



**Australian Government**  

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**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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INDIA

IAA reference: IAA21/09408

Date and time of decision: 30 July 2021 13:50:00

M Anderton, 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 applicant claimed to be stateless having arrived in Australia by boat in June 2013 from India. The applicant claimed to have been born in Sri Lanka and fled to India with his family when he was [age].
2. On 3 July 2017 the applicant applied for a safe haven enterprise visa. In his visa application the protection claims focused on fear of returning to Sri Lanka. At his protection interview he was also asked why he didn't want to return to India. His claims revolved around his uncle and father's LTTE involvement in Sri Lanka prior to 1990 and his limited rights living in India as a refugee without citizenship since he was [age] years old.
3. On 22 June 2021 the delegate refused the visa. The delegate found the applicant may be entitled to Sri Lankan citizenship if he applied under the Grant of Citizenship to Persons of Indian Origin (Amendment) Act no 6 of 2009, but that presently the applicant was stateless. So assessed the applicant's claims against India as his country of former habitual residence. The delegate found the applicant did not meet the definition of refugee or was owed complementary protection obligations if returned to India.

### Information before the IAA

4. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
5. On 16 July 2021 the applicant's representative provided submissions and new information, which included the applicant's unsigned statement.
6. The new information was:
  - a. As an ethnic Tamil refugee and stateless person living in India in refugee camps he was seriously harmed by the police several times. Because he was a young Tamil male police wanted to monitor and control people like him because they were assumed to have LTTE links or supporter. The family was monitored because of his work as [an occupation] for the LTTE in 1989 and were monitored in India on suspicion of LTTE support. He cannot remember the dates he was harmed as he focused on survival, not dates. On 7 or 8 occasions he was detained and physically assaulted by police coming or going to the refugee camps. On 2 occasions he was beaten and detained at the police station because he was a Tamil refugee with no rights in India. After his arrests the family decided to move camps because he was frequently targeted. Sometimes his family paid bribes to police to release him from prison. The physical assaults, monitoring and adverse attention did not stop until he left India. As a stateless refugee he will face what he faced in the past, which will continue. He does not believe that the Indian authorities will accept him as he is not an Indian citizen. In 2007 the Indian government announced any person who left the refugee camps to go to another country would not be accepted. The risks as a stateless Tamil male he faces on return are greater. He is afraid the Indian authorities will see him as a security risk or terrorist threat. They might assume as he failed asylum in Australia this was because he was a security risk. He is afraid it may be worse for him if deported from Australia.

- b. In the representative's submission it was claimed the applicant may also face extortive behaviour as he did in the past should he come to the adverse attention of Indian authorities. His deportation from Australia may carry with it a perception that he has available funds to be open to extortion and other forms of harm.
7. The applicant stated he did not provide this information earlier because no one asked him. The questions asked by the delegate and previous representative were focused on his Sri Lankan citizenship, but he was not asked anything further about his experiences in India. The delegate did not ask in detail about his serious problems in India. He is not a lawyer and did not understand he would be found stateless and could be returned to India. If he understood this or if his representatives had been given the information, the applicant would have provided a full account of his serious harm experiences in India. Most of the interview and post interview submissions focussed on Sri Lanka and the delegate's concerns.
8. It was submitted the information was credible and highly relevant as it may have persuaded the delegate about the applicant's serious harm in India and fear of return. It was submitted there were exceptional circumstances and the information could not have been provided before a decision because the applicant was not asked by his representatives or the delegate about his specific experiences in India, not legally trained, no knowledge of the ability to provide information on his own behalf and his representatives did not do so on his behalf. He could not have focussed on the breadth of his Indian experiences when so much emphasis was on evidence he was not a Sri Lankan, which was also the focus of post interview submission about Sri Lankan citizenship laws.
9. I have considered the applicant's and representative's arguments. In respect of the information in paragraph 6(a) above, I do not accept the applicant could not have provided the information before the decision. While there was a focus at the protection interview on the applicant's citizenship status, he was also asked about his Indian experiences. It is not correct that he was only asked once about India at the end of the interview. He was asked twice to elaborate on what difficulties he had had in India and what he felt would happen to him if he returned to India. This was  $\frac{3}{4}$  into the interview, not at the end. Further, he was asked about living in multiple Indian refugee camps also and made no mention of moving due to being targeted or arrested by police. Further, it was evident that the applicant understood both Sri Lanka or India were return possibilities. At the end of the interview the applicant again referred to his fears of how he would be treated if he had to return to Sri Lanka or to India.
10. The applicant also provided 2 statements (30 June 2017 and post interview statement dated 4 June 2021). I note in his 30 June 2017 statement the applicant stated that he did not know whether he was a Sri Lankan citizen and believed he might be considered stateless. I note also that the statement addressed his time in Sri Lanka and his time in India, but there was no mention of his claims of suffering serious harm, such as beatings or arrest or being targeted by police in India in past. His 30 June 2017 statement also mentioned they moved to different camps whenever there was an overflow, or if there was any drama or conflict in the camp. However, he made no mention of moving camps because he was targeted, arrested or beaten by police. Further, his representative provided lengthy post interview submissions (19 pages) and country information, which addressed at length the persecution reasons if returned to *India* and provided country information about that (see Part C of the submission reasons for persecution). The submissions clearly submitted and contemplated that the applicant was stateless, neither a citizen of India or Sri Lanka, and set out the reasons why. It was submitted the client's feared persecutor was the Indian state and he faced serious harm in India. The representative also made submissions, in the alternative if the applicant's

country of former habitual residence was Sri Lanka. The submissions reiterated the applicant's claims as well, which included his Indian experiences, but did not include anything about his arrests, detention, being targeted.

11. While the delegate was still unsure of the applicant's citizenship at the protection interview, she asked about the applicant's Sri Lankan and Indian experiences and what he feared upon return. The applicant and his representative were clearly on notice and aware before the delegate's decision that the applicant may be regarded as stateless and that his claims may be assessed against India his country of former habitual residence. As discussed above, lengthy post interview submissions addressed this also.
12. I do not accept that the applicant was not asked specifically about his Indian experiences either by the delegate or his representatives. There have been many opportunities throughout the application process when he was asked. Even with the initial focus on the applicant's citizenship, the applicant's experiences in India were covered many times in different forums. While June 2017 statement made claims against Sri Lanka, it also referred to problems he had in India, which indicate he was asked about his Indian experiences. He also stated he believed he was stateless. Further, since then the applicant and his representative have addressed claims in respect of both Sri Lankan and India. His Indian experiences are covered in his statements as well as in detailed submissions about fear of return to India. It is not credible that he would refer to some minor discrimination experiences in India and not to serious harm experiences, whether specifically asked or not. Further, the representatives provided lengthy submissions about fear of return to India, so I do not accept that the applicant's Indian experiences and fears were not discussed. I do not accept that the applicant or his representatives were not aware of the need to address fear of harm if returned to India. I do not accept he was not able to provide information about serious harm claims in India due to the focus on citizenship issues. I do not accept the submissions focussed on citizenship, rather they focussed on the applicant's fears of harm upon return to India as his former habitual residence.
13. While not a lawyer, the applicant is well educated ([specified] degree) and he was represented by lawyers, who made lengthy submissions and statements on his behalf. Further, I do not accept he was not capable of making his own claims or submissions. It was evident that he did so at the end of the interview also when he spoke in English and referred to his google searches about citizenship and his fear of return to both India and Sri Lanka. Further, he was warned it was his responsibility to provide all his claims and that he might not get another opportunity. The applicant was also asked if there was anything else he wanted to add.
14. In the circumstances, if he had been seriously harmed, arrested, detained or beaten and targeted by Indian authorities for his whole life in India, it is difficult to believe that he would not have mentioned that given many opportunities to explain his Indian experiences. He mentioned discrimination and having to sign in and out of the camp. If he had been arrested or detained beaten, I find it difficult to believe he would not mention the more serious claims. He mentioned his father's beating and arrest in Sri Lanka but made no mention of his own claimed many beatings. Further when asked about his multiple moves to other refugee camps, the applicant made no mention that the reason was because he was targeted and arrested by police. During that discussion, I find it difficult to believe that he would not mention that. Further, the applicant provided little detail and it is not credible that he would not recall when the arrests or detentions occurred. Further, the applicant is an intelligent young man. He completed a [qualification] and (according to his protection interview evidence), also a [specified] degree. It was evident he understood and could speak English at

the protection interview. It is just not credible that the applicant suffered such harm and failed to mention it given the many opportunities, his representation, his stateless claims and his education.

15. Further, it is not credible that as failed asylum seeker the Indian authorities would consider him a security risk and the applicant offered no country information in support. I consider such a claim is less than speculative and not credible.
16. Further, if the Indian authorities were not to accept him, I do not accept that would have affected the consideration of the claims as the assessment is based on former habitual residence and not whether India will accept his return to India by provision of a travel document.
17. In respect of paragraph 6a, I am not satisfied that either s.4783DD(b)(i) or (b)(ii) is met.
18. Further, I do not consider there are exceptional circumstances. As discussed above I do not accept that the applicant was not asked about specifically about his Indian experiences. I do not accept that he was not on notice that he may be assessed as stateless and for return to India. The applicant and his representative in fact made those submissions to the delegate (2017 pre protection interview statement and post interview submissions). For similar reasons set out above, I am not satisfied there are any exceptional circumstances to consider the information in paragraph a above.
19. I have not considered the new information in paragraph 6a above.
20. In respect of the new information set out at paragraph 6b, for similar reasons set out above, I consider there was plenty of opportunity to provide this information to the delegate. I am not satisfied as to s473DD(b)(i).
21. The applicant has not claimed past extortion (other than in paragraph 6a, which I have not found to be credible and not considered). However, I am satisfied that the fear of extortion upon return may on its face may be capable of belief on its own and I am satisfied as to s473DD(b)(ii).
22. However, there was little information about the circumstances of the claimed extortion fear. While the information was in the submissions, it was not in the applicant's post interview statement or statement provided to the IAA (or any other claims).
23. Even if capable of belief on its face, I am not satisfied that there are exceptional circumstances to consider the information as the applicant has not claimed past extortion and there is little information before me about the claimed possible future extortion circumstances or country information in support of the claim. As discussed above, I have not accepted the submissions and explanations above in relation to late disclosure of the information in paragraph 6a above and adopt similar reasons in respect of late disclosure of 6b. Further, the basis of any exceptional circumstances as pertains to 6b information has not been explained and there are none apparent to me. I am not satisfied that either s.473DD(a)and (b) is met.
24. I have not considered the new information in paragraph 6b above.

## Applicant's claims for protection

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

- According to his arrival interview his uncle was an LTTE member and his father was suspected as LTTE and was arrested many times. The LTTE also started to forcibly recruit people, so because of these problems the family moved to India. The applicant witnessed a lot of shooting as a child in Sri Lanka. They have all his father's records and it is not safe to return to Sri Lanka. In India living without citizenship was a painful experience as they did not have any rights, could not find work on their own, there was discrimination. Even though he finished a [qualification] he could not find a job. He started doing a [specified] degree and attended 30 interviews but did not find anything. The applicant's father was a refugee and he is. They cannot buy land in India or get a job and they were harassed by the crime branch as they had to sign in and out of the refugee camp. There was no freedom or independence. He came to Australia for a peaceful and independent life
- According to his 2017 application, the applicant is a Tamil Hindu. While born in Kandy, Sri Lanka, he lived in India since he was [age] years old at refugee camps in Tamil Nadu.
- He believed he was stateless. His birth certificate describes his parents as Indian Tamils. His parents were born in Sri Lanka. His grandparents were born in India, but came to Sri Lanka to work. Under the Indo-Ceylon agreement Act of 1967 Sri Lankan citizenship was offered to Indians living in Sri Lanka, but he is not sure whether his grandparents or parents applied for registration. Copies of his grandmother's Indian identity document and her brother's election commission identity card were provided. The applicant's mother applied for Indian citizenship in 2019.
- In 1985 his family moved to [City 1] because of community violence. They moved to [Town 1] which was LTTE controlled. In 1988 his uncle joined the LTTE. He remembers seeing his uncle in his uniform with a gun the last time he saw him.
- In 1989 his father was detained by authorities. The LTTE had forced him to use his boat to travel to India with goods from Sri Lanka. The authorities came to their house, rounded everyone up, asked about his uncle's whereabouts and his father's identity documents. When they saw his fishing licence, he was taken away and detained for 15 – 20 days. He was beaten and afterwards went to the hospital for treatment. The applicant believes his father's death in 2015, caused by a blood clot, was related to chest pain inflicted at the beating.
- Tamils were being detained and killed but it was worse for Indian Tamils because they could speak Indian Tamil and therefore make pickups in India for the LTTE and they suffered discrimination from Sri Lankan Tamils, which still goes on.
- The LTTE came to the house when he was young and tried to recruit the applicant's brother. The family left illegally by boat for India in 1990 as they were fearful of harassment from the army, or being forcibly recruited by the LTTE.
- Two or three days after they arrived at [the named] refugee camp, the Indian CID questioned them about their identities, took photos, issued them with refugee identity cards and took them to another refugee camp.
- Life as a refugee in India was hard. He was able to attend school but there was a lot of discrimination, their mobility was restricted as they had to sign in and out of the camp. As a refugee and Sri Lankan Tamil he could not get work or attain an official drivers' licence, or own land or assets in India.

- If returned to Sri Lanka he is scared he will be identified by the army as an Indian Tamil refugee with family links to the LTTE. He will be associated with his LTTE uncle and his father who was suspected as an active LTTE member. He fears harm also because he left illegally and because his parents are Indian Tamils. His parents were heavily discriminated against in Sri Lanka and it would not be safe for him. He is afraid he will be denied citizenship because his parents are Indian Tamils and his citizenship is uncertain. His rights will be limited because he would be considered an Indian Tamil, not Sri Lankan.
- He has read a lot on the internet and hears from others many Tamils who return to Sri Lanka have been shot and killed. He is scared he will be hurt badly by the Sri Lankan authorities because they know he has made a complaint against them to the Australian government and consider him a traitor. SBS reported that 20 returned Tamils were jailed in Sri Lanka.
- The applicant has no social networks and no means of financial or general support in Sri Lanka so does not know how he would make a life for himself. It would be difficult for him to find work and he would continue to be discriminated against as an Indian Tamil in Sri Lanka.
- In the protection interview the applicant said there was a translation mistake in his statement and his father had a fishing permit, not a fishing licence, which did not mean he held a Sri Lankan identity card. In a post interview statement of 4 June 2021, the applicant reiterated his claims and explained various money remittances to 5 people in Sri Lanka), his lack of Sri Lankan citizenship and that he believed he was stateless.
- In post interview submissions it was submitted that in respect of the applicant's payments to persons in Sri Lanka, the applicant is a generous individual who has sympathy for those in need and it would be unreasonable to construe those payments as indicating he has substantial close links and networks in Sri Lanka.
- The applicant is a descendent of Tamil Indians whose statelessness is a result of his grandparents going to Sri Lanka from India to work on Tea estates. His grandmother's and great uncle's Indian identity papers indicate the applicant is a descendant of Indian Tamils. The applicant's parents were illiterate and would not have known of the opportunities to obtain Sri Lankan citizenship and would not have been eligible for it as they did not intend or want to permanently reside in Sri Lanka. The applicant is not a descendant of Sri Lankan citizens. The applicant's mother had written to the district collector in late 2019 requesting she be allowed to apply for Indian citizenship on the basis of the Madras High Court June 2019 order which allowed illegal migrants to lodge citizenship application, but that has not been referred to the Central government for consideration or grant as yet. Unless the applicant can be found to be the descendant of an Indian citizen, there are no current laws in place to enable him to apply for Indian citizenship.
- It was submitted the applicant feared serious harm through the denial of capacity to earn a livelihood of any kind, which threatened his capacity to subsist and caused significant economic hardship.
- It was submitted that the applicant was stateless and feared persecution in India as a Tamil Indian born in Sri Lanka, and as a stateless Tamil Indian born in Sri Lanka to stateless parents as a result of being born to Hill Country Tamils who after Sri Lanka's independence were disenfranchised through the Ceylon Citizenship Act 1948, and as a Tamil Indian born in Sri Lanka to stateless parents of Indian Tamil descent whose country of reference is India due to long term residency as refugees in Tamil Nadu,

India, living as registered refugees in Tamil Nadu and severely discriminated against, and with no right to return to Sri Lanka or gain Sri Lankan citizenship and no right to return to India or gain Indian citizenship.

## Refugee assessment

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26. Section 5H(1) of the Act provides that a person is a refugee if, in a case where the person has a nationality, he or she is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

## Well-founded fear of persecution

27. Under s.5J of the Act ‘well-founded fear of persecution’ involves a number of components which include that:
- the person fears persecution and there is a real chance that the person would be persecuted
  - the real chance of persecution relates to all areas of the receiving country
  - the persecution involves serious harm and systematic and discriminatory conduct
  - the essential and significant reason (or reasons) for the persecution is race, religion, nationality, membership of a particular social group or political opinion
  - the person does not have a well-founded fear of persecution if effective protection measures are available to the person, and
  - the person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour, other than certain types of modification.

### *Receiving country*

28. I accept the applicant was born in Sri Lanka and moved to India in 1990 when he was [age] years old with his family during the civil conflict. His family continue to reside in India.
29. I accept based on the applicant’s birth certificate that he was born in Sri Lanka and that his parents were identified as Indian Tamils as indicated in the birth certificate. I accept, based on the grandmother’s and great uncle’s documents, that the applicant’s grandparents may have been in India and come to Sri Lanka to work and the applicant has Indian ancestry. The applicant was unsure whether his grandparents or parents were granted or registered for Sri Lankan citizenship under the Indo-Ceylon Agreement (Implementation) Act 1967. The information before me indicates that citizenship laws changed over the years<sup>1</sup>, and that some Indian Tamils in Sri Lanka or those in Tamil Nadu who fled during the conflict could take up Sri Lankan citizenship. It was submitted the applicant’s parents were illiterate and would not have known about such opportunities, did not want or intend to reside in Sri Lanka and so are not Sri Lankan citizens. The applicant and his family also had Indian issued family refugee cards which identified them as Sri Lankan citizen refugees. I accept that the applicant’s father

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<sup>1</sup> Citizenship Act of Sri Lanka 1948, 2003, 20099 Amendment



held a fishing pass in Sri Lanka. I accept that these documents are not evidence of citizenship. I accept that the applicant's mother's Aadhaar card is evidence of her Indian identity, but not necessarily her citizenship.

30. I have considered the DFAT country information about the June 2019 Madras High Court instruction to the government to reassess citizenship applications of 65 Sri Lankan Tamil refugees. I note that 13,805 Sri Lankan Tamil refugee families (40,000 individuals) submitted a petition to the Indian government seeking citizenship. I note the Indian government has granted Indian citizenship to Indian Tamils previously also. In the context of the Court instruction to the Indian government, I accept the applicant's mother lodged an application with the district controller to get permission to apply for Indian citizenship (the process indicated by the court), but has not heard of any outcome of that application.
31. I have considered the country information about Indian and Sri Lankan citizenship in the material and the submissions provided by the applicant's representative about the applicant's lack of citizenship. I accept that there is insufficient evidence before me to ascertain the applicant's citizenship, whether Sri Lankan or Indian. It may be that he is eligible for Sri Lankan citizenship under the Grant of Citizenship to Persons of Indian Origin (Amendment) Act no. 6 of 2009 or for Indian citizenship in due course from his mother's pre-application on the basis of the Madras High Court's instruction to the government in June 2019.
32. However, on the evidence before me, there is insufficient evidence to be satisfied as to the applicant's citizenship. I therefore I find the applicant has no nationality and is stateless.
33. Under s.5(1) of the Act, where an applicant has no has no country of nationality, the receiving country is his country of former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.
34. Given he has lived most of his life in India ( since he was [age] years old) and all his family continue to reside there, I am satisfied that India is the applicant's country of former habitual residence and is therefore the applicant's receiving country.

#### *Claims*

35. In respect of his claims regarding return to India, the applicant claimed life as a refugee was difficult, he experienced discrimination and was required to sign in and out of the refugee camp every time so his mobility and independence were restricted. He also found it difficult to find work as even after completing his [degree], he could not find work in his field after 30 interviews. The applicant claimed he could not own land or assets and that it was not until 2015 that they could have licences.
36. While I accept the applicant's movements in and out of the camps were restricted in that they had to sign in and out, I do not accept that amounts to harm. Further, I note according to his statement, the applicant's family was able to move from camp to camp if there was any drama, conflict or an overflow.
37. The DFAT country information before me indicates that the Indian government supported camp residents, provided education, healthcare, social security and amenities. I acknowledge the information that Sri Lankan Tamils have limited education and work rights in India.
38. However, while he was unable to secure employment in his chosen field, the applicant was able to find work in India [in a business], as well as working in [two business lines] while in

India. According to his employment history he was employed from 2006 until his departure from India in 2013.

39. While the applicant claimed he could not own land or assets in India, it was not evident that he tried to or proposed to do so. I note in any event the applicant and his family lived in refugee camps which were provided for them as did many thousands of refugees in Tamil Nadu. I note the applicant was aware that driver's licences could be obtained now also. Further, and in any event, I do not accept that not being able to own land or assets amounts to serious harm.
40. I do not accept that the applicant was unable to subsist or have the capacity to subsist. I am not satisfied that he faces a real chance of harm upon return in that regard. He is well educated and has been employed before and able to support himself. In Australia he has worked in [specified roles] and small jobs. While he was on Centrelink from time to time, the evidence before me indicates that the applicant regularly sent money to persons in Sri Lanka to help them and because he is a generous person. He was housed in refugee camp home. Further, the applicant's mother and siblings, with whom he is in contact, continue to live in India without harm.
41. I do not accept the applicant faces a real chance of economic hardship, denial of access to basic services or capacity to earn a livelihood of any kind that threatens his capacity to subsist.
42. I do not accept the applicant faces a real chance of harm or capacity to subsist for any reason.
43. In the protection interview the applicant stated he feared that if he returned to India he would be arrested and considered a criminal. When asked what he meant by that the applicant said because he did not have an identity card, departed illegally and or want to live under their rules. I acknowledge also that there is uncertainty about his and his parents' citizenship (though in his protection interview he said his grandparents had Indian citizenship). I note also the applicant was subject to the 2014 immigration data breach in which personal details (not claims) of some asylum seekers in immigration detention were published on the internet for a short period.
44. However, the applicant did not have citizenship or an Indian identity card when in India either and I have found he did not face serious harm when in India. . The applicant has been able to live and work in India in the past in those circumstances and live under the rules. Further, US state Department reports indicate that refugees are able to request police protection and courts as needed. I note also that many refugees have brought court action and petitions for their citizenship. Further, the applicant has identity documents such as his birth certificate and Sri Lankan refugee family card and may also have his education certificates Further, I do not accept the applicant if returned to India would be considered a criminal.
45. Further, I am not satisfied that the applicant faces any harm on the basis of his illegal departure or as a failed asylum seeker or due to the immigration data breach. The 2020 DFAT report makes no reference to penalties for illegal departure from India. It states DFAT is not aware of any credible reports of mistreatment of returnees, including failed asylum seekers. Further, the data breach did not disclose claims made and the authorities would be aware of the applicant's return as a failed asylum seeker in any event upon issue of a temporary travel document to return. Even as a failed asylum seeker who illegally departed India, I do not

accept that the authorities would have any particular or adverse interest in the applicant upon return.

46. Further, even if his uncle were LTTE in 1980s in Sri Lanka, I do not accept that the Indian authorities had or will have any interest in the applicant upon return for that reason. This was in the context of a civil war that ended many years ago in Sri Lanka.
47. Further, I do not accept the applicant's father was involved in smuggling goods for the LTTE. The applicant had very little meaningful detail about this. While I acknowledge he was young at the time, his father did not pass away until 2015, so I find difficult to believe that he would have had so little information about such a key claim, if true. Further, I consider the applicant's statement claims that his father showed him where he did LTTE drops or pickups in India is at odds with the applicant having no other information or detail about his father's LTTE activities. Further, that the family would flee Sri Lanka to avoid LTTE forcible recruitment is at odds with the applicant's claim that his father was involved in LTTE smuggling. Further, the applicant was able to live and work in the camps as was his family for many years without harm. I do not accept that the applicant or his family were of interest to Indian or Sri Lankan authorities or will be perceived as LTTE connected, or security threat. I do not accept he has or will have an adverse or profile of interest upon return.
48. I do not accept the applicant faces a real chance of harm on the basis of his ethnicity, being born in Sri Lanka, his background, circumstances, lack of identity documents or citizenship, being stateless, his illegal departure, as a failed asylum seeker or returnee, subject of the data breach or due to his connection to his family or his uncle.
49. The representative submissions set out the applicant's claims as a member of a range of particular social groups upon return to India related to being an Indian Tamil born in Sri Lanka to stateless parents of Tamil Indian descent, living as refugees in Tamil Nadu or long term residency as refugees in Tamil Nadu, or with stateless parents as a result of being born to Hill Country Tamils who left Sri Lanka and disenfranchised through the Ceylon Citizenship Act or stateless parent of Tamil India descent with no right of return to Sri Lanka or India or either citizenship.
50. It was submitted the Indian state failed or refused to protect the applicant by denying him citizenship and the core human rights associated with citizenship.
51. As discussed above under receiving country, there is insufficient evidence before me to determine if the applicant is an Indian or Sri Lankan citizen or entitled to such citizenship. The applicant maintained his parents were not Sri Lankan citizens, his grandparents were Indian Tamils and that his mother was seeking permission to petition to apply for her Indian citizenship. There was no evidence the applicant had applied or been denied citizenship. The submissions maintained the applicant was not a citizen of Sri Lanka or India.
52. I accept the applicant has Indian Tamil ethnicity from his parents or grandparents and that he was born in Sri Lanka. I accept the family were displaced from Sri Lanka due to the conflict and moved from Sri Lanka to Tamil Nadu, India in 1990. The applicant (until his departure to Australia in 2013) and his family have lived in India since then.
53. According to DFAT thousands of Tamils from Sri Lanka fled to Tamil Nadu during the Sri Lankan civil war. In 2019 62,000 live in 107 camps and receive monthly cash and in kind assistance from the Indian and Tamil Nadu governments. 37,000 live outside the camps as well.

54. According to US State department reports UNCHR estimates there are up to 95,000 Sri Lankan Tamil refugees living in Tamil Nadu and up to 28,000 were hill country (Indian) Tamils.
55. I have considered the representative submissions and country information about Upcountry Tamils (Indian Tamils who lived in Sri Lanka) in camps facing discrimination, such as name calling from Sri Lankan Tamil population and the conditions in refugee camps generally. The information indicated that the Upcountry Tamils in Indian refugee camps had mixed feelings about whether they wanted to stay in India or go back to Sri Lanka and did not know which was better.
56. The applicant's parents were Indian Tamils and the applicant was born in Sri Lanka. They left Sri Lanka in 1990 and they lived in refugee camps in India. The evidence from the applicant was that the applicant's family did not want to return to Sri Lanka and they discouraged him from returning to Sri Lanka also. The applicant's family have continued to remain in India.
57. The Refugee Survey Quarterly report (March 2004) in the submissions confirms that the Government provided free education, and cash dole and other assistance and there is a quota system for higher education places for refugees. As previously noted, the applicant was well educated to tertiary level.
58. It was submitted that his education did not protect him from cruel and inhuman living conditions.
59. While I note reports of poor sanitation and infrastructure, I do not accept that amounts to serious harm. I note the report was from 2004 and stated that households received cash assistance under the Tamil Nadu Infrastructure development programme to improve the physical infrastructure of the camp, including for repairs, lighting, sanitation and road facilities. Refugees also can access free medical services from government hospitals and claim financial assistance for major medical treatment from the State Government on recommendation of the district collector. While I acknowledge the difficulties in accessing health care due to the hospitals being far away or due to discrimination, the report also noted that the majority of households are able to pay for medical expenses from their own money. Further, the applicant made no claims to have been denied such or faced any harm in that regard.
60. I have considered the Refugee Survey Quarterly information about difficulties accessing employment in Tamil Nadu. However, the applicant was able to find employment in a number of jobs ([in specified business lines]) while there and did not show any periods of unemployment since he finished study.
61. As discussed above the applicant was able to access good education, including within a quota system as he did tertiary degrees and he was employed, albeit not in his field. There is no reason he could not do the same upon return. Despite having to sign in and out of the camps, he was able to move around and also move camps when there was an overflow or any drama or conflict in the camp. I do not accept the applicant had no freedom or independence.
62. Even if the applicant faced discrimination in camps, such as name calling, or in obtaining employment in his chosen profession, I am not satisfied that amounts to serious harm.
63. Regardless of how the applicant's particular social groups might be defined, the applicant was of this same social group when he resided in India and I have not accepted that he faced serious harm for any reason. Similarly, he did not have citizenship previously in India and I

have not accepted that he faced serious harm for any reason. Looking to the future, I am not satisfied that he faces serious harm upon return either. I note his siblings continue to live there with their families and the applicant's mother continues to live in India also. There is no evidence before me that they have suffered harm there. Even adding his return from Australia as a failed asylum seeker, illegal departee, stateless/no citizenship person, I am not satisfied that the applicant faces a real chance of serious harm.

64. Considered individually and cumulatively, I do not accept the applicant faces a well-founded fear of persecution on any of the bases claimed upon return to India.

#### **Refugee: conclusion**

65. 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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66. 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**

67. 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.
68. 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.
69. As to discrimination in finding employment in his chosen profession, I do not accept that it amounts to significant harm.
70. Further, I do not accept that conditions in the camps amount to significant harm as defined or that there is any intention to inflict harm. I do not accept that any discrimination such as name calling or not owning land or assets amounts to significant harm as defined.
71. Considered individually and cumulatively, I do not accept the applicant faces a real risk of significant harm upon return to India.
72. I have found that the applicant does not have a real chance of harm on any of the bases claimed, or otherwise. For the same reasons and applying the authority in *MIAC v SZQRB*

[2013] FCAFC 33, I am not satisfied the applicant will face a real risk of any harm, including significant harm if removed to India

**Complementary protection: conclusion**

73. 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.