



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

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA21/09633

SRI LANKA  
IAA reference: IAA21/09636

SRI LANKA  
IAA reference: IAA21/09635

Date and time of decision: 13 September 2021 10:18:00  
S McNeill, 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 referred applicants are a family of four (husband, wife and two children) and are nationals of Sri Lanka. They arrived in Australia by boat [in] November 2012. The daughter was born in Australia in [year]. On 10 July 2017 they lodged a combined application for a Safe Haven Enterprise Visa (SHEV).
2. The applicant husband (IAA21/09633) and the applicant wife both made claims for protection. The two children, a boy and girl (IAA21/09635 and IAA21/09636) have made no claims of their own but rely on membership of the applicant husband and wife's family unit. The applicant wife has raised some individual claims and she is the subject of a separate decision.
3. The applicant husband (the applicant) claims to fear harm from the Sri Lankan authorities because of his Tamil ethnicity, his imputed political opinion as a supporter of the Liberation Tigers of Tamil Eelam (LTTE) and as a failed asylum seeker.
4. On 4 August 2021 a delegate of the Minister for Immigration (the delegate) refused to grant the visa.

### Information before the IAA

5. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
6. On 27 August 2021 the Immigration Assessment Authority (IAA) received a submission from the applicant's representative. The submission contains legal argument in response to the delegate's findings and which I have considered, no new information has been identified and none is apparent.

### Applicants' claims for protection

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7. The applicant's claims can be summarised as follows:
  - He was born in [year] in [Town 1], Batticaloa, Eastern Province of Sri Lanka.
  - He is of Tamil ethnicity. His family is Hindu but in Australia he has converted to Christianity.
  - In 1990 his parents were killed in a bomb. After this, his older brother, younger sister, and he moved to [location] to live with his maternal aunt. His aunt lost her husband in the war the same year. They did not go to school. His older brother ran away.
  - In 2001 they moved to [Town 2]. His aunt arranged his marriage to 'R', and they married in 2004.
  - He worked as a [Occupation 1] and when not doing this, he helped his cousin selling [goods] at the [Town 2] market. Working as a [Occupation 1] he travelled between villages, sometimes Batticaloa, Trincomalee and Kilinochichi. Entering Batticaloa or Kilinochichi, they were required to sign at the army checkpoint.
  - In 2006 he became friends with a colleague 'S'. Beginning of 2008, S asked him to keep some documents at his house in [Town 2] and a friend would pick them up. In the bag

were some papers, a USB, and some wires. He could not read the papers. A few days later a friend picked them up. He helped S for about one year.

- Mid 2008 he was working in [the] market when a man refused to pay. When he asked for the money the man pushed him and he pushed back. His cousin intervened. The man yelled at them saying he would pay for attacking an army officer
- That night at 11pm five army officers in uniform came to his house, beat him, tied his arms and legs then took him in their vehicle. His wife screamed; she fell and broke her head. The neighbour came to help, and the army dropped him and fled in their vehicle. His son who was three was severely impacted by the incident.
- The next day his cousin was found dead. He stopped work at [the] market.
- Around October 2008 S was abducted in a white van. A colleague told him S was in the LTTE. Worried because he had been helping the LTTE for a year he sent his wife and son to India. After his passport and visa were approved, he joined them in April 2009.
- After their visas expired, they were forced to return to Sri Lanka in June 2010. Around June 2011, while he was working in [City 1], the CID came to his house looking for him. She told them he was working in Batticaloa. They returned three days later, this time his wife notice they had S's friend who picked up the documents in the van. Worried they organised for him to go to [Country 1] through an agent in July 2011.
- While in [Country 1] his wife told him, the CID visited his house four or five times looking for him. She said she didn't know where he was.
- A man name 'K' who had tried to behave inappropriately with his wife came to [Country 1]. He became anxious as no one knew he was there. K taunted him saying the CID were looking for him and asked if he had assisted the LTTE. He was worried K would tell the [Country 1] authorities. Around October 2012 he returned.
- At the airport the CID forced him in van, beat him and took him to the fourth floor in Colombo and tortured him. They asked about the documents he transported for S. He said he could not read. He has scars on his [Body Part 1] and [Body Part 2]. They released him after three days but told him he needed to return when they asked, and he could not leave the country. He found out his wife paid eight lakhs to secure his release.
- The agent arranged for their journey to Australia. They gave him the deed to their house.
- He fears serious harm from the Sri Lanka authorities if returned to Sri Lanka because they suspect him of LTTE involvement due to his scars and injuries, his Tamil ethnicity and as a failed asylum seeker. He also fears harm as he has converted to Christianity. If he is detained his wife who is uneducated and never worked, and his children will have no one to support them.

## Refugee assessment

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8. 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

9. 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.
10. There is no issue as to the nationality of the applicants. I accept that they are nationals of Sri Lanka and that Sri Lanka is the receiving country for the purposes of this review.
11. On the consistent oral and documentary evidence I accept the following in relation to the applicant: He was born in [Town 1], Batticaloa, Eastern province of Sri Lanka in [year] and he is of Tamil ethnicity. After his parents were killed in a bomb blast in 1990, he, his sister and brother lived with his aunt. They moved to [Town 2], North Western province in 2001. I accept the applicant no longer has contact with his brother. The applicant married his wife 'R' in 2004 and their son was born in [year]. The applicant worked in [Country 1] as a [Occupation 2] between July 2011 until October 2012. His sister was killed by her husband while he was in [Country 1]. The applicant was born a Hindu and practised his faith up until he came to Australia in 2012. His daughter was born in Australia in [year].
12. The applicant claims he had an altercation with a Sri Lankan army officer mid 2008 after a dispute at [the] market where he worked with his cousin, five army officers came to his house that evening, beat him and tried to take him away. His second core claim is his problems arising from assisting his work colleague friend 'S', a LTTE member, to hold documents for him for someone else to collect. The applicant took part in his SHEV interview on 21 May 2021 with the delegate.
13. The applicant's evidence regarding his claims came across in a rehearsed manner, he generally recited the incidents as per his written claims providing little further substantive details to flesh them out such that he might be recalling from a real lived experience. Firstly, while I accept it is plausible the applicant may have experienced an altercation at [the] market with an army officer who refused to pay him, I am of the view the applicant has sought to significantly embellish his claims in relation to the events that subsequently occurred that evening.
14. While I accept the Sri Lanka army committed various human rights abuses against Tamils during the civil war period, I find it fanciful that five army officers would arrive at night, beat him severely, tie both his arms and legs then attempt to carry him to their vehicle only to suddenly flee because his wife screamed, and their neighbours came out to see what was going on. The applicant had no profile with the authorities at the time of this incident. I find it odd that the army would depart without the applicant given the lengths they had gone to of

tying him up. This especially so given his cousin was apparently killed following the market incident.

15. The applicant claimed he found out from his aunt the next day his cousin had been found dead. The applicant in his written statement provided little information regarding the circumstances of his cousin's death, he provided no details as to where his cousin was found, what the cause of his death was, whether his aunt told the police or sought any assistance. Furthermore, his cousin was not the person who initially pushed the man at the market, it was the applicant, and his cousin only sought to intervene. At his SHEV interview he provided no further details about his cousin's death.
16. In his written claims, the applicant claimed he sent his wife and son to India as soon as he could after S was abducted in a white van in October 2008; after he found out S was LTTE and he became worried something might happen to his family. At his SHEV interview this narration changed, the applicant said after the army people came, they got scared and went to his wife's village and they said they better leave the country. He did not go as he did not have his passport at the time, so his wife and son flew there and stayed with her relatives.
17. The copy of the applicant's passport bio data page, included with his SHEV interview, indicates it was issued [in] 2009. The copy of his wife's passport bio data page indicates hers was issued [in] 2008. His wife's SHEV application form indicates she went to India in November 2008. This claimed incident of the army coming to his house occurred in mid-2008; however, they waited for at least five months before his wife and child travelled to India. That the applicant's passport was not issued until [month], nine months after the visit from the army and around five months after S's arrest does not imply any sense of urgency or fear. The applicant did not state he had any problems obtaining his passport or that it took an unusually long time to process.
18. Furthermore, it would appear after the army fled from their house, the army or any other authority did not seek to pursue or follow up on the applicant on account of this claimed altercation at [the] market. I also note in his arrival interview undertaken on 6 February 2013 soon after the applicant arrived in Australia, the applicant refers to his cousin being killed in 2011 by some Sinhalese people who stabbed him and who beat him (the applicant) a couple of times. There is no mention of a cousin being killed in 2008 by the Sri Lankan authorities.
19. Furthermore, while the applicant has claimed that his son was stunned by this incident, that he still has anxiety and trauma, and may have been severely impacted by this incident, no medical evidence has been provided to support this claim. I am not satisfied the applicant's son suffers from mental health issues on account of this claimed incident.
20. Given my concerns outlined above, while I am prepared to accept the applicant had a minor altercation with an army officer at [the] market 13 years ago when the army officer refused to pay and then threatened the applicant, I am not satisfied the army came to the applicant's house that night, beat him, tied him up and attempted to take him away but subsequently fled the scene. I also do not accept that his wife was beaten as claimed nor did she cut her head when pushed. I am not satisfied the applicant faces a real chance of any harm on account of this claim on his return to Sri Lanka now or in the reasonably foreseeable future.
21. The applicant claimed he began working as a [Occupation 1] in 2004 and became friends with a colleague S around 2006. Sometime around the beginning of 2008, S asked him to keep documents at his house and his friend would pick them up. In a bag were papers, a USB, and wires. As he had no education, he could not read the documents and considered them

harmless. S's friend picked them up and he assisted S for about a year. In around October 2008, S was abducted in white van while they were working in Trincomalee. He was worried about S and asked one of his colleagues who told him S had been with the LTTE, therefore the authorities abducted him.

22. At his SHEV interview the delegate put to the applicant that he claimed to have been detained after he returned from [Country 1] by the CID but not initially when he returned from India. Again, the applicant sought to recite his written claims stating he had been working as a [Occupation 1] going from village to village and he got to know 'a boy' who gave him documents to keep at home. He and his wife were not literate, they didn't know what the documents were, and someone would collect them. Two or three times they did this and once he heard people from a white van kidnapped him, then he asked another person who told him that person is an LTTE member and for that reason he wanted to leave and went to Saud Arabia. Again, with his oral evidence the applicant generally stuck to the script of his written claims and his evidence did not come across as spontaneous or natural. He provided little more in the way of further details to elaborate on this claim.
23. While I find it plausible the applicant might take documents from S on one occasion, I find it somewhat far-fetched that applicant would do so on at least three occasions and not make any enquiries as to what they related to or that he was not curious given the reference to 'wires'. While I accept the applicant and his wife are both illiterate, I am not satisfied the applicant would be so naïve or ignorant. Furthermore, given his other colleague knew of S's LTTE background, it is unclear why the applicant would not have had similar knowledge. I note the applicant also claimed to assist S for a year from the beginning of 2008, but he also claimed S was arrested in October 2008, a period of nine months. While this is not so controversial, considered along with my other concerns, it is another matter to doubt the applicant's overall claims.
24. Of greater concern is the authorities apparent lack of interest in the applicant following S's abduction which occurred in October 2008. The applicant was able to apply for a passport without any problem and then he was able to depart for India and return through Colombo airport on his official passport. It was only in June 2011, almost three years after S's abduction, and two years after the conflict with LTTE ended in May 2009, that the authorities showed any interest in the applicant when they came to his home looking for him. Again, the applicant was able to depart for [Country 1] again through Colombo airport in July 2011. Furthermore, given his minor role, it does not make sense the authorities would seek him out almost three years after S's abduction.
25. The applicant stated at his interview he did not know what role S had with the LTTE, he was a good friend with S but after he was taken by the LTTE he stopped asking or checking on him. Asked why he thought the authorities would continue to take an interest in him based on his mere friendship with S, the applicant said they also thought he (the applicant) was an LTTE member and that is why the CID took him and tortured him. The delegate noted that he claimed after he returned from India in June 2010, it was only after a year the CID came looking for him and he had been able to live in Sri Lanka for a year without issue or incident. In response the applicant stated he had been moving from village to village, once a month visiting his family; they would look for him then not and they did not know because he was moving a lot. That the applicant kept moving on his return to Sri Lanka in June 2010 because he was hiding from the CID was not mentioned in his SHEV application; reason given for his movement was because of different work projects.

26. The delegate observed the applicant had not claimed to have any involvement in the LTTE and he did not appear to have a profile of interest to the SL authorities, why would he be persecuted on return. The applicant stated that was what he also thought when he returned from [Country 1], but they detained him and beat him for no reason. The delegate noted that the authorities had released him after three days in custody when his wife paid a bribe and that it was reasonable to assume that he was not of any significant interest to the CID otherwise he would not have easily been released.
27. I do not find the applicant's evidence regarding the Sri Lankan authorities' interest in him a year after his return from India in June 2011 persuasive or compelling. Furthermore, if the authorities continued to come to his house and question his wife about his whereabouts and given the family had purportedly previously been harmed and threatened by army officers in June 2008, I am not convinced he would leave his wife and child alone in [Town 2] while he went to [Country 1] for two years to work. Lastly, I note as per the applicant's arrival interview of 6 February 2013, the applicant made no reference to being taken into custody by the CID on his return from [Country 1] in October 2012, or that he had any problems with the Sri Lankan authorities whatsoever. He also did not mention ever working as a [Occupation 1]. He only said he had been threatened and beaten by Sinhalese 'thugs.'
28. On the information before me, that I have concerns about the applicant's overall credibility, that he was able to leave through the airport on his own passport and travel to India and then return and then once again leave Sri Lanka without any adverse interest from the authorities and his claimed minimal involvement or association with the LTTE and the very delayed interest in the applicant by the authorities, I am not satisfied as to the occurrence of these claimed events.
29. I do not accept the applicant helped S by keeping documents at his house for someone else to collect. I do not accept the CID came in search of the applicant in approximately June 2011 twice and that the applicant then fled Sri Lanka because of any fear of harm. I find the applicant went to [Country 1] because of a work opportunity. I also do not accept the applicant returned to Sri Lanka in October 2012 because of K, a man who he claimed behaved inappropriately to his wife and who he believed might tell the [Country 1] authorities of his links to the LTTE. I also do not accept on his return to Sri Lanka in October 2012, the applicant was detained by the CID for three days at the fourth floor in Colombo, or that he was tortured and that his wife had to pay a bribe for his release.
30. The applicant claimed he has scars and injuries as a result of injuries sustained through torture he experienced from the CID. The applicant has not stated where on his body these injuries or scars are. While I have not accepted the applicant was tortured by the CID as claimed, it is plausible he has injuries or scars that are visible.
31. I am satisfied at the time the applicant, his wife and son departed Sri Lanka by boat to travel to Australia he was of no interest to the Sri Lanka authorities on account of a claimed friendship with S, an alleged LTTE member. I am not satisfied the applicant faces a real chance of any harm on this basis now or in the reasonably foreseeable future on his return to Sri Lanka.
32. The applicant claimed to fear serious harm from the Sri Lanka authorities because he would be imputed as an LTTE supporter because of his Tamil ethnicity. He also feared the authorities in Sri Lanka will suspect him of being involved with the LTTE due to his injuries and scars. I have accepted the applicant is of Tamil ethnicity. While the applicant lived in [Town 2], North Western province of Sri Lanka from 2001 when he was approximately [age] years old, he was born in Batticaloa, Eastern province which is a former LTTE controlled area. Ethnic Sinhalese

comprise 74.9 per cent of Sri Lanka's total population. Tamils constitute the largest ethnic minority, at 15.3 per cent of the population. A 2012 census noted in the Eastern Tamils comprised 39.2 per cent of its population, Muslims 36.9 per cent and Sinhalese 23.2 per cent. [Town 2] in the North Western Province is a majority Sinhalese area.<sup>1</sup>

33. According to the Australian Department of Foreign Affairs and Trade (DFAT) Sri Lanka achieved independence from the United Kingdom (UK) in 1948. Historically, relations between Sri Lanka's majority Sinhalese and minority Tamil communities have been tense. A number of militant groups emerged to advance the cause of Tamil statehood. The most prominent of these, the LTTE, was formed in 1976 and launched an armed insurgency against the Sri Lankan state in 1983. The LTTE – commonly known as the Tamil Tigers – established and maintained de facto control of Tamil-populated areas in the north and east.<sup>2</sup>
34. Government forces re-took the eastern part of the country from the LTTE in July 2007 and, in January 2008, launched a major offensive to capture remaining LTTE-controlled areas in the north, culminating in the elimination of most of the LTTE's senior ranks, including its leader, Velupillai Prabhakaran. The LTTE surrendered in May 2009. During and immediately after the civil war, Tamil civilians were targeted and persecuted by the Sri Lanka authorities based on their ethnicity. Tamils were either suspected of being members, supporters, or sympathisers of the LTTE.<sup>3</sup>
35. The Sri Lanka civil war ended over 12 years ago and there have been significant improvements in the security situation for Tamils. I accept that during the civil conflict and its aftermath, the SLA and other authorities sometimes equated Tamil ethnicity with support for, or association with the LTTE. There have been many changes since the end of the 26 year long civil war when in May 2009 the government announced its military victory over the LTTE and complete territorial control over Sri Lanka. The LTTE has not carried out attacks since 2009 and DFAT assesses that the LTTE no longer exists as an organised force inside Sri Lanka.<sup>4</sup>
36. The situation for Tamils improved significantly when the former President Sirisena took power in 2015, he publicly committed to reducing military involvement in civilian activities. It removed checkpoints on major roads in 2015 and there were no restrictions on travelling to the north and east. On Easter Sunday in 2019 after local Sri Lankan Islamic extremists carried out terrorist attacks on hotels and churches, some checkpoints were re-established (ostensibly to check for Islamist terrorists) and brought back fears and mistrust of the authorities. Whilst DFAT stated these checkpoints had since been removed,<sup>5</sup> more recent reports suggest checkpoints have been used to monitor and restrict population movements including in minority dominated areas although some of this has been associated to the military led response to the COVID-19 pandemic.<sup>6</sup>
37. DFAT noted in 2019 members of the Tamil community in the north and east continue to claim that authorities monitor public gatherings and protests, and practice targeted surveillance and questioning of individuals and groups. Security forces are likely to monitor people associated

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

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> 'Army fires at tractor illegally transporting sand for failing to stop at checkpoint', Colombo Page, 22 April 2021, 20210423124946; 'Sri Lankan military harass and block Tamil journalists travelling to Mullaitivu despite having permits', Tamil Guardian, 22 May 2021, 20210524151145; Freedom in the World 2021 - Sri Lanka', Freedom House, 03 March 2021, 20210304102827.



with politically sensitive issues related to the war, including missing persons, land release and memorial events. The previous government relaxed some commemorations of events associated with the Tamil's armed struggle for statehood. Tamils have been free to hold public ceremonies marking 'Great Heroes Day' since 2016 and were increasingly comfortable marking such events.<sup>7</sup>

38. The US State Department Report of 2020 noted throughout Sri Lanka, but especially in the north and east, Tamils reported security forces regularly monitored and harassed members of their community, especially activists, journalists, and former or suspected former LTTE members.<sup>8</sup> Such incidents, as well as harassment of human rights defenders, have also been noted by a United Nations Special Rapporteur.<sup>9</sup> The applicant does not fit this profile of someone likely to be regularly monitored or harassed.
39. Tamils were disproportionately detained under the Protection of Terrorism Act (PTA) in the past. This legislation was effectively suspended between 2016 and April 2019 and was used only sporadically. It remains legally in force and was used, alongside the Emergency Regulations to detain persons allegedly involved in the 2019 Easter Sunday terrorist attacks. The Emergency Regulations have lapsed, and most Tamils detained under the PTA have been released. Of those individuals who have been detained under the PTA, they were allegedly involved in an assassination plot and the Easter Sunday attacks. Anti-Muslim sentiment has increased in Sri Lanka following the attacks.<sup>10</sup>
40. DFAT observed late 2019 Tamils have a substantial level of political influence, there are numerous Tamil political parties, and their inclusion in political dialogue increased after the 2015 election when President Sirisena came into power and during his period in office there were many positive developments including more freedoms. DFAT reported both Tamil and non-Tamil, expressed concern human rights improvements achieved since 2015 could be reversed if Mahinda Rajapaksa, or an individual close to him returned to power.<sup>11</sup>
41. In November 2019 President Sirisena's government was replaced when Gotabaya Rajapaksa, candidate of the Sri Lanka Podujana Peramuna (SLPP) party was elected President. Gotabaya was Minister of Defence who oversaw the end of the civil war conflict.<sup>12</sup> On 5 August 2020, the SLPP party and his brother and Prime Minister, Mahinda, (President during the last days of the conflict and up until 2015) decisively won the Sri Lankan parliamentary elections.<sup>13</sup> Tamils overwhelmingly voted against the ruling SLPP party in the 2019 presidential and 2020 parliamentary elections because of concerns about its treatment of minority groups.<sup>14</sup> This

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<sup>7</sup> DFAT, "Country Information Report Sri Lanka", 4 November 2019, 20191104135244.

<sup>8</sup> 'Country Reports on Human Rights Practices for 2020 - Sri Lanka', US Department of State, 30 March 2021, 20210401122412.

<sup>9</sup> United Nations Human Rights Council, 'Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association', 5 May 2020, 20200622112923.

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<sup>11</sup> DFAT, "Country Information Report Sri Lanka", 4 November 2019, 20191104135244.

<sup>12</sup> 'Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka', OHCHR, 18 February 2020, 20200221140652; 'Sri Lanka: Economy, human rights key challenges facing Rajapaksas', Aljazeera, 19 August 2020, 20200819205836; 'A polarising figure becomes president of Sri Lanka', Economist, The, 23 November 2019, 20191122115336.

<sup>13</sup> 'Sri Lanka Elections: Stronger Powers, At What Cost? – Analysis', S. Rajaratnam School of International Studies (RSIS), 12 August 2020, 20200812104655.

<sup>14</sup> 'Sri Lanka: Presidential Election And Tamil Politics – OpEd', Eurasia Review, 27 November 2019, 20191128103208; 'Unfair to attribute racist dimension to Tamil vote, says Sampanthan', Hindu, The, 18 November 2019, 20191121095223; 'Support Sajith or minorities could suffer - Hakeem', Daily News Sri Lanka, 28 October 2019, 20191028114803; 'Sri Lanka Muslim party warns of a massive plot to buy minority votes to defeat Sajith Premadasa', Colombo Page, 09 November 2019, 20191111104451; 'Sri Lanka's Presidential Election Brings Back a Polarising Wartime Figure', International Crisis Group

victory has led to the consolidation of power of the Rajapaksa family. Gotabaya was accused of war crimes during the final days of the civil war and has been implicated in human rights abuses.<sup>15</sup> He has also appointed to senior government positions military figures alleged to have been involved in atrocities committed during the conflict.<sup>16</sup>

42. President Gotabaya and other officials announced their desire to reverse prior reforms that had reined in the presidency's power. A proposed constitutional amendment would allow the president once again to hold multiple ministerial portfolios, and unilaterally to appoint judges, the attorney general, the police chief and other senior officials, without involvement of the constitutional council.' In February 2020 several news agencies reported that the new government had dropped the singing of the national anthem in Tamil during the Sri Lankan Independence Day celebrations. This was a move away from the previous government who sang the national anthem in both Tamil and Sinhalese to promote ethnic harmony. The new Rajapaksa government has reversed or announced its intention to abandon many key legislative achievements and policy commitments of the preceding United National Party (UNP) government, including promises on post-war reconciliation, accountability and inclusive governance made to the UN Human Rights Council and to the EU.<sup>17</sup> Its withdrawal from the United Nations resolution 30/1 on accountability and reconciliation in February 2020 was a clear indication it will not cooperate with the international community on wartime inquiries.<sup>18</sup>
43. The number of PTA arrests appears to have increased in late 2020 and early 2021 – including reports that the Rajapaksa government used the PTA to detain Tamils involved in marking the birthday of slain LTTE leader, Vellupillai Prabhakaran and Muslims accused of spreading extremism through WhatsApp.<sup>19</sup> In November 2020, the Human Rights Commission of Sri Lanka has written to the Inspector General of Police requesting the police chief to urgently provide the details of persons detained under the PTA to the Commission.<sup>20</sup> The Rajapaksa government has pledged to look at provisions of the PTA to bring them into line with international human rights standards, and in June 2021 announced the formation of a Cabinet subcommittee to present recommendations following the adoption of a resolution in the European Parliament condemning its continued use.<sup>21</sup>
44. A report from a Sri Lanka Human Rights Documentation Centre (HRDC) June 2020 undertaken seven months after Gotabaya's election, reported 72 incidents of human rights violations in for May 2021. Eleven of these were physical attacks (15.3 per cent), three arrests and four

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(ICG), 18 November 2019, 20191119144914; 'Sri Lanka's new president has a worrying past', Economist, The, 23 November 2019, 20191122115223; 'Rajapaksa Rule', Foreign Policy, 14 August 2020, 20200817165533; 'Sri Lanka is becoming a one-family state', Economist, The, 15 August 2020, 20200814111514.

<sup>15</sup> UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil Separatism (version 6)", May 2020, 20200527172009.

<sup>16</sup> 'Sri Lanka: Resolution 30/1 Implementation Monitor Statistical and Analytical Review No. 4', Verite Research, 01 March 2019, 20190318141458; 'Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka', OHCHR, 18 February 2020, 20200221140652.

<sup>17</sup> UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil Separatism (version 6)", May 2020, 20200527172009.

<sup>18</sup> 'Sri Lanka Elections: Stronger Powers, At What Cost? – Analysis', S. Rajaratnam School of International Studies (RSIS), 12 August 2020, 20200812104655.

<sup>19</sup> 'Sri Lankan police arrest 19 and mark further 55 for posting Prabhakaran birthday messages', Tamil Guardian, 27 November 2020, 20201130114439; 'Sri Lanka: Tamil journalist arrested for social media posts', International Federation of Journalists (IFJ), 03 December 2020, 20201204143539; 'Sri Lanka arrests two for allegedly spreading Wahabism', Tamil Guardian, 03 April 2021, 20210406172936.

<sup>20</sup> 'Human Rights Commission requests IGP to provide details of persons detained under the PTA', Colombo Page, 25 November 2020, 20201126125645.

<sup>21</sup> 'Sri Lanka's Observations on the Resolution adopted in the EU Parliament', News.lk, 16 June 2021, 20210616115545; 'SL confirms its intent on revisiting provisions of PTA', Daily Mirror (Sri Lanka), 26 January 2021, 20210204134819; 'Cabinet Subcommittee for PTA amendments', the morning, 23 June 2021, 20210625155125.

attempted arrests or threats of arrests. The highest percentage of incidents (27.8 per cent) reported was related to verbal or written threats including online hate speech, and insulting statements. This was a significant increase when compared with the previous months. Another significant difference was 32% of incidents reported from North and East. Fourteen incidents (19 per cent of total incidents) were reported only from the Jaffna district. In the cases, where information on ethnicity was applicable and available, over 60 per cent of the victims were Tamils, 31 per cent Sinhala and 6 per cent Muslim. Similarly, when gender was considered, 87 per cent were males. The highest number of victims by profession was state officials. Secondly, it was politicians and their party members. Journalists and civil society activists were also relatively high. The military and police were responsible for highest percentage 37.5 per cent of incidents.<sup>22</sup> While this report indicates Tamils are predominantly targeted over other ethnic groups including the Sinhalese majority, it is Tamils with a specific profile including politicians, journalists or civil society activities.

45. The UK Home Office fact finding mission (FFM) to Sri Lanka conducted between 28 September and 5 October 2019 and published in January 2020 observed that most sources noted that Tamils are not specifically targeted. It stated certain Tamils may be subject to closer scrutiny such as political activists, journalists and those returning from abroad may be monitored although this was not the case for all Tamils. Tamils do have more freedom of speech but feared the return of former President Rajapaksa.<sup>23</sup> The UK Home Office 'Sri Lanka: Tamil Separatism' report of May 2020 confirmed Tamils are unlikely to face persecution based on their ethnicity alone.<sup>24</sup> According to Human Rights Watch in its 2021 World Report civil society groups have reported increasing harassment and intimidation towards family members of individuals who disappeared during the war who demand to know the whereabouts of their loved ones. Human rights defenders, as well as lawyers and journalists whose work was perceived as challenging the government were also targeted.<sup>25</sup>
46. DFAT is aware of reports that people with war-related scarring are more likely to attract adverse attention of the Sri Lankan authorities and Freedom from Torture reported in 2011 an unidentified number of people were detained by the authorities in April or May 2009 because there scarring was deemed evidence of LTTE membership, DFAT is unaware of more recent evidence of individuals being detained because of scarring.<sup>26</sup> In its May 2020 report the UK Home Office observed scarring may show that a person was involved in the conflict which ended in 2009, but that alone will not be enough to indicate that they would be at risk on return as previous LTTE connections are not perceived by the authorities as a destabilising threat in post-conflict Sri Lanka.<sup>27</sup> I am not satisfied the authorities will suspect him of LTTE involvement due to having injuries or scars.
47. There are still reports of torture occurring in Sri Lanka, including from US State Department, UN Special Rapporteurs, the HRDC, and other sources, although DFAT is unable to verify allegations of torture in Sri Lanka since 2016 and the UK Home Office expresses a similar view to DFAT.<sup>28</sup> There have been a few unverified torture complaints since 2016, white van

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<sup>22</sup> 'Repression of Dissent in Sri Lanka: 1st - 31st May 2020', INFORM Human Rights Documentation Centre, 29 June 2020, 20200702160949.

<sup>23</sup> UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928

<sup>24</sup> UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil Separatism (version 6)", May 2020, 20200527172009.

<sup>25</sup> 'World Report 2021. Events of 2020', Human Rights Watch (HRW), 13 January 2021, 20210114072851

<sup>26</sup> DFAT, "Country Information Report Sri Lanka", 4 November 2019, 20191104135244

<sup>27</sup> UK Home Office, "Country Policy and Information Note Sri Lanka: Tamil Separatism (version 6)", May 2020, 20200527172009.

<sup>28</sup> UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928; UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928; 'Country

abductions are no longer common, although the police continue to resort to excessive force particularly to extract confessions, and the civilian authorities generally maintain control over the security forces. DFAT assesses that Sri Lankans face a low risk of mistreatment that can amount to torture overall.<sup>29</sup>

48. While recognising concerns with the current government, the situation in Sri Lanka is much different from that during the conflict and post war period. I accept there are still reports of continued human rights violations and the Sri Lankan authorities acting with impunity. I acknowledge the serious allegations against the current President and his government but any suggestion that they will target ordinary members of the Tamil community, is speculative. The information before me does not support that the change of government gives rise to a real chance of harm to Tamils, or to individuals with the applicant's profile or that Tamils are currently imputed as LTTE supporters because of their Tamil ethnicity. The credible country information before me is that while it is not without issue, the security situation has improved considerably since the end of the conflict, particularly amongst the Tamil population. I am not satisfied that Tamils are being systematically targeted and subjected to persecution because of their ethnicity, gender, and provenance.
49. Sri Lanka is a party to the International Convention on the Elimination of All Forms of Racial Discrimination. The constitution provides that 'no citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any such grounds.' Some members of the Tamil community report discrimination in employment particularly in relation to government jobs. Even the Tamil dominated north and east have relatively few public servants. DFAT assesses there is no official discrimination based on ethnicity in the public sector employment. Rather, Tamils under-representation is largely the result of language constraints and disrupted education because of the war.<sup>30</sup>
50. The US State Department similarly reported Tamils maintained that they suffer discrimination in university education, government employment, housing, and health services.<sup>31</sup> Information before me does not indicate discrimination has increased under the Rajapaksa government. DFAT assesses that non-Muslim Sri Lankans, including Tamils, face a low risk of official or societal discrimination, including in their ability to access education, employment, and housing.<sup>32</sup> While the applicant did not go to school, he has not claimed to have been prevented from accessing education, employment or housing in Sri Lanka. I am not satisfied the applicant faces a real chance of any harm on this basis.
51. The applicant departed Sri Lanka in November 2012 almost nine years ago, and at which time, he was of no adverse interest to the Sri Lankan authorities. The applicant is not a journalist, human rights activist, politician, a former LTTE member, nor is he involved in Tamil separatism. He does not have a profile to attract the adverse attention of the authorities on his return to Sri Lanka. Given the passage of time since the war ended, I am not satisfied that he will be imputed to be a former LTTE member or supporter based on his Tamil ethnicity. I am not satisfied the applicant faces a real chance of any harm from the Sri Lankan authorities now or

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Reports on Human Rights Practices for 2020 - Sri Lanka', US Department of State, 30 March 2021, 20210401122412; 'Repression of Dissent in Sri Lanka: 1st - 31st May 2020', INFORM Human Rights Documentation Centre, 29 June 2020, 20200702160949.

<sup>29</sup> DFAT, "Country Information Report Sri Lanka", 4 November 2019, 20191104135244

<sup>30</sup> Ibid.

<sup>31</sup> 'Country Reports on Human Rights Practices for 2020 - Sri Lanka', US Department of State, 30 March 2021, 20210401122412.

<sup>32</sup> DFAT, "Country Information Report Sri Lanka", 4 November 2019, 20191104135244.

in the reasonably foreseeable future on his return to Sri Lanka on account of the fact he is a Tamil male who originates from the Eastern Province and has a number of injuries or scars.

52. The applicant claimed to have converted to Christianity since coming to Australia. Based on his oral evidence given at his SHEV interview, I accept this to be the case and that he attends church every Sunday. Although the applicant did not initially claim to fear harm on account of his Christian faith, at his SHEV interview, the applicant stated his becoming a Christian would be another problem on his return to Sri Lanka. He was afraid because all the others were Hindu. In Australia he goes out to speak to people and explains what God can and he talks about Jesus as he has to, and that is his life. When he goes back to Sri Lanka, he will have to do that, and he will have problems.
53. The applicant did not state which Christian denomination he adhered to or which church he attends. He has not claimed to belong to an evangelical church. Given my credibility concerns regarding the applicant overall and the late nature of this claim, I consider the applicant has somewhat embellished his claims regarding his need or desire to proselytise to strengthen his claims for protection.
54. According to DFAT, based on a the 2012 national census, Sri Lankas practise four major religions: Buddhism (71 per cent and mostly Sinhalese), Hinduism (12.6 per cent and mostly Tamil), Islam (9.7 per cent) and Roman Catholic and other Christian denominations (7.6 per cent concentrated in the Western and North Western Province). The Christian community encompasses both Sinhalese and Tamil ethnic groups. The Sri Lanka constitution provides for freedom of religion, including the freedom to change religion. The constitution also provides for freedom of public and private worship.<sup>33</sup>
55. Article 10 states that 'Every person is entitled to freedom of thought, conscience and religion, including the freedom to have or to adopt a religion or belief of his choice.'<sup>34</sup> However, Article 9 of the Constitution grants Buddhism a 'foremost place' and obligates the state to 'protect and foster' Buddhism while protecting the rights of religious minorities. In 2003, the Supreme Court ruled that the state was constitutionally required to protect only Buddhism.<sup>35</sup>
56. Sri Lanka recognises religious holidays for Buddhists, Hindus, Muslims, and Christians. Prominent Buddhist, Hindu, Muslim, and Christian leaders attend national functions, although most events include only Buddhist rituals. Religion is a compulsory subject in both public and private schools. Students are able to study their choice of Buddhist, Hindu, Muslim or Christian religious classes, depending on the availability of teachers.<sup>36</sup>
57. The former Rajapaksa Government sanctioned religious discrimination, including by supporting the extremist Buddhist group Bodu Bala Sena (BBS, Buddhist Power Force in English), and continued to do so in opposition. A number of extremist Buddhist groups operate in Sri Lanka, including the BBS, Sinha Le (Lion's Blood), Sinhala Ravaya (Sinhalese Roar) and the Mahason Balakaya (Strong Ghost Regiment). These groups emerged in response to perceived threats to Sri Lanka's Buddhist identity posed by religious minorities, mostly during the time of the Mahinda Rajapaksa Government. Under the Sirisena government, state authorities took a

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<sup>33</sup> Ibid.

<sup>34</sup> Ibid

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

relatively less tolerant approach toward Sinhala Buddhist extremism, and groups such as the BBS met some pushback.<sup>37</sup>

58. Around 82 percent of Christians in Sri Lanka are Roman Catholic. Other Christian denominations include Anglican, Assembly of God, Baptist, The Church of Jesus Christ of Latter-day Saints (Mormon), the Dutch Reformed Church, Jehovah's Witnesses, Methodist and Pentecostal. Membership of evangelical Christian groups is small but growing.<sup>38</sup>
59. DFAT noted the National Christian Evangelical Alliance of Sri Lanka (NCEASL) documented 88 incidents of violence and intimidation against Christians in 2018, 19 of which involved acts of violence. The NCEASL documented 96 such incidents in 2017, 90 in 2016 and 89 in 2015. These primarily involved intimidation, including physical and verbal threats against pastors and their congregations and disruption of worship services, demands for closure of churches and legal challenges.<sup>39</sup>
60. In Batticaloa, it was reported in 2018 there were 19 acts of intolerance against Christians, although it does specify what constitutes an act of intolerance. On October 21, a crowd of approximately 100, including a Hindu priest and chairman of the Hindu temple, issued death threats and verbally abused a Christian pastor and congregants of the Foursquare Church in Batticaloa. The landowner, who had leased the land to the church, later produced his title deed to the land in question. The pastor stated police admonished the Hindu priest and the chairperson of the temple for their actions and threatened to arrest them if they disrupted the Christian worship activities in the future.<sup>40</sup>
61. The NCEASL has documented over 50 incidents of anti-Christian violence and intimidation in 2019 to date, including the Easter Sunday terrorist attacks. Christians were deliberately targeted as part of these attacks. Most of those killed were parishioners attending Easter services at the St Anthony's Roman Catholic (Colombo), St Sebastian Roman Catholic (Negombo) and Zion evangelical (Batticaloa) churches. Public church services were suspended across Sri Lanka immediately following the attacks. They have since resumed, but with heightened security. Private Catholic schools reopened on 14 May.<sup>41</sup>
62. DFAT assesses that Christians in Sri Lanka face a low risk of official discrimination. DFAT assesses that evangelical Christians in Sri Lanka face a moderate risk of societal discrimination, and that Roman Catholics and other mainstream Christian denominations face a low risk of societal discrimination. The number of incidents targeting evangelical Christians has remained largely static over recent years and is highest in Buddhist-majority regions in the North Central, South, and Western provinces.<sup>42</sup>
63. The NCEASL has attributed some instances of violence and intimidation against Christians to the BBS, although DFAT is not aware of any specific incidents perpetrated by the BBS against the Christian community in 2018. The primary focus of the BBS and other Buddhist extremist groups is the Muslim community. There were no reported incidents of attacks on Christians by radical Muslims in Sri Lanka prior to the Easter Sunday terrorist attacks. Future attacks against

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<sup>37</sup> Ibid.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

<sup>40</sup> 'Sri Lanka: 20190917183739 – Evangelical Christians in Batticaloa and Colombo – Proselytising', Country of Origin Information Services Section (COISS), 27 September 2019, 20191001150129

<sup>41</sup> DFAT, "Country Information Report Sri Lanka", 4 November 2019, 20191104135244.

<sup>42</sup> Ibid.

the Christian community by homegrown Islamic extremists are possible. DFAT assesses that Christians face a low threat of violence from homegrown Islamic extremist groups.<sup>43</sup>

64. I note Christians mostly reside in either the Western or North Western Provinces. While I accept that from time to time there are incidents against Christians in Sri Lanka and some involve violence, on the information before me, that I am not satisfied the applicant is an evangelical Christian or that he intends to proselytise, I consider there is a remote chance but not a real chance of the applicant facing harm on account of his religion. I am not satisfied the applicant faces a real chance of any harm on his return to Sri Lanka now or in the reasonably foreseeable future on account of his conversion to Christianity.
65. I accept the applicant, his wife and son departed Sri Lanka in 2012 illegally by boat without their Sri Lankan passports. I accept that on their return to Sri Lanka, the applicants may be considered by the authorities to be failed asylum seekers who have resided in Australia for over eight years.
66. Sri Lanka's Constitution entitles any citizen 'the freedom to return to Sri Lanka'. The Immigrants and Emigrants Act (the IE Act) governs exit and entry from Sri Lanka and makes it an offence to depart other than via an approved port of departure, such as a seaport or airport. Returnees are treated the same regardless of their ethnicity and religion. According to DFAT, such persons are very likely to be questioned at the airport, security, criminal and identity checks, and enquiries undertaken, then charged with an offence under the under the IE Act. DFAT understands detainees are not subject to mistreatment during the interviewing process.<sup>44</sup> Both DFAT and the UK Home office indicate some asylum seekers may be passed to the CID based at the airport. The CID would make additional checks with the local police in the area where the person claimed to be from.<sup>45</sup>
67. The UK Home Office FFM confirmed in May 2020, as told by representatives of the International Organization for Migration (IOM), claiming asylum abroad is not an offence. A journalist and a human rights activist informed them that they were not aware of ordinary Tamils being targeted on return, with the human rights activist further noting that he could not recall any cases of ordinary Tamils being stopped at the airport. IOM told the UK FFM they did not believe there was a distinction between Tamil and Sinhalese returnees and whilst there may be isolated cases there was no systematic policy of discrimination. A journalist told the UK FFM that if a returning failed asylum seeker were found to have links with the LTTE they would likely face further questioning by the CID although an NGO told that that this would depend on the case. The UNHCR advised that since 2015 the level of security screening at the airport has decreased. Former LTTE cadres would only be of interest and face arrest if there was a pending criminal case against them pending and that mere membership of the LTTE would not make someone of interest.<sup>46</sup> The applicant does not have a criminal or terrorist background and he has no outstanding court orders or arrest warrants against him.
68. DFAT reports that passengers on a people smuggling venture (such as the applicant) are fined, usually between AU\$122 and AU\$162, and are not subject to a custodial sentence. Fines are issued to deter people from departing illegally in the future. DFAT has been advised by the Sri Lankan government that no mere passenger on a boat has been given a custodial sentence. As part of the process at the airport the applicant may be held in an airport holding cell for a period of two days if a magistrate is not available. A guilty plea attracts a fine, which can be

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<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid; UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928.

<sup>46</sup> Ibid.

paid by instalments. If a passenger pleads not guilty the magistrate will usually grant bail on a personal surety or guarantee by a family member. Where a guarantor is required, the returnees may have to wait for the guarantor to come to court. Additionally, there may be ongoing court costs. Under Sri Lankan law, anybody over the age of 12 at the time of their offence is treated as an adult. Children over the age of 12 can be charged under the IE Act so long as they were 12 or over at the time of the alleged offence.<sup>47</sup> The applicant's son was six when they departed Sri Lanka and his daughter not yet born. I am not satisfied they will be charged.

69. I accept the applicant will be questioned on his return to Sri Lanka. There is nothing in the information before me to suggest the applicant will plead not guilty and I consider he will most likely plead guilty. I accept the applicant will be subject to questioning, a relatively brief period of detention and a fine upon their return to Sri Lanka. In any event, it is clear the IE Act provisions that deal with a breach of the departure laws from Sri Lanka are not discriminatory on their face, nor do they disclose discriminatory intent nor are they implemented in a discriminatory manner. Moreover, I do not accept that these processes and penalties rise to a level that may be regarded as serious harm in this case.
70. I have found the children will not be fined and I am not satisfied they will be subject to any other penalties. The information does not suggest children are separated from their parents or mistreated in the process and I expect there would be some reporting or other country information if this was the case. I am also not satisfied the children who will be indirectly caught up in this process face a real chance of serious harm on this basis.
71. The Sri Lankan government has consistently stated refugees are welcome to return to Sri Lanka. DFAT notes that despite positive government sentiment, refugees and failed asylum seekers face practical challenges to successful return and most returnees have incurred significant expenses or debt to undertake their journey. Some refugees and failed asylum seekers reported social stigma upon return to their communities. Overall, DFAT understands that societal discrimination is not a major concern for returnees, including failed asylum seekers. Many returnees have difficulty finding suitable employment and reliable housing.<sup>48</sup>
72. DFAT understands some returnees including returnees to the north and east with suspected LTTE links have been subject to monitoring including visits and telephone calls from the CID; most are not actively monitored on an ongoing basis.<sup>49</sup> The UK Home Office also observes this.<sup>50</sup> I am not satisfied monitoring amounts to serious harm. I find the applicant does not have a profile to warrant any ongoing attention from the authorities on this basis. I am also not satisfied the applicant will return to Batticaloa, Eastern Province where he was born. I am not satisfied he will be subject to monitoring on his return. The applicant has also not claimed to owe anyone money for his travel to Australia.
73. The applicant is [age] years old and his children are [age] and [age]. I consider it highly likely they will return to [Town 2], North Western Province where he has spent most of his adult life with his wife and where his son was born. The applicant has work experience in Australia, [Country 1] and Sri Lanka and this work experience will assist him to find suitable employment. I accept that the family may face some social stigma on their return as returned/failed asylum

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<sup>47</sup> DFAT, "Country Information Report Sri Lanka", 4 November 2019, 20191104135244.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

<sup>50</sup> UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928; UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 202001231629.



seekers. However, although social stigma, whether in the form of negative attitudes, a level of social isolation or otherwise, may be hurtful or upsetting, I am not satisfied, it amounts to significant ill treatment or any other type of harm that may be regarded as serious harm.

74. I am not satisfied the applicants face a real chance of persecution on the basis of being returned (Tamil) asylum seeker/failed asylum seeker from Australia who departed Sri Lanka nine years ago now or in the reasonably foreseeable future.

75. Considering the applicants circumstances and profile as a whole and in the context of the current country conditions in Sri Lanka, I am not satisfied that the applicants face a real chance of persecution now or in the reasonably foreseeable future. The applicant does not have a well-founded fear of persecution within the meaning of s.5J.

### **Refugee: conclusion**

76. 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).

### **Complementary protection assessment**

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77. 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**

78. 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.

79. 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.

80. I accept the applicants may face challenges in reintegrating on return after their time in Australia and that may face some social stigma as returnees or failed asylum seekers. I have found that as a returnee who departed illegally, the applicant would be subject to an interviewing process whilst security, criminal and identity checks are undertaken by the authorities. I have found he might be remanded in custody for a brief period at the airport or at a prison before he is brought before a magistrate, that he is likely to be fined or that a surety or guarantee may be imposed on them. I have found the applicant does not to have any specific profile that would warrant a longer detention, custodial sentence, or further

interrogation. I am also not satisfied that the treatment (including court appearances) and penalties to which the applicant may be subject to amount to significant harm as defined. I am also not satisfied his son and daughter will be subject to significant harm. They will not be arbitrarily deprived of their life or subject to the death penalty or tortured. They will not be subject to cruel or inhuman or degrading treatment or punishment.

81. I have otherwise found that the applicant does not face a real chance of harm in relation to his claims and profile. The requirement for there to be a “real risk” of significant harm applies the same standard as the “real chance” test. For the same reasons as given above, I am not satisfied that there are substantial grounds for believing that, as a necessary consequence of the applicant’s removal to Sri Lanka, he will face a real risk of significant harm.

### **Complementary protection: conclusion**

82. 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).

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

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83. 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). For the purpose of s.5(1), the expression ‘member of the family unit’ is defined in r.1.12 of the Migration Regulations 1994 to include dependent children.
84. 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:

...

**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.