



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

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA21/09084

SRI LANKA  
IAA reference: IAA21/09085

SRI LANKA  
IAA reference: IAA21/09087

SRI LANKA  
IAA reference: IAA21/09089

SRI LANKA  
IAA reference: IAA21/09086

SRI LANKA  
IAA reference: IAA21/09088

Date and time of decision: 24 May 2021 11:15:00  
J Jennings, Reviewer

**Decision**

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The IAA affirms the decision not to grant the referred applicants protection visas.

*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 applicants are a family group comprising parent applicants, Applicant 1 (IAA21/9084) and Applicant 2 (IAA21/9089), and their four children, Applicant 3 (IAA21/9086), Applicant 4 (IAA21/9085), Applicant 5 (IAA21/9087) and Applicant 6 (IAA21/9088).
2. Applicants 1 to 5 were born in Sri Lanka and came to Australia in 2013 and claim to be Sri Lankan citizens; Applicant 6 was born in Australia in [year] and is described as stateless.
3. On 8 September 2017 the applicants lodged a combined application for Safe Haven Enterprise Visas (SHEV), Subclass 790. The applicants were assisted by a representative who was also appointed as the recipient for correspondence.
4. The applicants are Tamils. Applicant 1 advanced protection claims in his protection visa application; he fears harm in Sri Lanka because of his Tamil ethnicity and imputed links to the Liberation Tigers of Tamil Eelam (LTTE).
5. Applicant 1 was invited to attend an interview to discuss his protection claims with a delegate of the Minister for Immigration (the delegate). The invitation dated 23 March 2021 was sent to his representative. On 8 April 2020 the applicants' representative contacted the department and advised they had received no instructions from the applicant, would not be attending the interview, and provided the department with the applicants' current email contact details.<sup>1</sup> Departmental officers attempted to telephone Applicant 1 on 9 April 2021 without success; a message was left reminding the applicant of the interview and asking he contact the department to confirm his attendance. No response was received from the applicant. Applicant 1 did not attend the scheduled interview on 12 April 2021 and the department made further unsuccessful attempts to contact him by telephone on that day and on the next day.
6. A delegate refused to grant the visas on 26 April 2021. The decision notification was sent to the representative.

### Information before the IAA

7. I have had regard to the review material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
8. The review material outlines attempts made by the department to invite Applicant 1 to attend an interview to discuss his protection claims and the follow-up attempts made to contact him in this regard. I am satisfied that Applicant 1 was appropriately notified of the interview by correspondence sent to his representative who was authorised to receive correspondence in regard to the protection visa application.
9. The IAA sent the applicants letters dated 30 April 2021 acknowledging the cases had been referred for review; these were addressed to the applicants' residential address and a courtesy copy was sent to the personal email address given in the protection visa application. The IAA made further attempts to contact Applicant 1 by telephone on 3 May and 10 May 2021; these calls were not answered and a message was left for the applicant requesting he

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<sup>1</sup> This was the same email address as that given in the protection visa application

return the call. No response has been received from the applicants in reply to the acknowledgement letters or the telephone message, nor have the letters or email correspondence been returned.

10. Noting the repeated unsuccessful attempts by both the department and the IAA to contact the applicants, including telephone calls and emails to the email address given in the protection visa application, I am not satisfied that any further attempts to correspond with the applicants are warranted. In the circumstances I have decided to proceed on the information before me without inviting the applicants to provide further information.

### **Applicants' claims for protection**

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11. The protection visa application was accompanied by a statutory declaration made by Applicant 1 in which he outlined his protection claims. In response to the question in the application form "is the applicant raising their own claims for protection" all other applicants responded "no" although in his statement of claims Applicant 1 referred to concerns of harm to his wife as a woman and to harm to Tamils in general.
12. The applicants' claims can be summarised as follows:

#### *Applicants 1 to 5*

- The applicants were born in Sri Lanka and are citizens of Sri Lanka. The applicants have provided documents in support of their identity.

#### *Applicant 6*

- The applicant was born in Australia and her birth has not been registered with the Sri Lankan authorities; she is stateless. The applicant's Australian birth certificate has been provided.

#### *All applicants*

- The applicants are Tamils.
- Applicants 1 to 5 departed Sri Lanka legally in 2013.<sup>2</sup> Their passports were taken from them en route to Australia.
- The applicants do not have Sri Lankan passports.

#### *Applicant 1*

- In 2008 the applicant was living and working in Colombo and travelling home on weekends. In November 2008 he was arrested by authorities on suspicion of having links with the LTTE and was detained for 15 days.
- The applicant had many problems with the Criminal Investigation Department (CID) who used to take him and his brothers and neighbours regularly for questioning on suspicion of LTTE connections.
- In September 2012 the applicant was abducted by men who demanded he pay them 10 lakhs to be released. The applicant's brother paid the money and the applicant was

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<sup>2</sup> I note the delegate's findings in this regard but Applicants 1 to 5 each declared in their protection visa applications they departed Sri Lanka legally

released approximately two weeks later. The applicant has since discovered his kidnappers were from the CID.

- After this the applicant moved to Colombo for work. He began receiving threatening telephone calls and demands for money. He was fearful for his safety and that of his family and arranged to leave Sri Lanka.
- The applicant fears that if he is returned to Sri Lanka he will be harmed because of his Tamil ethnicity and that he will be imputed as being associated with the LTTE and opposed to the Sri Lankan government because he is a Tamil from the north and has sought asylum in Australia.
- As a person with money he will be suspected of having financially supported the LTTE, they will suspect he is an LTTE member and a supporter of Tamil separatism or a person with information about the LTTE.
- The applicant fears the local authorities and paramilitary groups will come immediately looking for him on return to his home village.

#### *Female applicants*

- In the statement of claims Applicant 1 expressed concern that women are vulnerable to harassment exploitation discrimination and violence in Sri Lanka.
13. In the decision the delegate referred to the release of personal data in February 2014. However I note that no protections claims have been raised in this regard and none are evident to me.

#### **Refugee assessment**

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14. 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**

15. 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 citizenship*

16. Applicants 1 to 5 have consistently claimed to be Tamils from the Northern Province in Sri Lanka and have provided identity documents in support of their claimed identity. I accept the applicants' identity and nationality as stated and that Sri Lanka is the receiving country for the purpose of this review.
17. Applicant 6 was born in Australia to Sri Lankan parents and a copy of her birth certificate has been provided. I accept the contention that Applicant 6 is stateless. Although Applicant 6 has never lived in any country other than Australia, I consider that Sri Lanka is the receiving country against which her protection claims should be assessed, as this is the country of nationality of her parents and the country to which the family would be returned if their claims were unsuccessful.
18. I accept that the applicants are Tamil.

### *Applicant 1 - CID claims*

19. Consistent with his claims in the protection visa application the applicant was interviewed by immigration officers in July 2013 soon after arrival in Australia and at that interview he stated he had been detained by the authorities for 15 days in Colombo in 2008. The applicant's account that he came to the attention of the CID at this time, had other problems with them and that he and other Tamils had other encounters with them is consistent with the country information reporting the situation for Tamils at the time. Throughout the civil war Tamils were subject to stringent security which involved identity checks and questioning as to their activities and any links to the LTTE.<sup>3</sup>
20. I accept as plausible that the applicant was detained on one occasion in Colombo for 15 days as claimed and, noting he originated from the former LTTE controlled north, it is plausible the authorities held him for a period while they conducted investigations. I accept he had other encounters with the authorities. However it is important to note that the applicant was released and was not charged with any security offences or taken into rehabilitation on this occasion, or on the other occasions when he had interactions with the CID, or at the end of the civil war. The country information advises that Tamils considered to have been LTTE members or to have had LTTE links of concern were detained in rehabilitation, or prosecuted for offences, at the end of the civil war.<sup>4</sup> That the applicant was not so detained indicates that after initial inquiries the authorities did not have any ongoing concerns and he was able to continue living and working in the community.
21. While I accept that the applicant may have ongoing concerns as to his safety from this incident country information indicates that since the end of the civil war and the applicant's departure from Sri Lanka in 2013 there has been significant improvement in the security situation and Tamils are no longer subjected to the same monitoring and harassment that was evident throughout the civil war. The indications from various international agencies are that the Sri Lankan government has moved away from the systematic program which

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<sup>3</sup> Human Rights Watch, "Return to War: Human Rights under Siege", 1 August 2007, CIS15356

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

operated after the civil war of targeting of Tamils and identification and detention and rehabilitation of LTTE members/supporters.<sup>5</sup>

22. The UK Home Office has commented on the profile of Tamils and returning asylum seekers who are of interest to the authorities and the Home Office's May 2020 report on Tamil separatism noted that the Sri Lankan government's present objective is to identify Tamil activists who are working for Tamil separatism and to destabilise the unitary Sri Lankan state. The indications are that being of Tamil ethnicity in itself would not warrant international protection, nor would being from the north. Those of concern are past members of the LTTE or those with a connection to the LTTE who are active in post-conflict Tamil separatism. Specifically the UK Home Office report identified those of interest to the authorities and indicates that this is "individuals who are, or are perceived to be, a threat to the integrity of Sri Lanka as a single state because they are, or are perceived to have a significant role in relation to post-conflict Tamil separatism within the diaspora and/or a renewal of hostilities within Sri Lanka".<sup>6</sup> There is no indication the applicant, or the other applicants, have been so involved.
23. I am not satisfied that the detention in 2008 or other interactions with the CID lead to a finding the applicant was imputed with a profile as a security concern; I am satisfied that these encounters were part of the security measures in place at the time to monitor the general Tamil community and that after completing their checks the authorities had no ongoing adverse interest in the applicant. Noting the country information reporting the shift in government concerns overtime I am not satisfied there is a real chance the applicant would face harm in Sri Lanka on this basis now or in the reasonably foreseeable future.

*Applicant 1 - abduction claims*

24. The applicant advanced the claim he was abducted in 2012 at the arrival entry interview conducted in Australia in 2013. The account given in the statement of claims is largely consistent with that previously given, however in this later statement he advised he was beaten and tortured by his abductors.
25. The delegate has noted the similar abduction reported by Human Rights Watch of a Tamil businessman in 2007 and DFAT has noted the instances of 'white van abductions' where individuals were abducted by unknown perpetrators in unmarked vehicles.<sup>7</sup> DFAT also noted the UN OISL report of frequent occurrences of abductions for ransom, particularly in the north, many of which were attributable to government forces.<sup>8</sup> In the context of the country information I find the applicant's claim to be plausible and I accept he was abducted in 2012 and that his family paid a ransom for his release and that he received further threatening demands for money. I have some concern as to the account that the abductors were from the CID and I find it difficult to accept that they would have identified themselves as such to the applicant's brother, as described in the statement of claims. However the country information before me confirms that the authorities were often complicit in such crimes and I accept as plausible that his abductors were from the CID or other authorities, however I am

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<sup>5</sup> US Department of State, "Country Reports on Human Rights Practices for 2019 - Sri Lanka", 11 March 2020, 20200312151418; UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil Separatism", May 2020, 20200527172009; DFAT, "DFAT Country Information Report - Sri Lanka", 4 November 2019, 20191104135244

<sup>6</sup> UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil Separatism", May 2020, 20200527172009

<sup>7</sup> Human Rights Watch, "Return to War: Human Rights under Siege", 1 August 2007, CIS15356; DFAT, "DFAT Country Information Report - Sri Lanka", 4 November 2019, 20191104135244

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

not satisfied that this indicates an adverse interest in him beyond the ransom opportunity. Nor am I satisfied that there is more than remote chance the applicant would be harmed in a similar manner should he return to Sri Lanka now or in the reasonably foreseeable future.

26. The country information advises that such disappearances are no longer common, and while they are still known to occur this has decreased considerably in the post-war period. DFAT assesses that wealthy Sri Lankans face a low risk of extortion or kidnapping for ransom.<sup>9</sup>

*All applicants - Tamils*

27. In his decision the delegate cited country information regarding the situation for Tamils in Sri Lanka, including more recent information on events since the applicants lodged their protection visa application in 2017 and he noted the return to power of the Rajapaksa government. I have considered reports of ongoing harm to Tamils in Sri Lanka and the remaining military presence in the north and I accept that as Tamils the applicants may be concerned as to their safety in Sri Lanka.
28. I have noted above the past abuse of Tamils and the improvement in the security situation since the applicants departed Sri Lanka. Although a degree of societal discrimination endures in Sri Lanka DFAT assess that Tamils face a low risk of official or societal discrimination and the UK Home Office advises that discrimination towards Tamils exist but they do not suffer persecution simply for their Tamil ethnicity. The US Department of State report describes systematic discrimination as being apparent in university education, government employment, housing and health services.<sup>10</sup>
29. Despite any discrimination he may have faced in education, employment, housing or similar Applicant 1 was in regular employment with a “number of contracts” in Sri Lanka prior to his departure and described himself as earning “a fair sum of money”. Considering the country information before me I am not satisfied that any discrimination the applicants may face in Sri Lanka now or in the reasonably foreseeable future would amount to serious harm.
30. I accept there is credible reporting of the brutality of the government of past President Mahinda Rajapaksa in which human rights abuses were committed both during the civil war and in the immediate aftermath and that many agencies and the general Tamil community have expressed concern as to the return of the Rajapaksas to power.<sup>11</sup>
31. However, the election of the coalition Sirisena government in 2015 saw a significant shift in respect for human rights for Tamils and the general population in Sri Lanka. Although there has been ongoing criticism of the slow pace of reform the change of government in 2015 provided Sri Lanka a chance to break from the repressive policies of the past which largely targeted the Tamil population. I note the concern about the incoming Rajapaksa government in the light of the past but Gotabaya and Mahinda Rajapaksa are returning to government in a very different environment from that in place when they were implicated in human rights violations. It is important to note the context of the repressive actions of the former Rajapaksa government being at the end of the civil war and in the aftermath of the war. It was in this environment that the excesses of human rights abuse were committed and

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<sup>9</sup> DFAT, “DFAT Country Information Report – Sri Lanka”, 4 November 2019, 20191104135244

<sup>10</sup> DFAT, “DFAT Country Information Report – Sri Lanka”, 4 November 2019, 20191104135244, UK Home Office, “Report of a Home Office fact-finding mission to Sri Lanka”, 20 January 2020, 20200123162928; US Department of State, “Country Reports on Human Rights Practices for 2019 - Sri Lanka”, 10 March 2020, 20200312151418

<sup>11</sup> UK Home Office, “Report of a Home Office fact-finding mission to Sri Lanka”, 20 January 2020, 20200123162928; Human Rights Watch, “Return to War: Human Rights under Siege”, 1 August 2007, CIS15356

continued to be committed in the aftermath of the war in attempts to quash any resurgence of the LTTE.<sup>12</sup>

32. I have noted reports of incidents since the election of the Rajapaksa government. The Office of the United Nations High Commissioner for Human Rights reports monitoring of Tamils following the election of President Gotabaya Rajapaksa but that those of interest are Tamils with certain profiles such as political activists and journalists, particularly those critical of alleged war crimes. Similarly the Human Rights Documentation Centre noted reports of harm to Tamil civilians in May 2020 the victims of which were largely journalists, activists and those involved in politics.<sup>13</sup> Noting the circumstances and profiles of those who have come to attention in these reports I am not satisfied that they give rise to a real chance the applicants would be harmed should they return to Sri Lanka. The indications from various international agencies are that the Sri Lankan government has moved away from the systematic program which operated after the civil war of targeting of Tamils and identification and detention and rehabilitation of LTTE members.<sup>14</sup>
33. DFAT assesses that the risk of torture perpetrated by either military, intelligence or police forces has decreased since the end of the civil conflict and is no longer state-sponsored.<sup>15</sup> I note the cautions in the DFAT report that verification of torture claims is complex as many allegations are made anonymously, often to third parties and that reports of torture carried out by Sri Lankan military and intelligence forces during the war and in its immediate aftermath are credible, but that DFAT is unable to verify allegations of torture since 2016 and local sources were not aware of recent cases of former LTTE members being subjected to torture. Similar to DFAT the UK Home Office in regard to International Truth & Justice Project reporting commented that a representative from the northern province community was not aware of any such incidents and had not received information on this from contacts in the north and east. Additionally reporting by a UK non-government organisation the Human Rights Commission advised they had not seen any evidence of the torture reported and no such cases had been brought to their attention in Sri Lanka.<sup>16</sup>
34. I note concern from various agencies at the continued use of the PTA. Although “effectively suspended” in 2016 the PTA was used “sporadically” from 2016 and was used widely along with the now-lapsed Emergency Regulations to detain persons allegedly involved in the 2019 Easter Sunday terrorist attacks.<sup>17</sup> The PTA sits outside the regular criminal law and contains special provisions on detention and the admissibility of confessions and allows for arrests for unspecified “unlawful activities”, permits detention for up to 18 months without charge and provides that confessions are legally admissible. But the indications are that recent application of the PTA has been largely directed at the Muslim population as a result of the 2019 attacks. Other recent applications have been two arrests for politically motivated assassination plots and in relation to the murder of two police officers and cases involving the seizure of explosives and drugs.<sup>18</sup> DFAT is unable to verify how many individuals have been

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<sup>12</sup> DFAT, “DFAT Country Information Report – Sri Lanka”, 4 November 2019, 20191104135244; UK Home Office, “Country Policy and Information Note Sri Lanka: Tamil Separatism”, May 2020, 20200527172009

<sup>13</sup> Office of the United Nations High Commissioner for Human Rights, “Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka”, 18 February 2020, 20200221140652; INFORM Human Rights Documentation Centre, “Repression of Dissent in Sri Lanka: 1st - 31st May 2020”, 29 June 2020

<sup>14</sup> UK Home Office, “Report of a Home Office fact-finding mission to Sri Lanka”, 20 January 2020, 20200123162928; UK Home Office, “Country Policy and Information Note Sri Lanka: Tamil Separatism”, May 2020, 20200527172009

<sup>15</sup> DFAT, “DFAT Country Information Report – Sri Lanka”, 4 November 2019, 20191104135244

<sup>16</sup> UK Home Office, “Report of a Home Office fact-finding mission to Sri Lanka”, 20 January 2020, 20200123162928

<sup>17</sup> DFAT, “DFAT Country Information Report – Sri Lanka”, 4 November 2019, 20191104135244

<sup>18</sup> DFAT, “DFAT Country Information Report – Sri Lanka”, 4 November 2019, 20191104135244



detained under the PTA since 21 April 2019 but the country information does not support a finding the PTA is being used widely or systemically against the Tamil population.

35. The UK Home Office spoke with a range of agencies and informed sources about conditions and the security situation in Sri Lanka, particularly for Tamils, in its fact finding mission in September and October 2019. These agencies included the UNHCR, the International Organization for Migration, the Human Rights Commission of Sri Lanka and journalists, human right activists and non-government organisations and importantly Tamil politicians, including from the Tamil National Alliance. In regard to the treatment of Tamils the report comments that “most sources noted that Tamils are not specifically targeted and do not suffer persecution just for being a Tamil”. The report noted that since the end of the civil war the focus of the Sri Lankan government has changed and most sources noted that Tamils are not specifically targeted and do not suffer persecution just for being Tamil but that “certain Tamils may be subject to closer scrutiny” indicating that these would be political activists and journalists.<sup>19</sup>
36. I am not satisfied that the applicants would experience harm in Sri Lanka because of their Tamil ethnicity, including being from the north. I am not satisfied that the information before me indicates that President Rajapaksa or his political supporters or his Sri Lanka Podujana Peramuna party (SLPP), intend to introduce repressive policies that would impinge on the Tamil population in general or Tamils with a profile similar to that of the applicant, or that such has been the result since the SLPP’s, success at the February 2018 local elections and ongoing political influence and subsequent success in the 2020 parliamentary elections.<sup>20</sup>

#### *Female applicants*

37. Violence against women is prevalent in Sri Lanka; the US Department of State reports sexual harassment is common and particularly widespread on public transport and women’s organisations report responses from the authorities to reports of violence to be inadequate.<sup>21</sup> DFAT reporting is that this is mostly evident in the north and east due to the high number of female-headed households as a result of the high male death rates during the civil war. Widows and other single women are particularly vulnerable to abuse. However, in 2017 the UN Special Rapporteur noted a decrease in the incidence of sexual assault by the military largely due to reducing militarisation.<sup>22</sup>
38. There is no indication in the information before me that the female applicants would be living in Sri Lanka in other than the family group or be without male protection and would be vulnerable to the harm experienced by single women. I note in the statement of claims the concern that the Sri Lankan authorities have a long history of mistreating Tamil women, however I take into account the improvement in the security situation in Sri Lanka since the end of the civil war and the improvement in the treatment of Tamils by the authorities.
39. I am not satisfied that there is more than a remote chance the female applicants would face harm in Sri Lanka as women.

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<sup>19</sup> DFAT, “DFAT Country Information Report – Sri Lanka”, 4 November 2019, 20191104135244

<sup>20</sup> DFAT, “DFAT Country Information Report – Sri Lanka”, 4 November 2019, 20191104135244; UK Home Office, “Country Policy and Information Note Sri Lanka: Tamil Separatism”, May 2020, 20200527172009

<sup>21</sup> US Department of State, “Country Reports on Human Rights Practices for 2019 - Sri Lanka”, 10 March 2020, 20200312151418

<sup>22</sup> DFAT, “DFAT Country Information Report – Sri Lanka”, 4 November 2019, 20191104135244; UK Home Office, “Report of a Home Office fact-finding mission to Sri Lanka”, 20 January 2020, 20200123162928; US Department of State, “Country Reports on Human Rights Practices for 2019 - Sri Lanka”, 10 March 2020, 20200312151418

*All applicants - returning asylum seekers*

40. I note the concern in the statement of claims by Applicant 1 that he would be imputed with a profile of concern including as a supporter of Tamil separatism as a returning asylum seeker to Sri Lanka, however I am not satisfied the country information supports a finding that there is a real chance he, or the other applicants would be harmed on this basis. On the evidence before me I am not satisfied that the status of Applicant 1, or that of the other applicants, as failed asylum seekers would attract adverse attention on return to Sri Lanka. I accept that there are reports of mistreatment of returned asylum seekers who have an actual or imputed profile of concern to the authorities; media and other reports are that prominent activists may attract attention.<sup>23</sup>
41. I have not accepted that Applicant 1 was imputed with a profile of concern when he departed Sri Lanka or that he would be now or in the foreseeable future as a returning asylum seeker and recent reporting indicates that asylum seekers who come to attention on return now to Sri Lanka do so for reason of a profile of being active in Tamil separatist activities.<sup>24</sup> There is no indication before me that any of the applicants have been so involved.
42. I am not satisfied that the applicants would face any harm as returning failed Tamil asylum seekers.
43. I accept the applicants do not have passports and would need to be issued a travel document to return to Sri Lanka. Returnees travelling on temporary travel documents, such as the applicants would be, are subject to an investigative process to confirm identity on arrival and checks are made to identify those suspected of concealing a criminal or terrorist background. This may involve interviewing the returnee or checking with local police in the returnee's home area. These checks may take several hours to complete and as involuntary returnees are processed in groups further delays may occur until all returnees are processed. DFAT assesses that returnees are treated according to standard procedures, regardless of their ethnicity and religion, and are not subjected to mistreatment during their processing at the airport.<sup>25</sup> I do not consider any likely questioning of the applicants by the authorities at the airport on arrival or any brief period held by the authorities to conduct such investigations would amount to serious harm for the applicants for the purposes of s.5J of the Act. I am not satisfied the applicants would face harm in this process.
44. Considering the totality of the material before me, I am not satisfied that there is a real chance the applicants would experience persecution on return to Sri Lanka now or in the reasonably foreseeable future.

**Refugee: conclusion**

45. The applicants do not meet the requirements of the definition of refugee in s.5H(1). The applicants do not meet s.36(2)(a).

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<sup>23</sup> Asian Tribune, "Key LTTE activist in Norway - Nadaraja Sethuparan arrested at BIA" , 23 June 2020, 20200624105850; Asian Tribune, "Accidental Bomb Blast Identified an Active LTTE Intelligent Agent" , 7 July 2020, 20200709151217; Colombo Page, "Ex-LTTE cadre, wife and sister arrested with firearms, explosives", 13 October 2019, 20191014130858

<sup>24</sup> DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244; UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil Separatism", May 2020, 20200527172009

<sup>25</sup> DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244

## Complementary protection assessment

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46. Under s.36(2)(aa) of the Act, a criterion for a protection visa is that the applicant is a non-citizen in Australia (other than a person who is a refugee) in respect of whom the Minister (or Reviewer) is satisfied Australia has protection obligations because there are substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm.

### Real risk of significant harm

47. Under s.36(2A), a person will suffer 'significant harm' if:
- the person will be arbitrarily deprived of his or her life
  - the death penalty will be carried out on the person
  - the person will be subjected to torture
  - the person will be subjected to cruel or inhuman treatment or punishment, or
  - the person will be subjected to degrading treatment or punishment.
48. The expressions 'torture', 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' are in turn defined in s.5(1) of the Act.
49. As noted above I have accepted that the applicants would be subject to an investigative process to confirm identity on arrival but that this would not amount to serious harm. Nor do I accept it would amount to significant harm. This process does not amount to the death penalty, arbitrary deprivation of life or torture and the evidence does not indicate there is an intention to inflict pain or suffering or severe pain or suffering or cause extreme humiliation.
50. Nor am I satisfied that any discrimination the applicants may face as Tamils would amount to significant harm.
51. I have otherwise found there is not a real chance that the applicants face harm on any of the bases claimed. Noting that the "real risk" test for complementary protection is the same standard as the "real chance" test,<sup>26</sup> and based on the same information, and for the reasons set out above, I am also satisfied that there is not a real risk that the applicants would face significant harm for these reasons.

### 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 applicants will suffer significant harm. The applicants do not meet s.36(2)(aa).

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<sup>26</sup> *MIAC v SZQRB* (2013) 210 FCR 505

### **Member of same family unit**

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53. Under s.36(2)(b) or s.36(2)(c) of the Act, an applicant may meet the criteria for a protection visa if they are a member of the same family unit as a person who (i) is mentioned in s.36(2)(a) or (aa) and (ii) holds a protection visa of the same class as that applied for by the applicant. A person is a 'member of the same family unit' as another if either is a member of the family unit of the other or each is a member of the family unit of a third person: s.5(1).
54. As none of the applicants meets the definition of refugee or the complementary protection criterion, it follows that they also do not meet the family unit criterion in either s.36(2)(b) or s.36(2)(c).

### **Decision**

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The IAA affirms the decision not to grant the referred applicants protection visas.

## Applicable law

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

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

In this Act, unless the contrary intention appears:

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***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.