



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

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA21/08958

Date and time of decision: 20 April 2021 11:38:00  
J Maclean, 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 who was born in the Northern Province of Sri Lanka. In July 2017 he lodged a valid application for a Safe Haven Enterprise Visa (SHEV). On 22 March 2021 a delegate of the Minister for Immigration (the delegate) refused to grant the visa because the delegate found the applicant is not a person in respect of whom Australia has protection obligations.

### Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act)(the review material). No further information has been obtained or received.

### Applicant's claims for protection

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3. The applicant's claims can be summarised as follows:
  - He is a Tamil Hindu born in [Year] in Jaffna District, Northern Province, Sri Lanka.
  - His village was in an area controlled by the Sri Lankan Army (SLA). However, people from the Liberation Tigers of Tamil Eelam (LTTE) would come from the LTTE-controlled area nearby and enter the village seeking food contributions, information about the SLA's movements, and for recruiting purposes. This started when he was about [age] years old. He helped with the LTTE's requests but did not join.
  - He believes someone doxxed him in to the SLA for supporting the LTTE, but he does not know who. He was regularly intimidated, harassed and abused by the SLA including accusing him of supporting the LTTE.
  - In about 2005 he was assaulted at an SLA checkpoint and accused of providing support to the LTTE. He was detained for a day and then released. Whilst detained he was beaten and his shoulder and leg were injured.
  - He was beaten by SLA soldiers on two other occasions, and was scared he would be beaten or detained again, or accused of helping the LTTE, and decided to leave for India in early 2007.
  - His family members stayed in Jaffna. His brother was never assaulted or treated as he was, he thinks because his brother was never doxxed in as a person who supported the LTTE.
  - He left India and came to Australia because life was very difficult in the refugee camps, and he was scared of returning to Sri Lanka.
  - Since he has been in Australia the Criminal Investigation Department (CID) has visited his parents and his brother and asked them about him. He believes this shows that the Sri Lankan government know he supported the LTTE and they are still interested in him.
  - In November 2017 he attended Martyr's Day commemorations in Sydney. He used to avoid it because he was fearful the Sri Lankan government may be watching, but he feels it is important to pay respects. If he returns to Sri Lanka he fears the government may know he went to the event.

- If he attends Martyr’s Day events in Sri Lanka the government may look into his background, and because of his history supporting the LTTE they may interrogate and punish him.
- He fears if returned to Sri Lanka he would be seriously harmed because of his Tamil ethnicity and because he will be imputed as having an association with, or supporting, the LTTE. He fears this harm from Sri Lankan authorities, particularly the SLA and CID, including being kidnapped in a white van, being disappeared or killed.
- He also fears returning to Sri Lanka because the Sri Lankan government arrest people who sought asylum in Australia. Such people are charged with immigration offences but are suspected of being in the LTTE. He fears on arrival at the airport he will be questioned by the CID, arrested, detained, and mistreated during detention.

### **Refugee assessment**

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4. 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**

5. 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.

### *Identity and background*

6. The applicant has been consistent in claiming to be a Tamil born in Jaffna District of the Northern Province of Sri Lanka in [Year]. Documentary evidence has been provided to support his identity, including an Emergency Travel Document issued by the Sri Lanka Deputy High Commission in Chennai [in] October 2010, and an Identity Card for Sri Lankan Refugees, from [Location] Camp, issued by the Government of Tamil Nadu India. The Emergency Travel Document includes a photograph bearing the applicant’s likeness, and shows the same place and date of birth the applicant provided to the department. However, the family name shown on the document varies slightly from the name the applicant has given to the department. I

consider the discrepancy is a result of transliteration. The quality of the Identity Card for Sri Lankan Refugees in the information before me is extremely poor, and I am unable to discern whether the person in the photographs resembles the applicant. In addition, the bulk of the information is not in English, and a translation of the document has not been provided. I am unable to discern whether this document contains information about the applicant.

7. The applicant was assisted by a Tamil interpreter during the Arrival and SHEV interviews, and appeared to converse easily in the language. On the information before me, I accept the applicant's identity is as claimed, that he was born in Sri Lanka, is a national of Sri Lanka, and Sri Lanka is the receiving country for the purposes of the Act. I also accept he is of Tamil ethnicity.
8. The applicant's evidence regarding his family background and his early life in Sri Lanka have been broadly consistent. I accept: he completed Year [grade] of schooling in Sri Lanka then worked in farming on the family farm; and that his parents and two siblings ([brother] and [sister]) remain living in the Jaffna district.
9. The applicant has consistently claimed he is of the Hindu religion, and I accept that to be the case. He has not claimed to fear harm on return to Sri Lanka because of his religion.

#### *Events in Sri Lanka and India*

10. In his statement of claims the applicant refers to his village in Sri Lanka being controlled by the SLA, but on the border with the LTTE-controlled area. At times people from the LTTE would enter his village and ask for food contributions and ask villagers to report on the army's movements in the area. He said this started when he was about [age] years old (which equates to about 2002), and that he helped with the LTTE requests. Although the LTTE were recruiting in his area he did not join. He claims he was regularly intimidated and harassed by the SLA, including being accused of supporting the LTTE. He believes someone doxxed him in to the SLA about supporting the LTTE, but he does not know who it was. In 2005 he was stopped at an SLA checkpoint when going to the shop, and was detained for a day, during which he was beaten and sustained an injury to his shoulder and leg. This was the first time he was assaulted by the SLA. He was beaten by SLA soldiers on two other occasions before leaving Sri Lanka.
11. At the SHEV interview, which was conducted by telephone, the applicant added that he had sometimes helped the LTTE when they asked for transport from one place to another. When asked about the frequency of providing the LTTE with help, he said sometimes once a month, and sometimes once a week. He could not remember exactly when he was beaten by the SLA, but said it was about 2001 or 2002. I accept the applicant may have some difficulty recalling exact dates of events after many years, and make no adverse inference regarding discrepancies regarding dates of events. He went on to say that the SLA considered all young Tamils as LTTE, and that is why they called them and beat them, that this had happened many times during the war, and he could not say how many times. The applicant was asked whether his parents, brother or sister faced any problems from Sri Lankan authorities, and he said that his brother and father were questioned and beaten for supporting the LTTE. When the delegate asked the applicant to explain the inconsistency with his statement of claims, where he stated that his brother was not beaten, the applicant said he had mentioned in his previous interview that his father and brother were also beaten, but did not specify exactly which interview he was referring to.
12. The LTTE, which was formed in 1976 and launched an armed insurgency against the Sri Lankan state, established and maintained de facto control of Tamil-populated areas in the north and

east. The majority-Tamil civilian populations of the areas they controlled were required to interact with the LTTE as a matter of course. Many Tamils, particularly in the north and east, reported being monitored, harassed, arrested or detained by security forces during the war, with security forces imputing LTTE support based on ethnicity because almost all LTTE members and supporters were Tamil.<sup>1</sup>

13. In the context of the country information, I can accept the LTTE sought assistance from Tamils in the area the applicant lived in, and that the applicant may have assisted them when requested to do so, by providing food, information, and transport. I also accept the claims that he was intimidated and harassed by the SLA, and detained and beaten by them, on one or more occasions, during which he was questioned on suspicion of supporting the LTTE, and sustained injuries. Although the applicant speculates that someone dobbed him in, I am not satisfied that is the reason he experienced mistreatment by Sri Lankan authorities. I consider if the applicant was genuinely suspected of assisting the LTTE he would have been detained indefinitely, rather than being released after questioning each time. Overall, I am not satisfied the applicant was of adverse interest to the SLA for any reason, including for suspected LTTE involvement or support, or that he was considered a security risk for any reason at the time he departed Sri Lanka. Rather, I am satisfied the treatment he experienced was part of the routine but troubling treatment of Tamils generally at the time. I consider the applicant's evidence at his Arrival interview, that all Tamils were suspected by Sri Lankan forces and ill-treated, and at the SHEV interview, that his father and brother experienced similar treatment, supports this finding.
14. The applicant has provided a number of accounts as to when he departed Sri Lanka. At the Arrival interview he said it was in 2006, in his statement of claims he said 2007, and at the SHEV interview he said he was unsure, and maybe it was 2007 or 2008. Despite his uncertainty about the date, I can accept the applicant had some fears for his safety, given the events I have accepted occurred in Sri Lanka, and that likely formed at least part of the reason he departed Sri Lanka illegally, and went to India by boat sometime between 2006 and 2008.
15. The applicant has been consistent in claiming that after arriving in India he lived in refugee camps in Tamil Nadu India, and I accept that to be the case. He claims he was granted refugee status in India and, as noted above, he provided an Identity Card for Sri Lankan Refugees issued by the Indian government. Despite the issues noted with that document, I am prepared to accept the applicant may have been recognised as a refugee in India. I also accept the applicant's broadly consistent evidence regarding life in the refugee camps in India, including that: shortly after his arrival he was questioned by the Q Branch about his involvement with the LTTE; life in the refugee camps was very difficult; he had to sign out and in to the camp every day; it was difficult to find work but he worked as [an Occupation] doing contract work for various employers; and there was a 6pm curfew in the camps.
16. I accept the applicant's consistent evidence that he married his wife in January 2012 in India, and they have one [child] together. In his statement of claims the applicant states that he has known his wife since childhood, and she travelled to India in 2012. At the SHEV interview the applicant confirmed his wife is a Sri Lankan citizen, that she travelled to India for their wedding, and that she and their [child] returned to live in Jaffna District of Sri Lanka in about 2015, where she has some land/a farm, that was gifted to her. I also accept his evidence on these issues.

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<sup>1</sup> Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

17. I accept the applicant's consistent evidence that he departed India by boat in 2013, arriving in Australia in May 2013, that he has never held a Sri Lankan passport, and that he has not been to Sri Lanka since he left. He claims that he felt it was too risky to return to Sri Lanka, and he did not do so, even when his father was sick in 2010. At the SHEV interview the applicant clarified that, although he obtained the Emergency Travel Document to return to Sri Lanka in 2010, this was just after the end of the war and the government were still threatening those who helped the LTTE, so he did not return to Sri Lanka at that time. I can accept the applicant may have had subjective fears regarding returning to Sri Lanka, and that formed at least part of the reason for departing India for Australia, along with the difficult conditions in India.

#### *Events in Australia*

18. The applicant's statement of claims notes that since he has been in Australia the Criminal Investigation Department (CID) have visited his parents and his brother and asked about him, but provides no further details about the circumstances of the visit, such as exactly when it occurred, and whether it occurred once or on a number of occasions. He claims his family told the CID he is in Australia, and the CID said they are waiting for him. To him this indicates the Sri Lankan government knows he gave support to the LTTE and they are still interested in him. At the SHEV interview he confirmed the CID had visited his parents' home looking for him, but said he did not know why they are looking for him. As noted above, I am not satisfied the applicant was of adverse interest to Sri Lankan authorities at the time he departed Sri Lanka, or that he was considered a security risk at the time he departed. It is not apparent to me why the CID would wait for at least five years to make enquiries with the applicant's family about his whereabouts. If the applicant were genuinely of interest to Sri Lankan authorities, including in relation to LTTE links, I consider enquiries would have been made shortly after his departure from Sri Lanka, and I do not accept the CID made the claimed visit or enquiry.
19. In his statement of claims the applicant refers to attending Martyr's Day commemorations in Australia, in Sydney in November 2017. Although the statement is undated, it appears to have been provided to the department at the same time the SHEV application was lodged, in July 2017. It seems likely the November 2017 date in the statement was given in error. At the SHEV interview the delegate asked the applicant about his attendance at Maaveerar Naal in Australia. Maaveerar Naal, or Great Heroes' Day commemorates those who died fighting for the LTTE.<sup>2</sup> The applicant said he goes every year to an event at [Suburb], on 27 November, in remembrance of the LTTE soldiers who died in the war, and where they light a lamp and do a remembrance prayer.
20. Included in the review material are a number of images of Maaveerar Naal celebrations in Australia. The delegate obtained the images by searching on Google, and the images include large groups of people at various events. Although the applicant has provided no evidence in support of his claimed attendance, such as photographs of him in attendance, I am prepared to accept he has attended Maaveerar Naal celebrations on a number of occasions since his arrival in Australia.

#### *Tamil ethnicity and imputed LTTE connections*

21. The applicant fears being targeted and harmed by Sri Lankan authorities because of his Tamil ethnicity, and that he will be imputed with an association to, or as a supporter of, the LTTE for

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<sup>2</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

that reason, and because of the support previously provided to the LTTE. There have been significant changes in Sri Lanka since the applicant departed, and the information before me does not support that he would face a real chance of persecution for the reasons claimed if he returned to Sri Lanka.

22. During the civil conflict in Sri Lanka, and for several years after it ended in May 2009, more Tamils were targeted by Sri Lankan authorities than any other ethnic group. While LTTE members and supporters were targeted, there was also widespread, systematic, and discriminatory harm and mistreatment of Tamils with no connection to the LTTE, but who lived in areas formerly controlled by the LTTE during the civil war, in the north and east of the country, with LTTE support at times imputed on the basis of ethnicity. Although the LTTE were comprehensively defeated in 2009, both DFAT and the UK Home Office confirm the Sri Lankan government remains sensitive to the potential re-emergence of the LTTE or other Tamil separatist groups. However, the Sri Lankan government's present focus is to identify those who pose a threat to the country's unity, rather than identifying a person's past LTTE links.<sup>3</sup>
23. The UK Home Office reported in its 2020 assessment, from a fact-finding mission to Sri Lanka, that if returning failed asylum seekers were found to have links to the LTTE they would likely face further questioning, but it would depend on the case. A non-governmental organisation worker advised the UK Home Office in October 2019 that although after the war whoever was connected to the LTTE would be arrested, sent to court and go through rehabilitation, now just having supported the LTTE is not enough to be arrested. The Attorney General's Department and the CID told the UK Home Office that former LTTE cadres would only be of interest if there was a pending criminal case against them, and that mere membership of the LTTE would not make someone of interest. In October 2019, a representative of the Northern Province community advised that after 2015 (the change of government), there continued to be some surveillance and house visits of former LTTE cadres by intelligence services, however the style of enquiry was different to pre-2015 – they were polite and non-threatening.<sup>4</sup>
24. The applicant was not a member of the LTTE or a combatant, and there is no evidence there is a pending criminal case against him in Sri Lanka. The information before me does not support a conclusion that his previous association with the LTTE, providing support in the form of food, information and transport, more than 13 years ago, or the interest Sri Lankan authorities had in him previously, would cause him to be of interest to Sri Lankan authorities on his return.
25. The situation has improved generally for Tamils since the end of the conflict. The UK Home Office and DFAT have confirmed the UNHCR position 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. The country information does not indicate Tamils are currently at risk of persecution in Sri Lanka purely on account of their race, or that Tamil ethnicity of itself imputes LTTE membership or a pro-LTTE opinion, even when combined with other factors such as gender, age, marital status, or place of origin.<sup>5</sup>
26. The security situation in Sri Lanka, particularly in the north and east, has improved significantly since the end of the civil war in May 2009, changing notably during the period of the former Sirisena government. The government exercises effective control over the entire country,

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<sup>3</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244; UK Home Office, 'Country Policy and Information Note Sri Lanka: Tamil Separatism', May 2020, 2020052717200

<sup>4</sup> UK Home Office, 'Country Policy and Information Note Sri Lanka: Tamil Separatism', May 2020, 2020052717200

<sup>5</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244; UK Home Office, 'Country Policy and Information Note Sri Lanka: Tamil Separatism', May 2020, 2020052717200

including in the predominantly Tamil-populated north and east of the country. Security was heightened across Sri Lanka following the Easter Sunday terrorist attacks of 21 April 2019. Emergency regulations and checkpoints were brought back in, and the military and police enjoyed expanded powers of detention, search and entry, which resulted in fears amongst the Tamil community. However, the focus was clearly on the Muslim community and the apprehension of terrorists, rather than being directed at Tamils.<sup>6</sup> DFAT reports the military maintains a significant presence in the north, particularly in the Jaffna Peninsula, but that most military personnel are confined to the Security Forces Cantonment on Jaffna Peninsula and smaller surrounding military camps, and military involvement in civilian life has decreased.<sup>7</sup> Both DFAT and the UK Home Office report that the checkpoints reinstated temporarily after the Easter attacks are no longer in operation, the emergency regulations have lapsed, the heightened security has eased, and the military is much less visible.<sup>8</sup>

27. I accept there is a continued military presence in the north and east of Sri Lanka, and that there may be heightened security in response to specific incidents of concern. A number of the applicant's relatives continue to live in Jaffna district, including his father and brother, however the applicant gave no evidence they have recently been of interest to authorities, or that they had any problems as a result of the ongoing military presence. Overall, I am not satisfied the ongoing military presence in the north and the east, is indicative of a risk of harm to the applicant.
28. There have been substantial political changes in Sri Lanka recently, in particular the election of Gotabaya Rajapaksa as President in November 2019. Gotabaya is the brother of Mahinda Rajapaksa, who was president from 2005 to 2015, and who was appointed prime minister shortly after the 2019 election. The Tamil community and various commentators have expressed concerns about the return of the Rajapaksas to power, including concerns about the appointment of military officials to key government positions, some of whom served during the former Rajapaksa era and who have been implicated in human rights violations in the final stages of the war. There are also criticisms about the lack of progress on reforms promised by the previous Sirisena government, including delayed delivery of human rights and reconciliation commitments, and the government being slow to implement transitional justice mechanisms. DFAT reports that although there has been some progress, for example with the establishment of offices for Missing Persons and Reparations, implementation of the government's transnational justice and reconciliation commitments has been slow and uneven to date, and minimal progress on accountability for abuses committed during the war, including against the Tamil community.<sup>9</sup>
29. More recent country information reports on the Rajapaksa government's overwhelming victory in the August 2020 parliamentary election in Sri Lanka. Commentators have expressed concerns regarding the centralisation of powers, that planned constitutional reforms will lead to authoritarianism and a further crackdown on journalists and political dissent, and regarding the impact for the future of democracy and pluralism in Sri Lanka.<sup>10</sup>

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<sup>6</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244; UK Home Office, 'Report of a Home Office fact-finding mission to Sri Lanka', 20 January 2020, 20200123162928

<sup>7</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

<sup>8</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244; UK Home Office, 'Report of a Home Office fact-finding mission to Sri Lanka', 20 January 2020, 20200123162928

<sup>9</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

<sup>10</sup> London school of economics and political science, 'Sri Lanka's parliamentary election: Landslide win for the Rajapaksa puts democracy and pluralism at risk', 12 August 2020, 20200813141629; S. Rajaratnam School of International Studies (RSIS), 'Sri Lanka Elections: Stronger Powers, At What Cost? – Analysis', 12 August 2020, 20200812104655; Aljazeera, 'Sri Lanka: Economy, human rights key challenges facing Rajapaksas', 19 August 2020, 20200819205836



30. Although the applicant made no specific claims regarding the recent political changes in Sri Lanka, I accept Sri Lankan Tamils may be concerned about the impact of the return to power of members of the Rajapaksa family. I accept the present government is more authoritarian than the previous government and is unsympathetic to continuing post-war reconciliation efforts, or Tamils' calls for greater cultural recognition and political representation. Despite the concerns, I am satisfied the situation for Tamils in Sri Lanka is vastly different than under the previous Rajapaksa regime. On the information before I am not satisfied the change in government has resulted in a deterioration of conditions for Tamils generally in Sri Lanka, or more specifically that the risk for people with the applicant's profile has increased, or would increase in the reasonably foreseeable future.
31. The applicant also fears harm as a result of his attendance at Maaveerar Naal events in Australia. At the SHEV interview he said the Sri Lankan government will target him for his attendance because they will think he is an LTTE supporter. The delegate asked him if he feared he would be imputed with a political opinion opposed to the Sri Lankan government because he attended these events, and the applicant said 'yes'.
32. I have accepted the applicant has attended Maaveerar Naal commemorations in Australia, and I can also accept he may participate in such events if he returns to Sri Lanka. DFAT reports that the Sri Lankan government has relaxed some restrictions on the public commemoration of events associated with the Tamils' armed struggle for statehood, and although sources told DFAT there is monitoring by the authorities, Tamils have been free to hold ceremonies marking Great Heroes' Day since 2016, and Tamils are increasingly comfortable marking such events.<sup>11</sup> Shortly after the 2019 election of Gotabaya Rajapaksa as President Tamils turned out in droves to commemorate Maaveerar Naal, at multiple locations across the northeast.<sup>12</sup>
33. I am satisfied the overall security situation in Sri Lanka has improved since the applicant departed, and in particular the security environment for Tamils has improved. Monitoring of Tamils in day-to-day life decreased significantly under the Sirisena government, however surveillance of Tamils in the north and east continues, particularly those associated with politically-sensitive issues.<sup>13</sup> Other than participating in commemorative events, the applicant has not indicated he has been associated with any politically-sensitive issues, or that he intends to do so on return to Sri Lanka. Taking into account the applicant's profile, in particular that he provided low-level support to the LTTE, and country information supporting that commemorative events are celebrated in Sri Lanka, I am not satisfied the applicant would attract the adverse attention of Sri Lankan authorities as a result of having attended commemorative events in Australia, or that he would be imputed with being an LTTE supporter, or with a Tamil separatist or anti-government political opinion for having attended those events, even if his background were investigated, and authorities were aware of the prior support. I am also not satisfied his attendance at such events in Sri Lanka in the future would result in investigation and punishment in relation to prior support given to the LTTE many years ago. I accept it is possible the applicant may be monitored if he attends Maaveerar Naal commemorations in Sri Lanka, however, I am not satisfied such monitoring would amount to serious harm for this applicant.
34. With regard to the applicant's fear of being subjected to an enforced disappearance, country information reports that systematic abductions using white vans, often leading to enforced disappearances, occurred during the war and in the period after. The term 'white van

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<sup>11</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

<sup>12</sup> Aljazeera, 'Trouble brews in post-election Sri Lanka', 08 December 2019, 20191209095947

<sup>13</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

abductions' describes instances where individuals were abducted by unknown perpetrators in unmarked vehicles and were mostly never seen again. DFAT assesses that reports of a small number of abductions involving white vans in 2016 and 2017 likely referred to incidents where police did not follow protocol during arrest. DFAT understands that such disappearances are no longer common.<sup>14</sup> Similarly, the UK Home Office reports instances of abductions between 2015-2018, but no recent reports of white van abductions.<sup>15</sup>

35. Considering the country information, I can accept the applicant may have some subjective fears regarding returning to Sri Lanka, particularly given his previous treatment by Sri Lankan authorities. Taking into account the applicant's evidence in the context of the country information, I am not satisfied the applicant was of adverse interest to Sri Lankan authorities at the time he departed Sri Lanka for India, or that he would be of any ongoing interest to Sri Lankan authorities on his return, now or in the reasonably foreseeable future, for any reason, including because of his Tamil ethnicity, as a result of the low-level support he provided to the LTTE, or for his attendance at Maaveerar Naal commemorations in Australia. In all the circumstances, I am not satisfied the applicant would be imputed with pro-LTTE or anti-government opinions for any reason, including should he participate in such commemorative events on his return to Sri Lanka, or that there is other than a remote risk of him being arrested and detained for any reason, such that he would be subject to mistreatment from authorities during detention, or that there is more than an extremely remote risk of him experiencing an enforced disappearance or kidnapping. Although I have accepted he may be monitored by authorities if he attends events in Sri Lanka commemorating those who died in the conflict, I am not satisfied that monitoring would amount to serious harm for the applicant.

#### *Returning asylum seeker and illegal departure*

36. The applicant claims to fear harm on return to Sri Lanka as a returning asylum seeker from Australia, and because he will be suspected of LTTE links. He claims he will be questioned by the CID on arrival at the airport, that he will be arrested and detained, and mistreated during detention. The delegate also considered the risk he would be harmed as a result of having departed Sri Lanka illegally.
37. I have accepted the applicant departed Sri Lanka illegally and travelled to India in about 2007, that he departed India illegally by boat and travelled to Australia in April 2013, and that he has never held a Sri Lankan passport. Sri Lankans without passports can re-enter the country on temporary travel documents. I consider it highly likely as a result of the manner of his return, using such documents, the applicant will be identified as an asylum seeker returning from Australia, and who departed Sri Lanka illegally.
38. DFAT reports that most returnees, including those from Australia, are questioned upon return (usually at the airport) and, where an illegal departure is suspected, they can be charged under the *Immigrants and Emigrants Act (I&E Act)*. DFAT understands such people are processed by police located at the airport. The process often involves interviewing returning passengers, confirming their identity, contacting police in their claimed hometown, contacting claimed neighbours and family, and checking criminal and court records, and would identify someone trying to conceal a criminal or terrorist background, or trying to avoid court orders or arrest warrants.<sup>16</sup> I am not satisfied the applicant has a profile that would be of interest for those reasons. The applicant indicated at the SHEV interview that he had a copy of his Sri Lankan

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<sup>14</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

<sup>15</sup> UK Home Office, 'Report of a Home Office fact-finding mission to Sri Lanka', 20 January 2020, 20200123162928

<sup>16</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

birth certificate, and whilst in India he was previously issued with a temporary travel document, and I am satisfied Sri Lankan authorities would readily be able to confirm his identity.

39. At the earliest available opportunity after investigations are completed, police transport individuals charged with departing Sri Lanka illegally to the closest Magistrate's Court. The Court makes a determination as to the next steps for each individual. Should a magistrate not be available, for example because of a weekend or public holiday, those charged may be detained at the airport for up to two days. Although DFAT describes this as occurring in a 'holding cell', the UK Home Office observed returnees sat in a 'waiting area or room' off the CID office at the airport, and that there was access to bathrooms, a prayer room, food and water, and the airport has a medical facility available to all passengers if required. The International Organization for Migration (IOM) provides support for returnees during the arrivals process, and unlike in the past, has not seen intense questioning in the last few years. The information before me does not indicate returnees are subject to mistreatment at the airport, and all returnees are treated according to standard procedures irrespective of ethnicity and religion.<sup>17</sup>
40. I am satisfied the applicant is likely to be questioned at the airport, and may be detained for a period of time at the airport, before being transferred to the court for the matter of his illegal departure to be dealt with. Country information indicates those who plead guilty receive a small fine for departing Sri Lanka illegally, which can be paid by instalments, and they are allowed to leave.<sup>18</sup> It is not in issue that the applicant departed illegally, and he has not suggested he would do other than plead guilty to the illegal departure. I consider it highly likely he would plead guilty to that offence, and I find that he would do so, that he may receive a fine, and will be allowed to leave. I am not satisfied the applicant would be arrested at the airport, that he would be mistreated during processing at the airport, or that the processes he will experience on return, including being questioned, detained for a short period of time, and being fined, amounts to serious harm for this applicant. On a separate basis, I am satisfied the *I&E Act* provisions relating to illegal departure are not discriminatory on their face, and they are not discriminatory in intent or implemented in a discriminatory manner. I find that the investigation, detention, prosecution or punishment of the applicant under the *I&E Act* for his illegal departure would not be the result of systematic and discriminatory conduct, and does not amount to persecution within the meaning of s.5J(4).
41. Those who plead not guilty to an illegal departure are usually granted bail, and are subject to discretionary bail conditions, which can involve monthly reporting to police at the returnee's expense, over a protracted period of time. The usual result is a fine. The penalties and processes associated with pleading not guilty to an illegal departure are equally non-discriminatory, and I am not satisfied they amount to persecution, should the applicant plead not guilty.
42. Thousands of Sri Lankans have returned from Australia and other western countries after unsuccessfully seeking asylum, and Sri Lankan authorities are reported to have said they are welcome to return.<sup>19</sup> There is no information before me to support that such returnees are targeted merely for seeking protection or being failed asylum seekers. As noted above, reports to the UK Home Office indicate that simply having supported the LTTE is now not enough for a person to be arrested, and the even former LTTE cadres would only be of interest if there was a pending criminal case against them, and even mere membership of the LTTE would not make

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<sup>17</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244 ; UK Home Office, 'Report of a Home Office fact-finding mission to Sri Lanka', 20 January 2020, 20200123162928

<sup>18</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

<sup>19</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

someone of interest. Although the applicant provided some support to the LTTE, including in the form of food and transport, he was never an LTTE member/cadre. Other than his attendance at commemorative events he has had no involvement in any activities that could be considered to be anti-government. I am not satisfied the applicant's profile is such that he would be of interest for those reasons on return.

43. I am satisfied the applicant would very likely return to live in the Northern Province, where he always resided in Sri Lanka, and where a number of his family members reside, including his wife and child. DFAT understands that some returnees have been the subject of monitoring by the authorities, involving visits to the returnees' homes and telephone calls by the CID. However, most returnees, including failed asylum seekers, are not actively monitored on an ongoing basis, and DFAT is not aware of such people being treated in a way that endangers their safety and security. Failed asylum seekers have also reported social stigma on return to their communities. However DFAT understands that societal discrimination is not a major concern for returnees, including failed asylum seekers, and some Tamils who had failed to secure asylum in Australia and returned to the Northern Province told DFAT they had not experienced societal discrimination, and they were able to reintegrate into their communities and find employment. DFAT understands reintegration issues are not due to failure to obtain asylum, but rather due to the employment and accommodation difficulties returnees may face.<sup>20</sup> I consider the applicant will have the support of his family, who will be able to provide him accommodation, and some assistance with obtaining employment.
44. Taking into account my finding above, that the applicant does not have an adverse risk profile, and the country information before me, I accept there is a low chance the applicant may be subject to a degree of monitoring by authorities on return, such as a visit or phone call. However, I am not satisfied the applicant has a profile such that there is a real chance he would be subject to ongoing monitoring, including taking into account his illegal departure and return as a failed asylum seeker. I also accept he may encounter some challenges re-integrating to society, and it is possible he may experience some social stigma. I am not satisfied any monitoring, social stigma or reintegration difficulties the applicant may experience, rises to the level of serious harm for him, whether considered separately or together. I am not satisfied the applicant faces a real chance of persecution in Sri Lanka, as a result of his illegal departure, or for being a returning failed asylum seeker from Australia, whether those factors are considered separately or together.
45. In all the circumstances, I am not satisfied the applicant faces a real chance of persecution now or in the reasonably foreseeable future for any of the reasons claimed, even when those reasons are considered together.

### **Refugee: conclusion**

46. 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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47. 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

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<sup>20</sup> DFAT, 'DFAT Country Information Report Sri Lanka', 04 November 2019, 20191104135244

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**

48. 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.
49. 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.
50. I accept on return to Sri Lanka it is likely the applicant will be subject to administrative processes, he may be detained for a short period of time, questioned and subject to penalties as a consequence of his illegal departure from Sri Lanka. I have not accepted the applicant was of adverse interest to authorities when he departed Sri Lanka, or that he would be a person of interest to the authorities on return for any reason, or that there is a real risk he would be mistreated during processing at the airport or any associated brief period of detention. I accept the applicant may face some challenges re-integrating into Sri Lankan society, and it is possible he may face some social stigma and a brief period of monitoring as a returning asylum seeker, and he may be monitored should he attend Maaveerar Naal commemorations. Although undergo the processes associated with arriving in Sri Lanka, receiving a fine, and experiencing monitoring and social stigma, may be stressful and hurtful, I am not satisfied the processes or penalty, the limited monitoring, any social stigma or reintegration challenges, he may face on return would amount to significant harm, as defined in the Act, for this applicant, including considering these matters cumulatively.
51. I have otherwise found there is not a real chance the applicant will face any harm on return to Sri Lanka for the reasons claimed, now or in the reasonably foreseeable future. For the same reasons, I am also not satisfied there is a real risk of any harm on return, including significant harm.

### **Complementary protection: conclusion**

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

### **Decision**

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



## Applicable law

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### ***Migration Act 1958***

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

In this Act, unless the contrary intention appears:

...

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

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

...

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

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

but does not include an act or omission:

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

...

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

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

...

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

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

...

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

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
  - (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
  - (c) for the purpose of intimidating or coercing the person or a third person; or
  - (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
  - (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant;
- but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

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

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

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

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

...

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

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

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

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

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



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

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

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

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

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

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

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

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

...

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

...

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

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

...

#### *Protection obligations*

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

#### *Determining nationality*

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