT is not aware of returnees, including failed asylum seekers, being treated in such a way that endangers their safety and security.
43. The applicant has advised that he never held a National Identity Card (NIC) in Sri Lanka as he was too young to be issued with one. He also advised that his birth certificate was issued in Vavuniya and that the Department holds a copy of that birth certificate. Accordingly, I consider that the Sri Lankan authorities would have a record of the applicant's birth. DFAT reports<sup>15</sup> that Sri Lankans generally use the NIC as their primary identification document, although birth certificates, driver's licences and passports are also frequently used. Sri Lankan citizens are required by law to register their identity under the *Registration of Persons Act*. Following registration, persons over the age of 16 are eligible to apply for a NIC regardless of their ethnicity, religion, language or geographic location. A NIC is obtained through one's grama niladhari or the Department for Registration of Persons, and is required to access government services, including public health and education services. The NIC can be used to acquire all other identity documents. A NIC can be obtained only within Sri Lanka. As the applicant has a record of his birth, I am satisfied that it would be open to him to apply for and obtain a NIC on his return to Sri Lanka.
44. There are reports that some refugees and failed asylum seekers faced social stigma upon return to their communities, including for being beneficiaries of financial reintegration assistance<sup>16</sup>. DFAT assesses that returnees face a low risk of societal discrimination upon return to their communities. I do not accept that any challenges that the applicant may face in terms getting established, obtaining documentation, finding employment, or any social stigma he may experience as a returning asylum seeker from Australia, if it does occur, amounts to serious harm.
45. Overall, I accept that serious mistreatment of some Tamils with certain links is an ongoing issue in Sri Lanka but the weight of the evidence indicates that it has significantly reduced and that the chance of such treatment for being a Tamil or a Tamil male from the Northern Province with the background, profile and type of experiences that the applicant has had are remote.

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<sup>14</sup> DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244, 5.45

<sup>15</sup> Ibid, 5.58

<sup>16</sup> Ibid, 5.49

Given the improved situation in the country, the length of time since the cessation of the conflict and the applicant's overall profile, I am not satisfied the applicant faces a real chance of harm on his return in the reasonably foreseeable future for reasons including his ethnicity, place of origin, time spent in India and Australia or actual or imputed political opinion. Further I am not satisfied that the applicant faces a real chance of any harm as a result of his illegal departure from Sri Lanka and seeking asylum and spending time in Australia or any combination or accumulation of those factors.

46. I am not satisfied that the applicant holds a well-founded fear of persecution.

### **Refugee: conclusion**

47. 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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48. 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**

49. 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.

50. 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.

51. I have accepted that, on his return to Sri Lanka, the applicant may face challenges as a returning asylum seeker as outlined above including the need to re-establish himself, obtain identification documents and find accommodation and work. I also accept that he may face some social stigma in the community and as a person who has not lived in Sri Lanka for a long time. I am not satisfied that these difficulties and treatment would amount to significant harm as defined. I am not satisfied that it would amount to the arbitrary deprivation of life or the death penalty. I am also not satisfied that it would amount to being subject to torture, cruel or inhuman treatment or punishment or degrading treatment or punishment as defined in the Act. I am not satisfied there is a real risk of significant harm on this basis, or when considered in conjunction any treatment he may experience for having departed illegally.

52. In relation to the remainder of the applicant's claims, I have found that there is not a real chance that the applicant will face any harm on his return to Sri Lanka for any other claimed reasons or combination or accumulation of those reasons. Real chance and real risk involve the same standard<sup>17</sup>. On the same factual findings, I am similarly not satisfied that the applicant faces a real risk of suffering any harm on any of the remaining grounds raised, including significant harm, should he be returned to Sri Lanka. I am not satisfied that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Sri Lanka there is a real risk, he will suffer significant harm.

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

53. 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.

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<sup>17</sup> *MIAC v SZQRB* (2013) 210 FCR 505

## 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.