



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

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA21/10070

Date and time of decision: 24 January 2022 16:19:00  
M Anderton, Reviewer

**Decision**

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The IAA remits the decision for reconsideration with the direction that:

- the referred applicant is a refugee within the meaning of s.5H(1) of the Migration Act 1958. IAA.

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

## Background to the review

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### Visa application

1. The applicant, a Tamil Christian, arrived in Australia by boat in May 2013 from India with his parents and siblings. The applicant was born in India of Sri Lankan parents and claims to be stateless. On 2 June 2017 he (along with his family) lodged an application for safe haven enterprise visa.
2. The applicant's claims revolved around fear of harm due to his father's Liberation Tigers Eelam (LTTE) profile, being a Tamil and Christian and not being familiar with Sri Lanka. He claimed he could not return to India as he was stateless, had no right to reside there and feared extortion, assaults from Indian authorities and jail.
3. On 7 October 2021 the delegate refused the visa. The delegate assessed the applicant for return to Sri Lanka and found that he did not face a real chance of harm or real risk of significant harm.

### Information before the IAA

4. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
5. The IAA obtained the 2020 India DFAT country information report. I am satisfied there are exceptional circumstances to consider the information as the applicant claims to be stateless and will need to be assessed against his former habitual residence, which was India. The report is publicly available. I also provided a copy of the report to the applicant and asked for his comments.
6. In response, on 13 December 2021 the applicant's representative provided submissions and new information, which included the applicant's December 2021 statement and country information about India.
7. I am satisfied that the information meets s473DD(b)(i) as the applicant could not have provided the information to the delegate as the delegate had not discussed or assessed the applicant against India. While the country information is general country information that does not meet s473DD(b)(ii), the statement is credible personal information and meets s473DD(b)(ii). For similar reasons and because it is highly relevant to his claims against return to India and the information is in response to my invitation to comment on adverse information, I am satisfied there are exceptional circumstances that justify its consideration.
8. I have considered the information.
9. On 21 December the IAA informed the applicant's representative that an interview would be conducted on 5 January 2022. On 22 December 2021 I sent the letter inviting the applicant to an interview on 5 January to discuss his claims against India. That interview was cancelled due to Covid restrictions. The applicant attended an IAA interview on 24 January 2022 by video.
10. I have considered the information provided by the applicant at the IAA interview as the information could not have been provided to the delegate as the delegate did not consider or discuss the applicant's possible return to India. I am satisfied as to s 473DD(b)(i). Further, on

its face it was credible personal information which may have affected the consideration of his claims about return to India. Given this aspect of his claims was not canvassed and it is relevant to an assessment of the applicant's return to India, I am satisfied as to s473DD(a).

11. I have considered the information.

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

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

- He is a Tamil born in India. His parents are Sri Lankan citizens. His family have not registered his birth with Sri Lankan authorities as they are afraid of the Sri Lankan authorities, so he is stateless.
- Life in India was very difficult as they were constantly discriminated against. He grew up in refugee camps and they were also imprisoned for 5 years, when he was very small.
- When they were released from prison, they were able to attend school and were taunted and harassed by other children because they were Tamil refugees and had been in jail. Police would hit them often and ask why they were in India.
- He worked in India but had no rights and they were treated poorly, and it was hurtful.
- When he was 20 years old, his sister's child was in hospital, so could not report to authorities as was required every 15 days. So, Q branch demanded the child's government allowance. The applicant asked how in the circumstances the child could report. Q branch beat the applicant and after this his parents were forced to give them money.
- The applicant understands that children of Sri Lankan citizens are entitled to Sri Lankan citizenship, but only if they register with Sri Lankan authorities within in a year of birth, otherwise a fine is incurred. None of the children have been registered and so he is not a Sri Lankan citizen.
- He has never been to Sri Lanka and has no family there as his parents have no contact with anyone. He has been in India his whole life.
- His parents left Sri Lanka illegally many years ago due to fear for their lives. The applicant will be arrested and detained upon return because he will be a failed asylum seeker and his family and friends are not in a position to pay his bail if arrested or fined. He fears spending time in prison and suffering significant harm from officials and prisoners. As a result of the immigration data breach, his fears have increased as the authorities will know they sought asylum.
- Upon return to Sri Lanka, he would be questioned and interrogated as returning to Sri Lanka after so long would raise suspicions and authorities would want to find out what his parents had been doing and why he had never been there before.
- As a young Tamil male with parents who fled Sri Lanka dangers, he fears abduction, arrest, detention, physical assault and death by Sri Lankan authorities.
- According to his 2014 response to the immigration data breach, the family was jailed in India when he was a child because they were involved with the LTTE. He feared if he returned to Sri Lanka, they will say he had training in India as they were held in prison as LTTE. The government will have their information. The applicant added that he became friendly with politicians in Tamil Nadu and was involved in protests, photographed and

there were Sri Lankan intelligence people there who knew everything. According to his protection interview, however, the applicant said someone else wrote this for him and he was not involved in protests.

- In his December 2021 statement the applicant claimed life would be even worse in India than before. He will be put in jail straight away. He will be punished as he left illegally without a passport and they will put charges against them and make enquiries. Authorities will refer to the applicant's father's LTTE connection and that he was involved in driving the boat and the applicant will end up in jail.
- He does not think the Indian government will register them as refugees again and therefore he will have no documents or evidence of identity, nowhere to live, no right to work or support himself or access to health care.
- If they do put him in a refugee camp, he will have no freedom and they will be required to attend the police station and physically harmed as they did in the past. They have no right of work or means of support. If he tries to work, he will be subject to extortion and physical abuse like before.
- At the IAA interview the applicant elaborated on his claims against return to India and provided information about dependency on the family.
- It was submitted the applicant feared persecution upon return to Sri Lanka because of his imputed political opinion on account of his father's high level past membership and involvement with the LTTE, the applicant's Tamil ethnicity, asylum claims and extended residence in Australia where he could be perceived to be part of the Tamil diaspora and his imputed anti-government political opinion. He feared harm due to membership of particular social groups, being the family of his parents, people who fled Sri Lanka illegally and sought asylum in Australia and for his ethnicity and as a Christian (Roman Catholic).

## **Refugee assessment**

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13. 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**

14. 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.

*Receiving country*

15. I accept the applicant was born in India is entitled to Sri Lankan citizenship as his parents are Sri Lankan citizens, but that he has not been registered with Sri Lankan authorities. I note DFAT country information that those who did not register their citizenship run the risk of statelessness. There is no evidence that the applicant is an Indian citizen. I find therefore at this stage the applicant is stateless.
16. Where a person is stateless, according to the legislation, the receiving country is the applicant's former habitual residence. Given the applicant was born and lived all his life in India, until his arrival in Australia, I find the 'receiving country' is India. This is despite the fact that he may not have a right to return there (s.5 of the Act). I note the claims and submissions that the applicant has no legal right of return to India. Nonetheless, as it is his receiving country, I have assessed him against return to India.
17. I note that the applicant, as a stateless person, must be assessed against India as his former habitual residence. However, presuming any facilitated entry to India would need to be on a lawful basis and noting the applicant (and none of the other applicants) does not have a present right of entry to India, I have also assessed him against Sri Lanka.

*Return to India*

18. I accept that life for the applicant was difficult in India growing up in prison for 5 years and then refugee camps. His family were released from the prison or special camp when he was young.
19. According to DFAT approximately 95,000 Sri Lankan Tamils live as refugees in Tamil Nadu, India, which, at its closest point, is situated 35 kilometres from Jaffna. Of these, about 60,000 live in camps run by the Tamil Nadu Government. DFAT understands that 44 Sri Lankan Tamil refugees reside in a 'special camp' in Tiruchirappalli, Tamil Nadu, managed by the Tamil Nadu Prisons Department. DFAT understands camp inhabitants include former LTTE members, refugees with formal criminal convictions and those awaiting court hearings. DFAT understands that, unlike other refugee camps in Tamil Nadu, special camp inhabitants are not permitted to leave, work or receive benefits entitled to other Sri Lankan Tamil refugees (including a monthly allowance). Similar 'special camps' in Chengalpattu and Cheyyar were closed in 2014 and 2016, respectively.
20. I accept that movement was restricted in and out of the camps, but the applicant was still able to attend school, received an education to grade 9 and worked for a living in various jobs in India. I accept that he may have been taunted and discriminated against by others at school for being in jail and a Tamil refugee. However, he is no longer at school and has worked in various jobs. Further, while hurtful, I do not accept that such taunts or discrimination amounted to serious harm.
21. While his life may have been difficult with restricted movement and discrimination and lack of citizenship, I do not accept that amounted to serious harm.

22. The applicant claimed he was beaten once when he was 20 when he challenged authorities about taking away the monthly allowance for his sister's child for failure to report (because the child was in hospital). The applicant claimed that police extorted money from them also when they returned from work to the camp.
23. I asked the applicant about the past harm he suffered. The applicant said whenever police saw them the police verbally harassed them, saying they were refugees and took their money. When he returned from work late the Indian police made him get down on his knees and beat him with a large baton and took their earnings. He said this happened at least twice a week. They could not question this or seek any protection as the authorities threatened, they would put them in jail.
24. I accept that the applicant was extorted and assaulted frequently by Indian police. I note the country information that police extortion and corruption occurs in India and in particular, the US Department of State report that most urban refugees worked in the informal sector or street vending, where they suffered from police extortion, nonpayment of wages and exploitation. I accept the applicant may face extortion and beatings upon return.
25. It was submitted that the applicant will be an undocumented foreigner, who has no access to housing, income, work rights, education or health care and whose mere presence in the country is a criminal offence for which he may be subject to detention and abuse. It was submitted as a stateless refugee he had no legal right to return to India or automatic right to resume his refugee status and would be subject to harm because of his lack of status and being without documents if the government refused to register him as a refugee again. The submissions referred to the US Department of State report in support.
26. However, I do not accept that upon return to India he would be an undocumented foreigner. I do not accept that his presence in India would be a criminal offense. Any return to India would be a facilitated return that would be lawful and with Indian authorities' permission. According to DFAT the Australian immigration department is required to notify Indian authorities prior to the arrival of escorted removals from Australia and the Indian High Commission has previously advised of the requirement that a travel document application should be signed by the applicant and accompanied by a letter stating the applicant consented to the issuance of the document and is willing to return to India.
27. I acknowledge that it may well be that the Indian authorities would not accept the applicant's return to India as he does not presently have a right to return to India and is not entitled to Indian citizenship. However, if returned to India, there is no evidence before me to suggest that any such return, if it were to occur, would be otherwise than a lawful basis. In that case, I do not accept that his presence in India would be a criminal offence for which he may be subject to detention.
28. I acknowledge the India DFAT report largely deals with Indian nationals, but it also refers to those who are not. According to UNHCR and NGOs India had a large population of stateless persons, but there were no reliable estimates. UNHCR estimated 95,000 Sri Lankan Tamil refugees living in Tamil Nadu. While India does not subscribe to the Refugee Convention, according to the UNHCR India Factsheet from December 2019, the government directly provided assistance and protection to 203,235 refugees from Sri Lanka and Tibet and 39,960 asylum seekers of other nationalities registered under UNHCR mandate. Courts protected refugee and asylum seekers in accordance with the constitution. I note also the country information that recognised refugees and asylum seekers were allowed access to housing, education, health care and the courts.

29. According to DFAT, camp refugees are registered with India's Department of Rehabilitation and Welfare, and are provided education, health care, social security and amenities by the Indian Government. Refugees living outside the camps are required to register at their local police station and to re-register if they move between police precincts. In addition to this cohort, there is a smaller undocumented group of refugees residing outside the camps who have not registered for fear of police harassment. Refugees living outside the camps are generally better off than those in the camps, and often run successful businesses. They are unable to move into the camps, with camp registration having closed in 2011.
30. Further, I note the US Department of State report that India generally allowed recognised refugees and asylum seekers access to housing, education, health care and the courts. They were able to use public services, although it became complicated because many refugees were unable to acquire the digitized national identity card. Where they were denied access, it was often due to lack of knowledge of refugee rights by the service provider, but in many cases UNHCR was able to intervene and advocate for refugee access. I note also that the applicant was able to access these services in the past in India. As a refugee, the country information indicates the applicant would have such access and be able to subsist. The applicant was able to do so in the past, and I note he has acquired new skills as a concreter in Australia as well, which may be of assistance upon return to India.
31. I note also the submissions and country that the applicant may lose his refugee status and not be registered as a refugee upon return to India.
32. The Al Jazeera article about BK was submitted in evidence of this. BK (a Tamil Sri Lankan refugee in Tamil Nadu) had briefly returned to Sri Lanka for medical emergency and was also charged with offences by India's Q Branch (of which he was acquitted) and a deportation process to Sri Lanka had commenced. The submissions noted he and 18 other Tamils were charged with human trafficking, criminal conspiracy and cheating.
33. However, BK's circumstances are not the same as the applicant. The applicant has not returned to Sri Lanka as BK did, and the applicant does not have Sri Lankan citizenship, as BK did. The applicant has also not been charged with any offences or have outstanding charges in India. If returned to India (as a facilitated lawful return from Australia) on the evidence, I am not satisfied that the applicant could not use his refugee identity card, and Indian birth certificate as evidence of his 'refugee status' or statelessness.
34. It was submitted that the applicant could not live in the refugee camps as they had closed to registration. I note the DFAT report indicates the camps were closed from 2011. According to the US State Department the government ceased registering Sri Lankans as refugees. I note country information that 62,000 Sri Lankan refugees live in 107 camps in Tamil Nadu and about 37,000 refugees live outside the camps, as "non-camp refugees".
35. I note the applicant has a refugee identity card issued in Tamil Nadu and was able to access services in the past. I note the country information about BK and the submissions that the applicant may not be recognised as a refugee and not be able to live in the refugee camps. While I am not convinced that the applicant's circumstances are the same as BK, I acknowledge that the applicant may be unable to move into the refugee camps as they closed in 2011.
36. Even if not re-registered as a refugee or he cannot live in the refugee camps, I consider the applicant could live as a non-camp 'refugee', like many others do. I note DFAT country information (from DFAT Sri Lanka reports) that those in the camps are provided government

assistance and those outside the camps who have not registered are generally better off than those in the camps as they run successful businesses, though this has been affected due to covid restrictions and downturn in the economy. I note also that refugees and non-camp 'refugees' were also provided financial assistance during covid. The applicant is educated, has worked in the past and could do so in future and would be returning with his brother and they could support each other. He is familiar with the environment having lived most of his life there.

37. The applicant claimed if he returned to India, he would be put in jail straightaway as he left illegally and he will be punished. He claimed the authorities will put charges against him and refer to his father's LTTE suspicion and involvement in driving the boat to Australia, so end up in jail.
38. I note the Al Jazeera September 2021 article about BK, a Sri Lanka Tamil refugee living in India. According to the article BK was accused of human trafficking in June 2016, but according to his lawyer all he did was land in India in 2006. BK was acquitted. The article indicated that BK was still housed in a special camp, which was meant for detaining foreigners who have committed bigger crimes and tried to escape India. In 2020 BK was threatened with revocation of his refugee status to process him for deportation to Sri Lanka and was issued a Sri Lankan passport.
39. I accept the applicant departed India illegally and that his father assisted in driving the boat from India to Australia, in exchange for reduced fares and because the people smugglers abandoned the boat. The applicant helped his father drive the boat as well, as he had been trained by his father, so could assist. He said they had no choice as the people smugglers abandoned the boat mid-sea. I accept the applicant departed India illegally and assisted in driving the boat from India to Australia, along with his father. I accept there is a possibility that the applicant may be jailed in India for his part in driving the boat from India to Australia.
40. Such laws however are laws of general application and not discriminatory and for the lawful purpose of controlling borders and legal people movement. I find any penalties or punishment or harm for that is not for a s5J reason.

#### *Cumulative considerations*

41. I have accepted that the applicant's father was involved in the LTTE and drove boats for them between Sri Lanka and India. In the applicant's father's decision, I have made findings about the applicant's father's LTTE involvement and that as a result of this (and the applicant's father's involvement in driving the boat from India to Australia) the applicant's father faces a real chance of serious harm upon return. I will not further detail this here, given the confidential nature of the claims.
42. I have accepted that the family were imprisoned in India for 5 years due to the applicant's father's LTTE involvement. I am not satisfied that the Indian authorities continued to be interested in the applicant's father's past LTTE connections per se, as the family were released many years ago and lived in India as refugees for many years. They would not have been released if there continued to be of adverse interest to Indian authorities.
43. I accept also that the applicant may face extortion, physical assaults and exploitation by police, authorities and others in the community given he faced this in the past and his ethnicity and being stateless. I note the US State Department report of exploitation and extortion of foreigners and that the applicant has faced such in the past.



44. I have accepted that the applicant is a Tamil, born in India who will remain stateless upon return to India. I have accepted that he will not be able to register in the refugee camps either as they closed in 2011. Further, he will not be returning with his parents. I have accepted also that the applicant is a practising Catholic.
45. I am concerned that the applicant's profile is different to other Tamil, Indian born, stateless returnees, because he has been previously detained in prison due to his father's LTTE activities, so would be known by the authorities. In addition, his involvement in driving the boat to Australia would further raise his profile as one of adverse interest.
46. I consider upon return the applicant will come to the attention of Indian authorities again, because of his illegal departure and boat driving and he will likely be imprisoned. I consider the combination of this and the applicant's father's LTTE connections and the family past imprisonment may again raise the applicant profile to one of adverse interest to authorities.
47. Further, I consider the applicant's father's LTTE profile, past imprisonment, boat driving, and extortion experiences makes the applicant vulnerable and puts him at heightened risk of further harm from authorities. I note also the DFAT information about the prevalence of corruption, arbitrary arrest and manufactured charges. I consider the applicant's adverse profile increases his vulnerability to more frequent or serious extortion, intimidation, assaults, detention and arbitrary arrest, such that there is a real chance of serious harm.
48. Upon return to India, I find there is a real chance that the applicant faces extortion, intimidation, exploitation and arbitrary arrest and detention because of a combination of his ethnicity, statelessness, past prison detention in India, his connection to his LTTE father.
49. I am satisfied that the applicant faces a real chance of serious harm upon return to India from authorities. I am satisfied they are for reasons of his ethnicity, past imprisonment, connection to his LTTE father, being stateless, his involvement in boat driving for illegal departure from India.
50. I am satisfied that there is a real chance of serious harm, including significant physical harassment and physical ill-treatment of the applicant as contemplated by s.5J(5). I am also satisfied that such conduct would be systematic and discriminatory and for the essential and significant reason of his cumulative profile as a Tamil, stateless refugee, who was detained as a LTTE family in an Indian prison and for his illegal transport of people to Australia as one of the drivers of a people smuggling boat and his connection to his LTTE father.
51. While I am not satisfied that any of these one factors would necessarily give rise to a real chance of persecution, when I consider them together, in combination with the applicant's particular circumstances, I am satisfied the chance of serious harm is one that is not remote.
52. I am not satisfied that the applicant can take steps to avoid persecution given these are innate characteristics of ethnicity, family connection and the applicant's previous experiences.
53. As the harmed feared is from the State, I find that the real chance of persecution relates to all areas of Sri Lanka and that effective protection measures are not available to him. I find s5LA is met. Further and in any event, I am not satisfied that the applicant can seek protection from the State for such harm or extortion. I accept that because of the applicant's ethnicity, statelessness and LTTE familial connections and past imprisonment means there is a real chance of him facing serious harm, such as arbitrary arrest, detention and serious assaults.

Given this from State perpetrators, I am satisfied the applicant cannot obtain effective protection.

54. I have had regard to all of the evidence before me and on a cumulatively basis, I am satisfied the applicant has a well-founded fear of persecution for s5J reasons in the reasonably foreseeable future, if he returns to India.

***Return to Sri Lanka***

55. Noting that the applicant's parents are Sri Lankan citizens, and that the applicant is eligible for Sri Lankan citizenship, I have considered the applicant's possible return to Sri Lanka. I note the delegate only considered the applicant's return to Sri Lanka.
56. The applicant's claims were based on fear of harm on account of his imputed political opinion due to his father's LTTE involvement and imputed anti-government political opinion. It was submitted the applicant feared harm because of his father's previous LTTE involvement, his statelessness, Tamil ethnicity and Roman Catholic religion which would make him stand out to authorities on return and place him at risk of harm.
57. The applicant also feared he would be arrested or detained upon return because his parents left illegally due to fear they had, and because he would be returning failed asylum seeker, subject to the data breach and having spent extended period in Australia and considered part of the Tamil diaspora. He feared returning so many years later would raise suspicions and authorities would want to find out about his parents and why he had never been there before. He feared imprisonment as his family and friends could not afford bail if arrested or fined.
58. I have considered the country information and submissions about Sri Lanka and treatment of Tamils in particular. I accept that during the conflict and shortly thereafter Tamils were disproportionately harmed and affected, including being detained and tortured and killed. Since the conflict ended, and particularly since 2015, the situation in Sri Lanka has improved significantly. Country information (DFAT, UK Home office) indicated that Tamils per se no longer faced persecution.
59. I note the recent country information and submissions about the return of Gotabaya Rajapaksa in November 2019 to government and the concern this has brought to Tamils, in particular. I note that reconciliation and accountability efforts under the former Sirisena government have regressed since Rajapaksa has come to power, and the anti-Tamil sentiment. According to the UK Home Office, US State Department and DFAT, the Sri Lanka authorities have sophisticated intelligence and do take an interest in those who advocate for Tamil separatism and threaten the integrity of the Tamil state and may monitor certain Tamil diaspora depending on their profile, including activists and journalists and those who advocate for a separate Tamil state or families who advocated for victims of enforced disappearances.
60. I do not accept that the applicant was involved in any protests or had his photo taken in India. The applicant appeared to abandon that claim at his protection interview and confirmed that he was not involved in any protests or politically active or interested in doing so in the future. I note also the post protection interview submissions confirmed that the applicant had not attended meetings or protests, but that he meant that he had participated in National Heroes Day celebrations with his family. On the evidence, I do not accept the applicant has or would be perceived as an activist.

61. While I accept the applicant is a Christian (as are the rest of his family) I am not satisfied that he faces a real chance of harm as a Christian upon return. The country information does not support that. While I acknowledge the 2019 Easter bomb attacks, the authorities increased security and dealt with the extreme Islamist group who was responsible.
62. I do not accept that seeking asylum in Australia or having been born in India means the applicant faces a real chance of harm. Many thousands have returned to Sri Lanka as failed asylum seekers without harm as have others returned who were born in India, like the applicant. I note country information about the many refugees from Tamil Nadu who returned to Sri Lanka.
63. I note the applicant's mother's claims regarding her Sri Lankan family. I have not accepted that the applicant's parents face a real chance of harm from the applicant's mother's Sri Lankan family. Similarly, I do not accept that the mother's family would have any interest in the applicant or that he faces a real chance of harm from them upon return. I acknowledge however that the applicant has no connection with them and is not likely to be able to rely on them for any support upon return.
64. The applicant's main claims revolved around his connection to his LTTE father and harm he might face as a result. The applicant did not know any details of his father's LTTE involvement and although he was told about it when he was a young child, he did not understand or believe it. It was not something that was talked about or that he could ask about. The applicant has not been told of his father's activities beyond running boats for the LTTE and having a high position with the LTTE and the family being detained in India due to his father's LTTE involvement.
65. The lack of knowledge of such a critical claim might ordinarily lead to some doubt about its credibility. However, I note each member of the family submitted their own claims and asked that they be kept confidential from each other, which is consistent with the parents' guardedness about their claims and the applicant's lack of knowledge of his parents' past experiences and explanation of why this claim was not disclosed earlier.
66. Further, I have assessed the applicant's parents' claims and I have accepted that the applicant's father was LTTE member and involved in certain LTTE activities (which I will not disclose here, given the request for confidentiality) including running boats for the LTTE between Sri Lanka and India. I have accepted that the family were imprisoned in India for 5 years due to the father's LTTE activities.
67. As discussed, and assessed in his parent's applications, I have accepted that his parents will be of adverse interest to authorities and face real chance of persecution upon return to Sri Lanka on the basis of their profiles. The reasons are set out in the parents' decisions.
68. Given the applicant was born in India, has never lived in Sri Lanka and had no other LTTE connection and has no interest in such activities, I am not satisfied that the applicant has an antigovernment political opinion or profile. I do not consider the authorities will have the same interest in the applicant as they would in his father.
69. However, I note country information that family members of former LTTE are harassed and monitored in Sri Lanka. It may be that the applicant faces questioning and monitoring because of his father's LTTE profile and the applicant's ethnicity and being a young Tamil male returning from overseas.

70. Further, given he had been detained in India for 5 years (due to his father's LTTE activities), I consider that this would be known by Sri Lankan authorities, which raises the applicant's profile. Country information indicates the Sri Lankan authorities have sophisticated intelligence including an electronic database of those involved in past LTTE activities or detentions.
71. The authorities would also know about the applicant's father and want to question the applicant about this also, particularly given the applicant's father would not be returning to Sri Lanka. I note the UK Home Office 2020 quoting the Human Rights Activist that there is interest from the security forces to look for former LTTE members. Some with an activist profile, but not all. The US State Department report noted security forces regularly monitored and harassed members of the Tamil community, especially activities, journalists and former or suspected LTTE members.
72. I note the DFAT 2021 report stated close relatives of high-profile former LTTE members who are wanted by Sri Lankan authorities may be subject to monitoring. The ITJP, based on interviews with Tamils who have fled the country and are resident overseas, states that family members of former or suspected former LTTE cadres have been subject to harassment and detention.
73. The applicant also will return as a stateless person and would have to apply for Sri Lankan citizenship, register and apply for ID card when he returned to Sri Lanka.
74. I consider he could obtain Sri Lankan citizenship. According to DFAT Children born to Sri Lankan Tamil refugees in Tamil Nadu are eligible for Sri Lankan citizenship. For a child born to refugee parents in Tamil Nadu to obtain Sri Lankan citizenship, their birth must be registered with the Sri Lankan Deputy High Commission in Chennai and a citizenship application form submitted. Citizenship is typically issued six months from the date of application. Citizenship applications for Indian-born refugee children over the age of 21 can only be made in Sri Lanka and involve the payment of a LKR25,000 (approximately AUD205) fine. Those not registered for Sri Lankan citizenship run the risk of statelessness. On the evidence, I am not satisfied that he could not register his citizenship. In any event, he would be required to register his identity (as do all adults in Sri Lanka) under the Registration of Persons Act. Following this he is eligible to apply for a national identity card, which is obtained through the grama niladhari or Department for Registration of Persons. According to DFAT identity cards were issued within a month of granting citizenship.
75. The applicant would also return to Sri Lanka without his parents as I have found that they meet the refugee definition. I accept that the applicant has no knowledge of Sri Lanka, never having lived there and would be identifiable as not local. Further, he would be stateless for a period and not have important documentation such as an ID card. He would have no family support or networks to assist him (other than his brother who would be returning in the same way.)
76. Given his statelessness, lack of ID card and lack of family support or networks, I consider he runs the risk of more frequent questioning. I note also the submissions about the applicant's trauma and mental health having been detained at a young age in prison in India.
77. I am concerned that the applicant may face more frequent questioning and detention for investigation given the applicant's father's LTTE and the applicant's statelessness, lack of ID card, his past imprisonment and ethnicity and young age. I am satisfied that the chance of such detention is not remote.

78. Further, I accept country information about the prevalence of torture and harm in detention, in particular in extracting confessions or information once detained.
79. Upon return to Sri Lanka, I am satisfied that the applicant faces a real chance of frequent questioning, intimidation, arbitrary arrest, detention and other serious harm due to a combination of his ethnicity, gender, age, statelessness, lack of ID card, his past imprisonment and connection to his father's LTTE activities.
80. I am satisfied that there is a real chance of serious harm, including significant physical harassment and physical ill-treatment of the applicant as contemplated by s.5J(5). I am also satisfied that such conduct would be systematic and discriminatory and for the essential and significant reason of his cumulative profile as a young Tamil, stateless male, with no Sri Lankan ID documentation or family support, who had been detained in an Indian prison due to the family LTTE connections and because of his father's LTTE involvement and who had not returned to Sri Lanka (as found to be a refugee).
81. While I am not satisfied that any of these one factors would necessarily give rise to a real chance of persecution, when I consider them together, in combination with the applicant's particular circumstances, I am satisfied the chance of serious harm is one that is not remote.
82. I am not satisfied that the applicant can take steps to avoid persecution given these are innate characteristics of ethnicity, and the previous experiences of the applicant or his family.
83. As the harmed feared is from the State, I find that the real chance of persecution relates to all areas of Sri Lanka and that effective protection measures are not available to him. I find s5LA is met.
84. I have had regard to all of the evidence before me and on a cumulatively basis, I am satisfied the applicant has a well-founded fear of persecution for s5J reasons in the reasonably foreseeable future, if he returns to Sri Lanka.

#### **Refugee: Conclusion**

85. The applicant meets the requirements of the definition of refugee in s.5H(1).

#### **Decision**

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The IAA remits the decision for reconsideration with the direction that:

- the referred applicant is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*.

## 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.