



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA21/09883

SRI LANKA
IAA reference: IAA21/09882

SRI LANKA
IAA reference: IAA21/09880

SRI LANKA
IAA reference: IAA21/09881

Date and time of decision: 8 November 2021 12:21:00
M Oakman, Reviewer

Decision

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

Visa application

1. The referred applicants (the applicants) claim to be Tamil Hindus from Sri Lanka. They are a husband [IAA21/09883] (Applicant 1), a wife [IAA21/09880] (Applicant 2), their oldest son [IAA21/09881] (Applicant 3) and their youngest son [IAA21/09882] (Applicant 4). Applicant 2, 3 and 4 arrived in Australia [in] April 2013 and Applicant 1 arrived in Australia on [a later date in] April 2013. The applicants lodged applications for Safe Haven Enterprise [XE-790] visas (SHEV) on 30 May 2017. On 7 September 2021 a delegate of the Minister for Immigration (the delegate) refused to grant the visas.
2. The delegate prepared two decisions in relation to the applicants' SHEV applications. In the first she considered Applicant 1's protection claims, with Applicants 2, 3 and 4 as members of the same family unit as Applicant 1. In the second she considered Applicant 2's protection claims, with Applicants 1, 3 and 4 as members of the same family unit as Applicant 2. I have prepared one decision covering all four of the applicants and their protection claims.

Information before the IAA

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

Applicants' claims for protection

4. Applicant 1 is the primary applicant in this matter. Applicant 2 also makes her own protection claims. Applicants 3 and 4 indicated in the SHEV application (Part B, Q3 and Part C, Q87) that they were making their own claims. Applicants 3 and 4 did not make statements of their own and, at the relevant sections of the SHEV application (Part C, Q89, 90 and 93-96), each stated "Please refer to my parent's Statutory Declarations attached to their applications". The applicants also claim as members of the same family unit.
5. Applicant 1's claims may be summarised as follows:
 - If forced to return to Sri Lanka, he is scared he or his sons will be detained, interrogated, tortured or killed by the Sri Lankan authorities because his father, half-sister and [uncle] were all members of the Liberation Tigers of Tamil Eelam (LTTE) and also because he is Tamil.
 - He is afraid if they are sent back to Trincomalee, they will be killed. His LTTE uncle was killed and he doesn't know if his LTTE sister is dead or alive. The Sri Lankan government knows about his family history and they will know who they are if they return. They will detain, torture and kill them.
 - He is afraid his children will also be targeted because they are young Tamil boys and their grandfather, aunty and granduncle were all part of the LTTE. The Sri Lankan government will think that he and his sons are supporters of the LTTE and harm them. This is because Sri Lankan authorities will think that they have followed in their family footsteps and say they have returned to Sri Lanka to reinvigorate the LTTE.
 - If they are returned to Sri Lanka, they will be detained at the airport because of his family history with the LTTE and because he left Sri Lanka illegally and as a failed asylum

seeker. He is afraid he will be interrogated and tortured. He has heard that when Tamils who illegally left Sri Lanka return, they are detained at the airport until family in Sri Lanka can confirm their identity. He has no family in Sri Lanka and is afraid this will mean he and his family will be detained indefinitely.

- He has been told that Sinhalese people have colonised his village, demolished his family property and taken their land. They would have nowhere to live, no livelihood and no support in their home village. He is scared of the Sinhalese people because of his LTTE relatives' experiences. He has heard that schoolgirls are raped and abducted, people are tortured or go missing, because they had a father or sibling in the LTTE.
- He has a friend who went back to Sri Lanka who had one family member who was part of the LTTE. His friend is interrogated every day; he can't work; his wife can't go shopping; and his children can't go to school. As he had three relatives in the LTTE, the consequences for them would be much greater. Applicants 3 and 4 are afraid they will be beaten up and he is afraid the family will go missing or be tortured or killed.
- Applicants 3 and 4 were born in India. They have no documentation to show they are Sri Lankan citizens. He doesn't know how he could prove they are citizens. This will be a problem if they are detained at the airport, especially as he has no family to prove who he and his sons are.

6. Applicant 2's claims may be summarised as follows:

- If forced to return to Sri Lanka, she is scared she or her sons will be detained, interrogated, tortured or killed by the Sri Lankan authorities because of the Sri Lanka Army's (SLA) suspicion of her father and her husband's family links to the LTTE, and because they are Tamil.
- If forced to return to Trincomalee, she is afraid that the Sri Lankan authorities will know she is her father's daughter. They suspected her father to keep questioning him and she is afraid those same suspicions will mean she will be in trouble and the Sri Lankan authorities will think she has links to the LTTE.
- She is afraid that she and her family will be detained at the airport because of who her father is, her husband's family's links to the LTTE, and because she left Sri Lanka illegally and as a failed asylum seeker. When detained, she is afraid they will be interrogated and tortured. Though she has a grandmother in Sri Lanka, she was [age] years old (in 2017) so Applicant 2 doesn't believe she will be able to confirm her identity after they are detained at the airport and they may be held in detention indefinitely. Applicants 3 and 4 also have no Sri Lanka identity documents or proof of citizenship, and she doesn't know if they can be Sri Lankan citizens.
- She fears that her sons will be kidnapped or endangered because their grandfather, aunty and grand uncle were supporters of the LTTE. The Sri Lankan authorities will think they also all support the LTTE.

Factual findings

Background

7. Applicant 1 was born in Trincomalee, Eastern Province, Sri Lanka in 1980. He and his family lived in [City 1] between 1985 and 1988, before moving back to Trincomalee. In 1990 he and his family went to India as refugees. Applicant 2 was born Trincomalee, Eastern Province, Sri

Lanka in 1983. In 1990 she and her family went to India as refugees. Applicants 1 and 2 met in India in about 1999 and married there in 2001. Applicants 3 and 4 were born in India in [year] and [year], respectively. Applicant 1 attended school at various times in Sri Lanka and India, completing Year [level] in India (1999). Applicant 2 attended school at various times in Sri Lanka and India, completing Year [level] in India (1998). Applicants 3 and 4 attended school in India and Australia. At the time of Applicant 2's SHEV interview (May 2021), Applicant 3 had finished his schooling and was looking for work, while Applicant 4 was still attending school. Applicant 1 worked in India as a labourer in various jobs (2000-2013) and was working in Australia as a [Occupation 1]. The applicants are Tamil and Hindu. Applicants 1 and 2 speak, read, and write Tamil and English (a little). Applicants 3 and 4 speak Tamil and speak, read, and write English.

Problems in Sri Lanka and life in India

8. In summary, Applicant 1 claims that if forced to return to Sri Lanka, he is scared he or Applicants 3 and 4 will be detained, interrogated, tortured or killed by the Sri Lankan authorities because Applicant 1's father, half-sister and [uncle] were all members of the LTTE and also because he is Tamil.
9. He says his family were supporters of the LTTE in Sri Lanka and that is why they fled to India for their lives. His father was a supporter of the LTTE. He [worked] for them, and he supported and assisted them. Applicant 1 does not know more details of what other activities his father did for the LTTE as his mother has only revealed that he [worked] for them. He was very young at the time, and his father did not tell him anything.
10. The applicant claims the Sri Lankan government came to know about his father's support of the LTTE and started to arrest and harass his father. He was arrested about three times. The first time he was arrested, the SLA warned his father against supporting the LTTE and his father was detained for about two days before he was released. His father continued to assist the LTTE after his release. His father was arrested a second time and taken to [prison] where he was beaten and tortured, before being released after about 15 days and allowed to return home. This arrest and tortured made his father more aggressive in his support for the LTTE and he enrolled Applicant 1's half-sister (his father's eldest daughter) with the LTTE to show his support. His half-sister was around [age] years old, and his father's daughter from his first marriage. After his father enrolled her with the LTTE, she no longer lived with them and he believes she was trained as a soldier for the LTTE. His half-sister did not come to India with the family and he does not know where she is or if she is alive or dead. His father also helped LTTE members to hide.
11. Applicant 1 says that after his father's second arrest, his family left his home village and went to live in [City 1]. They lived at his father's friend's house to escape the SLA but returned to their home after three years. His father was then arrested for a third time. His father was kept at [prison] for over a month and was tortured. When his father and 16 other prisoners were taken to be killed, while transported, a LTTE van came and helped them all to escape. After this his father fled to India. Applicant 1 remembers his mother telling him when they were in Sri Lanka that his father had escaped but it was only after coming to Australia that he asked his mother for more information. He has said what he has remembered and what his mother has told him.
12. Applicant 1 says his mother had two brothers, "A" and "B". B was a supporter of the LTTE, but A joined the EPRLF, which opposed the LTTE. B got trapped by the EPRLF and they ordered A to

execute his own brother. He remembers when B's body was brought home his mother cried and said that they got his own brother to murder him.

13. Applicant 1 claims all this made his father more aggressive in his support of the LTTE and both the SLA and the EPRLF wanted his father dead. His father therefore escaped to India before this could happen. His mother did not know his father had gone to India and went to [prison] to look for him. As a result, the SLA started to threaten his mother. She received a telegram from his father saying that he was in India. His mother took them to India so they could join his father. He remembers walking to the named departure point. When they got on a boat, they demanded money and his mother had to pay them with her gold necklace.
14. He says his father joined them in India three days after they arrived. Applicant 1 was [age] years old when he left Sri Lanka. Because of his father's injuries from torture and his mother looking after him in hospital, the family struggled when initially in India, often being hungry. After they were transferred to another camp in 1992 his father got work, but still struggled. As a result, Applicant 1 left school in Year [level] to work and support his family. He supported them until he was married, after which his brothers worked and supported his parents and he supported his own family. In 2000 they transferred to another camp and endured poor conditions due to the size of rooms and lack of sound proofing.
15. Applicant 1 claims they had no freedom as refugees in India. There were restrictions on when they could leave the camp, including being kept inside while VIPS or politicians were visiting the area. Once he was late coming back and he was assaulted by Q Branch, fracturing his leg. It was also a struggle to make sure his children were educated, he spent 150,000 and 100,000 rupees on Applicant 3's and Applicant 4's education, respectively. They are branded as Sri Lankan refugees in India, even though they are Tamils living in Tamil Nadu, which is considered a stigma there. One time his brother happened to be near a train fire started by a gang, he was arrested and jailed for six months because he was accused of the crime when he ran from the site of the fire. Because he was in jail his brother's name was removed from the family refugee card. His father, who never properly recovered from the torture he received in Sri Lanka, was severely broken and depressed by how they were treated in India and he believes his father died because of depression. His father died in 2007. Before they left India, he noticed children in the camp drinking alcohol and taking drugs and was worried about the future of Applicants 3 and 4. When they got the message that the Indian government was going to return Sri Lankan refugees to Sri Lanka, they knew they would be killed if they were returned so they no option but to leave India.
16. Applicant 1 fears for himself and his sons, if returned to Sri Lanka (see Applicants' claims for protection above).
17. In summary, Applicant 2 claims that if forced to return to Sri Lanka, she is scared she or Applicants 3 and 4 will be detained, interrogated, tortured or killed by the Sri Lankan authorities because of the SLA's suspicion of her father and her husband's family links to the LTTE, and because they are Tamil.
18. Applicant 2 claims her family fled Sri Lanka in 1990 when she was [age] years old. While in Sri Lanka, the SLA came and questioned her father on a number of occasions. She remembers they would come early in the morning and take him away. Her mother would be crying, they would tell her that they needed to question him. He would then be released 4-5 hours later. She doesn't know why they questioned her father, but she believes they beat and tortured him. They must have been suspicious of something as they kept questioning him. She believes they suspected that he had connections to the LTTE.

19. She says her father was also very concerned about the LTTE. The LTTE had a rule that every family must let one member be conscripted to fight for the LTTE. The LTTE wanted her or her brother but as they were still too young at the time, they would just tell her father, when your children are old enough, one of them must join us. Her father was scared that she or her brother would have to fight for the LTTE.
20. Applicant 2 claims there was an army camp near their house and in 1990 there were a lot of problems nearby. Her mother's brother was kidnapped by a white van and they never saw him again. She remembers seeing her father being dragged away by the SLA and seeing people get shot and beaten and tortured in the street. There was also bombing and one time, when they were on their way to her grandmother's house, a helicopter appeared. Her father told her to lie on the ground and a bomb blast hit not far from her head and she was very scared. Her father decided to flee Sri Lanka with the family. Her grandfather's two younger brothers were also shot and killed by the SLA in 1989.
21. She says she was a refugee in India for 23 years. They did not have freedom in India and were under the control of Q Branch. At the camp, they had to sign out if they wanted to leave and there were restrictions on returning. If Applicant 1 returned from work late, he would be questioned and beaten. Once, a family friend passed away, she had to ask permission to go to the funeral and by the time it was granted the funeral was over. Applicants 3 and 4 also have no rights or freedom in India.
22. Applicant 2 fears for herself and her sons, if returned to Sri Lanka (see Applicants' claims for protection above).
23. Applicant 1's mother is in India with his youngest brother, and his other brother is in Australia. Applicant 2's father, sisters and a brother live in India. She has another brother in [Country 1], and she believes he was granted permanent residency after applying for protection. Her grandmother and two of her father's sisters live in Sri Lanka.
24. The applicants provided various supporting documents including identity documents, copies of birth certificates and documents in relation to being Sri Lankan refugees in Tamil Nadu.
25. The Department of Foreign Affairs and Trade (DFAT) notes that many Tamils, particularly in the north and east, reported being monitored, harassed, arrested or detained by security forces during the war, and that from the mid-1980s many thousands of Tamils fled Sri Lanka for Tamil Nadu in India because of the war.¹
26. The applicants have provided generally consistent address, education, employment, and family details throughout the visa application process, and I accept those details, including that they are Tamil and Hindu, as set out in the family's SHEV applications and at the SHEV interviews of Applicants 1 and 2, except as discussed below.
27. In assessing the evidence of Applicants 1 and 2, I have taken into account the difficulties often faced by applicants for protection, particularly those for whom some period has passed since they departed their country of origin, including factors such as recall problems, misunderstandings in interpreted material, cultural communication issues, a lack of cohesive narration due to experiencing trauma or the passage of time, and the young ages of Applicants 1 and 2 at the time events are said to have occurred in Sri Lanka and when they left for India.

¹ DFAT, "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244.

28. Applicant 2 provided generally consistent details about why her family left Sri Lanka in 1990 in her arrival interview with the Department, in her SHEV application statement and at the SHEV interview. The details she provided of the various adverse incidents her family members encountered with the Sri Lankan authorities is, on its face, also credible. I accept her claims including that her father was suspected of supporting the LTTE and he was taken and mistreated by the SLA on a number of occasions; an uncle was kidnapped by a white van; two of her great uncles were killed in 1989 by the SLA; and she was near an explosion when a helicopter was bombing the area.
29. However, I hold concerns about the credibility of some of Applicant 1's claims. In particular, I do not consider it credible that, after his father was taken and tortured by the authorities because of his own support of the LTTE, the father would decide to place his [age] year-old daughter at similar if not greater risk by enrolling her in the LTTE. I do not consider the claimed incident where his father and 16 other LTTE prisoners were rescued by the LTTE at the last minute, that is while they were on the way to their executions, to be credible. I also do not consider the claimed staged killing/execution of his uncle B by his uncle A at the direction of the EPRLF to be credible. Additionally, I do not consider it credible that Applicant 1 said in his arrival interview (July 2013) that his father was forced to [work] for the LTTE but by the time of his SHEV application statement (May 2017) this had changed to his father being a supporter of the LTTE, whose support increased each time he was taken and tortured by the authorities. At his SHEV interview (May 2021) he also claimed for the first time that, as well as his father being a supporter of the LTTE and doing lots of work for them, his father would also help LTTE members hide. I am aware of the limitations with arrival interviews. However, per the recording of that interview, he volunteered that his father was forced to [work] for the LTTE; he was consistent about that fact when the interviewer asked a follow up question about it; and then confirmed his father was forced to [work] when answering a later question about whether he or his family had any involvement with armed groups operating in the area when he was in Sri Lanka. In short, his evidence at the arrival interview about his father being forced to [work] for the LTTE was clear and repeated, and inconsistent with his SHEV application statement and SHEV interview. Similarly, I do not consider it credible that in his arrival interview he referred to his father taking the family to India, but in his SHEV application statement his evidence changed to his father going there first, after he escaped via the claimed LTTE rescue, and his family joining him there shortly afterwards. Nor do I consider it credible that he would not mention something as significant as having an uncle in the EPRLF who executed his uncle who was an LTTE supporter, if true, when asked at the arrival interview about whether he and his family had any political affiliations or when talking about the impact of armed groups in his area. I also do not consider it credible that, at his SHEV interview, Applicant 1 indicated his mother had two brothers in the LTTE when discussing why the family had to leave Sri Lanka. Applicant 1 also claimed in his SHEV application statement that his friend, who had a relative in the LTTE, returned to Sri Lanka and is interrogated every day; he can't work; his wife can't go shopping; and his children can't go to school. Given the country information discussed below about the changes in Sri Lanka since 2015, I simply do not consider the claimed problems encountered by his friend and his friend's family to be credible. Nor do I consider it credible that he did not repeat his claims about his friend and the friend's family when asked on a number of occasions at his SHEV interview why he would be at risk of harm if he now returned to Sri Lanka.
30. Overall, I am not satisfied that Applicant 1's SHEV application statement and his evidence at the SHEV interview are free of embellishment and exaggeration, and I prefer and accept the details he gave in his arrival interview in relation to the circumstances under which he and his family left Sri Lanka for India. On that basis, I accept that his father was forced to [work] for the LTTE; his father was taken two or three times by the SLA and questioned and mistreated

because he was [working] for the LTTE; and his father took the family to India as a result. I am not satisfied on the credible evidence before me that Applicant 1 has a half-sister who joined the LTTE when she was [age] years old; that his father was a supporter of the LTTE who did lots of work for them and helped LTTE members hide; that his father was held in [prison] and was rescued by the LTTE while being transported to his execution; that his father went to India before the rest his family after escaping from the authorities; that his uncle B was a LTTE supporter and killed by his uncle A who was in the EPRLF; and that he has a friend who has returned to Sri Lanka and encountered the adverse circumstances claimed.

31. Both Applicant 1 and Applicant 2 have been generally consistent throughout the protection visa process about the applicants' lives in India and I accept the evidence in that regard as set in the SHEV application statements and at the SHEV interviews of Applicants 1 and 2.

Returned Asylum Seekers

32. Applicants 1 and 2 claim they left Sri Lanka with their families in 1990 to travel illegally to India. They left India in 2013, Applicant 2 with Applicants 3 and 4, and Applicant 1 separately, to travel to Australia, in boats organised by a smuggler. The applicants do not have passports. I find that, if they were to return to Sri Lanka, they may be considered by the Sri Lankan authorities to be returned asylum seekers and that Applicants 1 and 2 left Sri Lanka illegally.
33. Applicants 1 and 2 lived in the Trincomalee area as children before going to India in 1990. They have framed their protection claims in relation to their being returned to Trincomalee. In those circumstances, I am satisfied that, if the applicants return to Sri Lanka, they will return to the Trincomalee area.

Receiving country

34. Based on the documents and other evidence provided, I accept Applicants 1 and 2 were born in and are citizens of Sri Lanka. As such, they are nationals of Sri Lanka. I am satisfied that the receiving country of Applicants 1 and 2 is Sri Lanka.
35. Applicants 3 and 4 were born in India. There is varying evidence concerning their citizenship in the referred material. At question 17 of their SHEV applications the citizenship at birth of Applicants 3 and 4 is identified as "Sri Lankan". Elsewhere in the application (question 53), Applicant 3 suggests this is not the case as he states does not have citizenship of any country. Applicants 1 and 2 said in their SHEV application statements that they were concerned that they would have difficulty proving the Sri Lankan citizenship of Applicants 3 and 4 because of lack of documentation. In their s.56 letter response, Applicants 1 and 2 go somewhat further, confirming they had not registered the birth details of Applicants 3 and 4 with the Sri Lanka authorities and implied Applicants 3 and 4 did not have current Sri Lankan citizenship. In the delegate's decision(s) she referred to the citizenship of Applicants 3 and 4 as stateless but nevertheless assessed their receiving country as Sri Lanka, despite them never having resided there. There is no suggestion in the referred material that they are citizens of India.
36. Country information indicates² that Applicants 3 and 4 are entitled to Sri Lankan citizenship, because of the citizenship of their parents, and which can be claimed by following an administrative procedure with any Sri Lankan overseas mission. Registration for someone over 21 can only be made in Sri Lanka, and a small fine is imposed in that case. However, given that they are not currently registered, I am satisfied that Applicants 3 and 4 are not formally

² DFAT, "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244.

recognised as Sri Lankan citizens. While it is apparent that they are entitled to such citizenship and it is easy to obtain, I am nevertheless satisfied on the material before me that Applicants 3 and 4 are currently stateless. As India is the only country they have resided in prior to their arrival in Australia, I am also satisfied it is the only country of habitual residence for the purposes of the definition of receiving country in s.5 of the Act. As such I am satisfied the receiving country for Applicants 3 and 4 is India. I note that Applicants 1 and 2 have both expressed fears their sons will face harm in Sri Lanka. Although it is not necessary for me to consider whether Applicants 3 and 4 face a well-founded fear of persecution or a real risk of significant harm in Sri Lanka, for completeness (and in the event I am wrong about their nationality), I have done so.

Refugee assessment

37. 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

38. 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.

Sri Lanka

39. Country information indicates that Tamils maintained they were subject to longstanding, systematic discrimination in university education, government employment, housing, health services, language laws and naturalisation procedures.³ Incidences of extra-judicial killings, disappearances and kidnapping occurred frequently in Sri Lanka during the war, particularly in the north and east, there are credible reports of torture carried out by Sri Lankan security forces both during the war and in its immediate aftermath, and many Tamils, again in the north and east in particular, reported being monitored, harassed, arrested or detained by security forces during the war and under the previous Rajapaksa government. However, in 2015 there

³ US Department of State (USDOS), “Country Reports on Human Rights Practices for 2020 - Sri Lanka”, 29 March 2021, 20210401122412.

was a change of government with the election of President Sirisena, and a Sri Lankan government focussed on post-conflict reconciliation, transitional justice, democratic renewal and governance and economic reforms.⁴

40. The UK Home Office (UKHO) indicates that under the Sirisena government there were positive developments including: curtailing of executive power; attempts at the reestablishment of independent commissions, including the Human Rights Commission of Sri Lanka (HRCSL); de-proscription of a number of international diaspora organisations; and review of cases held under the *Prevention of Terrorism Act* (PTA) and release of some detainees. However, progress was slow and little improvement was reported in 2018 and 2019.⁵ The US Department of State's (USDOS) recent report notes that the HRCSL generally operated independently of, and with a lack of interference from, the Sri Lankan government.⁶ A 2020 UN report also noted that the HRCSL continued its proactive and outspoken defence of human rights in an independent and professional manner and commended its timely interventions in the aftermath of the attacks of Easter 2019 as playing an important role in preventing resort to excessive or discriminatory measures; but expressed concern that the inability of the Sri Lankan government to deal comprehensively with impunity and to reform institutions may trigger the recurrence of human rights violations.⁷ Similarly, a 2021 UN report noted that from 2015, Sri Lanka took some important steps in strengthening democratic institutions and opening up democratic space, including for civil society and the media; but indicated significant challenges and negative trends emerged over 2020.⁸
41. DFAT assesses that Tamils face a low risk of official or societal discrimination based on ethnicity or caste, including in relation to access to education, employment, or housing. Some members of the Tamil community report discrimination in employment, particularly in relation to public sector employment. However, DFAT assesses that the limited Tamil appointments are largely the result of disrupted education because of the war and language constraints. DFAT states that Tamils have a substantial level of political influence and increased inclusion in the political dialogue since 2015. DFAT understands that Tamils do not receive unwarranted attention from the authorities because of their political involvement and assesses that there are no barriers to political participation by Tamils. Members of the Tamil community in the north and east continue to claim the authorities monitor public gatherings and protests, practise targeted surveillance and questioning of individuals and groups, and use more subtle monitoring methods than in the past. DFAT assesses that the monitoring of Tamils in day to day life decreased significantly under the Sirisena government, but surveillance of Tamils in the north and east continues, particularly for those associated with politically sensitive issues, and physical violence against those being monitored is not common.⁹
42. The UKHO fact finding visit to Sri Lanka in September and October 2019 indicates that all sources they spoke to had identified an improvement in the general situation since 2015, with people in general feeling no threat from the government or security forces. Several sources noted that whilst the situation improved post-2015, following the October 2018 political crisis (where President Sirisena sacked Prime Minister Wickremesinghe, replacing him with the former President Mahinda Rajapaksa) and the Easter 2019 bombings, intimidation and

⁴ DFAT, "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244.

⁵ UKHO, "Country Policy and Information Note Sri Lanka: Tamil Separatism", May 2020, 20200527172009.

⁶ USDOS, "Country Reports on Human Rights Practices for 2020 - Sri Lanka", 29 March 2021, 20210401122412.

⁷ Office of the United Nations High Commissioner for Human Rights (OHCHR), "Report of the OHCHR on Sri Lanka", 18 February 2020, 20200221140652.

⁸ OHCHR, "Promotion reconciliation, accountability and human rights in Sri Lanka: Report of the OHCHR", 27 January 2021, 20210203162131.

⁹ DFAT, "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244.

monitoring had increased with some civil society actors experiencing increased monitoring of their activities and multiple visits by the intelligence service or military who collected details on their programmes and funding. After the Easter bombings check points were reinstated, although they had all been removed at the time of the UKHO visit.¹⁰

43. DFAT reports that the security situation in Sri Lanka, particularly in the north and east, has improved significantly since the end of the war in 2009. There was an increase in security activity, including the use of roadblocks, security checkpoints and increased detention powers for the police and military, following the Easter 2019 bombings. However, such checkpoints had since been removed, the emergency regulations that gave increased detention powers have lapsed, and the heightened security posture in the north has subsequently eased.¹¹
44. The country information indicates that although some monitoring still occurs, mainly in the north and east, the monitoring and harassment of Tamils has significantly decreased, there have been significant positive developments for Tamils in the country's politics and the situation for Tamils generally has substantially improved in the years since 2015.
45. Several observers have expressed concern about changing conditions in Sri Lanka with Gotabaya Rajapaksa's rise to power, including concerns about the position of journalists, former LTTE members, the space for civil society and those who have been critical of the Rajapaksa family in the past.¹² However, notwithstanding those expressed concerns, it remains speculative to suggest that the current Rajapaksa government has or will lead to a significant change in attitude by the Sri Lanka government towards the Tamil population. Although some actions - rolling back investigations and announcing a withdrawal from a UN resolution in relation to post-war accountability, no longer singing the national anthem in Tamil at Independence Day celebrations, preventing Heroes' Day commemorations, making additional proscriptions, and announcing the re-establishment of rehabilitation centres - are disappointing and a departure from the approach of the former government, it is also speculative to suggest those actions or announcements have or will result in a deterioration in general conditions in Sri Lanka or, more particularly, that it increases the risks in Sri Lanka to those with profiles like the applicants or to Tamils more generally. To the extent that there is some suggestion of an increase in monitoring, harassment and intimidation of Tamils since November 2019, country information continues to indicate that Tamils are not specifically targeted based on their ethnicity.¹³ In the circumstances, I am satisfied the DFAT 2019 report and its assessments and observations in relation to improvements in conditions for Tamils and the general country conditions in Sri Lanka, despite it being prepared just before Gotabaya Rajapaksa's election as President, remain generally valid.

¹⁰ UKHO, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928.

¹¹ DFAT, "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244.

¹² Including UKHO, "Country Policy and Information Note Sri Lanka: Tamil Separatism", May 2020, 20200527172009; "Abandoned Promises? Preserving Human Rights and Pursuing Accountability in Gota's Sri Lanka", Sri Lanka Campaign for Peace and Justice, February 2020, 20200330123213; ITJP, Journalists for Democracy in Sri Lanka, "SRI LANKA: AND THE CRACKDOWN BEGINS", January 2020, 20200114142534; 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; "Sri Lanka: Economy, human rights key challenges facing Rajapaksas", Aljazeera, 18 August 2020, 20200819205836; "Rajapaksa Rule", Foreign Policy, 14 August 2020, 20200817165533; "Sri Lanka is becoming a one-family state", The Economist, 15 August 2020, 20200814111514; "Sri Lanka To Set Up Rehabilitation Centers For Extremists – Analysis", Eurasia Review, 15 March 2021, 20210316115940; "Freedom in the World 2021 - Sri Lanka", Freedom House, 3 March 2021, 20210304102827; "Tamil organisations speak out against Sri Lanka's ban", Tamil Guardian, 4 April 2021, 20210406172318; and OHCHR, "Promotion reconciliation, accountability and human rights in Sri Lanka: Report of the OHCHR", 27 January 2021, 20210203162131.

¹³ "Repression of Dissent in Sri Lanka: 1st - 31st May 2020", INFORM Human Rights Documentation Centre, 29 June 2020, 20200702160949; UKHO, "Country Policy and Information Note Sri Lanka: Tamil Separatism", May 2020, 20200527172009; and UKHO, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928.

46. Country information indicates that Sri Lankan Tamil refugees in Tamil Nadu have returned to Sri Lanka, albeit in relatively small numbers, particularly since 2015.¹⁴ DFAT indicates returnees from Tamil Nadu report they are glad to have returned and would recommend it to other refugees. While there is some social stigma attached to returnees from Tamil Nadu, sources have said that locals were generally welcoming, and returnees did not feel they were treated differently. DFAT also notes that according to a UNHCR survey, over 90 per cent of returnees from Tamil Nadu felt either generally or completely safe in Sri Lanka; and that credible sources were not aware of returnees from Tamil Nadu being subjected to monitoring or harassment by the authorities.¹⁵ The UKHO fact finding mission did not report any particular concerns or fears in relation to returnees from Tamil Nadu.¹⁶
47. Applicants 1 and 2 left Sri Lanka with their families in 1990, when they were children, and lived in India in Sri Lankan refugee camps in Tamil Nadu for some 23 years until they left in 2013. Applicants 3 and 4 were born in India, and lived in Sri Lankan refugee camps, from their respective births until they left India in 2013 with Applicants 1 and 2. If returned to Sri Lanka, the applicants would not be returning from Tamil Nadu, nor have they been in Tamil Nadu for some eight years. However, given the extensive period they lived in Tamil Nadu as Sri Lankan Tamil refugees, I accept that they may be perceived in a similar way as to those returning directly from Tamil Nadu. Based on the country information, I am not satisfied that the applicants would be subject to monitoring, harassment, or other specific / targeted harm in Sri Lanka because of their time living in Tamil Nadu. However, I accept based on the same country information, that they may be subject to some social stigma. Although facing some social stigma in relation to their time in Tamil Nadu, whether in the form of negative attitudes, a level of social isolation or otherwise, may be hurtful and/or upsetting, I am not satisfied, even taking into account the ages of Applicants 3 and 4, it amounts to significant ill treatment or any other type of harm that may be regarded as serious harm. I am not satisfied that the applicants face a real chance of serious harm, now or in the reasonably foreseeable future, because they lived for an extensive period of time as Sri Lankan Tamil refugees in Tamil Nadu, if returned to Sri Lanka.
48. The applicants are Hindu, but Applicants 1 and 2 have not claimed that they or their families experienced any discrimination or harm while they were in Sri Lanka, and the applicants make no protection claims, on that account.
49. I am not satisfied that the applicants' fear of harm, if returned to Sri Lanka, whether on account of their Tamil ethnicity, because of LTTE links, for any imputed political opinions, or for any other reasons, is well-founded. DFAT confirms¹⁷ that the Sri Lankan authorities remain sensitive to the potential re-emergence of the LTTE and collect and maintain sophisticated intelligence, including electronic stop and watch databases, on former members and supporters of the LTTE. The UKHO notes that persons who are, or are perceived to be, a threat to the integrity of the unitary Sri Lankan state because they are or are perceived to have a significant role in relation to post-conflict Tamil separatism within the diaspora and/or a renewal of hostilities within Sri Lanka may be at risk. The UKHO is also of the view that those with previous LTTE connections or sympathies (direct or familial) are not generally perceived by the authorities as posing a risk or threat in post-conflict Sri Lanka. Tamils are unlikely to face persecution based on their ethnicity alone. According to the UKHO there is no evidence to

¹⁴ "Sri Lankan refugees to return from South India", News.lk, 25 March 2019, 20190326103343; UKHO, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928; and DFAT, "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244.

¹⁵ DFAT, "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244

¹⁶ UKHO, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928.

¹⁷ DFAT, "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244.

suggest that all returning Tamils are at risk of being perceived to have links to the LTTE, or if they do have links that this is a problem for them on return.¹⁸

50. There are still reports of torture occurring in Sri Lanka since the end of the previous Rajapaksa government in 2015, including from UN Special Rapporteurs, the HRCSL, and other sources,¹⁹ although DFAT is unable to verify allegations of torture in Sri Lanka since 2016 and the UKHO expresses a similar view to DFAT.²⁰ There have been a few unverified torture complaints since 2016, white van 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.²¹ DFAT assesses that Sri Lankans face a low risk of mistreatment that can amount to torture overall. The operation of the PTA was also suspended a few years ago for a couple of years, however, in that time it was still used in response to isolated incidents. The PTA was reinstated following the Easter 2019 bombings in Sri Lanka and action to repeal and replace the PTA has stalled since that time.²²
51. I accept that the applicants are Tamil and that, while in Sri Lanka, Applicants 1 and 2 and their families lived in areas (Trincomalee/[City 1] and Trincomalee, respectively) which were controlled at times by the LTTE during the war. Applicant 1's father was, on my findings, forced to [work] for the LTTE, and was arrested, detained and mistreated on two or three occasions. I accept that Applicant 2's father was suspected of being a LTTE supporter and was on occasion arrested and mistreated; and that some of her other relatives were killed by the SLA and one was abducted. However, having regard to the information before me, I am not satisfied the applicants face a real chance of harm, now or in the reasonably foreseeable future, for several reasons.
52. First, as the UKHO report notes, residence in a former LTTE controlled area or being Tamil does not give rise to a need for protection. All those who lived in LTTE controlled areas had to interact with the LTTE on a daily basis, and the Sri Lankan authorities would be well aware that was the case. Applicants 1 and 2 were not involved with the LTTE and, as they left for India when they were children, could not be suspected of any involvement with the LTTE. Similarly, no suspicion of LTTE involvement could attach to Applicants 3 and 4 because of their ages and as they were living in India up until the end of the war in Sri Lanka.
53. Secondly, although the fathers of Applicants 1 and 2 were detained, questioned, and mistreated by the SLA in Sri Lanka, on my findings, they were released on each occasion. The detention, questioning, and mistreatment of their fathers, and the deaths and abduction of Applicant 2's other relatives, occurred over 30 years ago and during the war when such events were, unfortunately, not uncommon. Applicants 1 and 2 do not claim that they, their fathers, or anyone else in their families provided any support for the LTTE, or otherwise engaged in any pro-LTTE or pro-separatist activities, in India while the war was still on, after Applicants 1 and 2 left Sri Lanka with their families in 1990. Any residual interest the Sri Lanka authorities may

¹⁸ UKHO, "Country Policy and Information Note Sri Lanka: Tamil Separatism", May 2020, 20200527172009.

¹⁹ Including DFAT, "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244; UKHO, "Country Policy and Information Note Sri Lanka: Tamil Separatism", May 2020, 20200527172009; OHCHR, "Promotion reconciliation, accountability and human rights in Sri Lanka: Report of the OHCHR", 27 January 2021, 20210203162131; and USDOS, "Country Reports on Human Rights Practices for 2020 - Sri Lanka", 29 March 2021, 20210401122412.

²⁰ DFAT, "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244; UKHO, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928; and UKHO, "Country Policy and Information Note Sri Lanka: Tamil Separatism", May 2020, 20200527172009.

²¹ UKHO, "Country Policy and Information Note Sri Lanka: Tamil Separatism", May 2020, 20200527172009; UKHO, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928; and USDOS, "Country Reports on Human Rights Practices for 2020 - Sri Lanka", 29 March 2021, 20210401122412.

²² DFAT, "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244.

have had in the fathers and other family members of Applicants 1 and 2 would have completely dissipated since 1990.

54. Thirdly, it is now over 30 years since Applicants 1 and 2 were in Sri Lanka and the war has been over for 12 years. The general situation and country conditions for Tamils in Sri Lanka have improved substantially since 2015. Further, as the UKHO report notes, a person's past LTTE connections are not generally seen by the Sri Lankan authorities as posing a risk. The Sri Lankan authorities do remain sensitive to the potential re-emergence of the LTTE.²³ Nevertheless, although the Sri Lankan authorities may monitor overseas activities, they are generally only interested in significant involvement in pro-Tamil separatist diaspora activities and activity such as attending demonstrations overseas is unlikely to attract adverse interest from the Sri Lankan authorities.²⁴ High profile leaders of pro-LTTE diaspora groups may come to the attention of the Sri Lankan authorities for taking part in demonstrations and the authorities may monitor members of the Tamil diaspora returning to Sri Lanka depending on their risk profile. DFAT understands some returnees have been subject to monitoring, including those with suspected LTTE links, but also states that Tamils who had failed to secure asylum in Australia and since returned to the Northern Province told DFAT that they had no protection concerns, had not experienced harassment by the authorities nor received monitoring visits.²⁵
55. The applicants have not been involved in any pro-Tamil separatist or pro-LTTE diaspora activities in India or Australia. I am not satisfied that the applicants' profiles, which as discussed are not ones that places them at a real chance of harm, will be increased by the fact that Applicants 1 and 2 left Sri Lanka as children and have spent more than 30 years outside of Sri Lanka, and Applicants 3 and 4 have always lived, in India and Australia, and that they have claimed asylum outside of Sri Lanka. I am also not satisfied, given their profiles, whether as individuals or as a family, that there is a real chance that they will be perceived by the authorities as wanting to reinvigorate the LTTE or that they will be monitored, because of their time living outside Sri Lanka and/or as Tamil asylum seekers, if returned.
56. The applicants do not have profiles, individually or as a family, that country information suggests would lead to a real chance of harm, now or in the reasonably foreseeable future, for any LTTE links, for any imputed political views, for their long residence in Tamil Nadu, because of their Tamil ethnicity, their individual and family backgrounds, or for any other reasons. I do not consider that the Sri Lankan authorities had any adverse interest in Applicants 1 and 2 when they left the country as children in 1990, nor that they would have any adverse interest in Applicants 3 and 4, including because of their parents or as young Tamil males. The general harassment and monitoring of Tamils has significantly decreased since 2015 and a person's past LTTE connections are no longer generally of interest to the Sri Lankan authorities. I do not consider that the applicants, individually or as a family, would be of any adverse interest to the Sri Lankan authorities, or that they face a real chance of suffering harm for that reason, if they returned to Sri Lanka. I am not satisfied the applicants face a real chance of harm for reason of their ethnicity, background, for any real or imputed links to the LTTE, for any imputed political views, for their long absence from Sri Lanka while residing in Tamil Nadu and Australia, or otherwise, if returned to Sri Lanka, now or in the reasonably foreseeable future.
57. I accept that, on their return to Sri Lanka, the applicants may be considered by the authorities to be failed asylum seekers.

²³ DFAT, "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244.

²⁴ UKHO, "Country Policy and Information Note Sri Lanka: Tamil Separatism", May 2020, 20200527172009.

²⁵ DFAT, "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244.

58. Entry and exit from Sri Lanka is governed by the *Immigrants and Emigrants Act 1949* (Sri Lanka) (IE Act). Under the IE Act it is an offence to depart other than from an approved port of departure. DFAT states that the age of criminal responsibility in Sri Lanka is 12 years of age and that children under 12, or persons who were younger than 12 at the time of the alleged offence, are not charged under the IE Act.²⁶ Applicants 1 and 2 were well under 12 years of age when their parents took them out of Sri Lanka for India in 1990. Applicants 3 and 4 have never been in Sri Lanka. I am not satisfied that any of the applicants are at risk of prosecution under the IE Act.
59. Advice from DFAT is that upon arrival in Sri Lanka, involuntary returnees are processed by agencies including the Department of Immigration and Emigration, the State Intelligence Service, the Criminal Investigation Department and, at times the Terrorist Investigation Department, who check returnees' travel documents and identity information against immigration databases, intelligence databases and the records of outstanding criminal matters. Processing can take several hours, returnees are processed as a group, and individuals need to remain until all returnees are processed.²⁷
60. For returnees travelling on temporary travel documents, police undertake an investigation to confirm the person's identity, to see whether someone was trying to conceal their identity due to a criminal or terrorist background or trying to avoid court orders or arrest warrants. This often involves interviewing the returning passenger and contacting their claimed home suburb or town.²⁸
61. DFAT states that all returnees are treated according to the standard procedures, regardless of their ethnicity and religion, and is not aware of mistreatment of returnees during processing at the airport.²⁹ The UKHO identifies a similar process for returnees at the airport, notes the various facilities available, including that medical facilities are available at the airport if required, indicates adults with children are prioritised, and also makes no mention of mistreatment allegations.³⁰
62. Taking into account my findings about their profiles, and the country information, I am not satisfied that the applicants will be at risk of adverse attention or that they face a real chance of harm from the Sri Lankan authorities when scrutinised on their return to Sri Lanka, whether when processed at the airport or on their return to the Trincomalee area.
63. The Sri Lankan authorities may monitor members of the Tamil diaspora returning to Sri Lanka depending on their risk profile. I have found that the applicants' profiles are not ones that place them at a real chance of suffering harm. As discussed above, I am not satisfied that with their profiles there is a real chance that the applicants will be monitored because of their backgrounds, LTTE links, lengthy absence from Sri Lanka in Tamil Nadu and Australia, or as failed Tamil asylum seekers, if returned.
64. DFAT indicates that some returnees receive reintegration assistance in the form of transport assistance and livelihood support upon return to Sri Lanka from the government, UN agencies and NGOs, but this requires a returnee to meet strict eligibility guidelines and is minimal. Failed asylum seekers receive limited reintegration assistance. Bureaucratic inefficiencies rather than official discrimination present the biggest challenge to reintegration for returnees. DFAT states

²⁶ DFAT, "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244.

²⁷ DFAT, "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244.

²⁸ DFAT, "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244.

²⁹ DFAT, "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244.

³⁰ UKHO, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928.

some refugees and failed asylum seekers have reported social stigma from their communities on return. DFAT assesses that returnees can face re-integration issues but face a low risk of societal discrimination upon return to their communities. DFAT states that Sri Lanka's unemployment rate (4.4 per cent in 2018) is relatively low, although regional variations exist. The Western Province has the lowest unemployment rate in the country, at 3.2 per cent, while the Northern Province has the highest, at 7.7 per cent. Unemployment in the Southern (5 per cent) and Eastern (6 per cent) provinces is also higher than the national average.³¹

65. If returned to Sri Lanka, the applicants may be able to access some of the limited assistance provided to failed asylum seekers. Although the applicants no longer have originals of their documentation (because of a house fire in India) they do have copies of their birth certificates, Sri Lankan and Indian, as well as some documentation as Sri Lankan Tamil refugees in Tamil Nadu that among other things confirm that Applicants 1 and 2 arrived in India in 1990. The availability of these copies should minimise any delays in establishing their identities and citizenship and obtaining valid government ID. Although Applicants 1 and 2 were concerned about not having relatives in Sri Lanka who could confirm their identity, the country information does not indicate in any identification process undertaken by the authorities that confirmation by a relative is a requirement. Applicant 1's family home and land in Sri Lanka no longer exists. However, Applicant 1 has many years of work experience as a labourer in India, has also worked as a [Occupation 1] in Australia, and he is educated. Applicants 3 and 4 are at an age where they could also seek work and, although lacking work experience, they are educated and there is no suggestion they are not able-bodied. Applicant 2 has a grandmother and two grandaunts in Sri Lanka. The applicants have shown themselves to be resourceful and resilient by adapting to life outside of Sri Lanka in India and then Australia. The applicants all speak Tamil and English. Given those factors, I am not satisfied that the applicants will be unable to re-establish and re-integrate themselves in Trincomalee. I accept that they may face some social stigma as returned/failed asylum seekers who has been away from Sri Lanka for some many years. However, although social stigma, whether in the form of negative attitudes, a level of social isolation or otherwise, may be hurtful and/or upsetting, I am not satisfied, even in combination with other stigma they may face due to their time living in Tamil Nadu and taking into account the ages of Applicants 3 and 4, it amounts to significant ill treatment or any other type of harm that may be regarded as serious harm.
66. Having considered the applicants' circumstances and profiles as a whole, including as individuals and a family, in the context of the 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 applicants do not have a well-founded fear of persecution within the meaning of s.5J.

India

67. Applicant 2 stated on her sons' behalf that they have no rights or freedoms in India. Applicants 3 and 4 lived in India in a Sri Lankan refugee camp, with their parents, from their births ([year] and [year] respectively) until the family left for Australia by boat in 2013. I accept that their lives, and the lives of their immediate and extended family, in the camp(s) were subject to restrictions, including limitations on when they could leave and return to the camp, as well as having to seek permission to do so. Applicant 2 said in the SHEV interview that although they were subject to those restrictions on their freedom living in the camp, they were not harmed. Applicant 1 had an adverse encounter with Q Branch, where he was beaten for returning late to the camp on one occasion. Applicant 1's brother was also jailed for six months in relation to

³¹ DFAT, "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244.

the incident with the burning train. However, I am satisfied based on Applicant 1's evidence, that these were isolated, one off incidents over the extensive period since the families of Applicants 1 and 2 moved to India in 1990. Applicants 3 and 4 were able to pursue their education in India, although it was subject to occasional interruptions if a dignitary such as the Prime Minister was visiting the area, which would result in their being restricted to the camp for the duration of such visits. Although Applicant 1 said there was a stigma in being a Sri Lankan refugee in India, Applicants 1 and 2 did not claim that the applicants were otherwise subject to any other incidents of harm while living in India, whether from the Indian authorities or anyone else. Applicant 1 was also able to obtain work, over many years, while he was in India. DFAT indicates³² that there are some 95,000 or so Sri Lankan refugees, and their descendants, in Tamil Nadu in India, and other than commenting that unregistered refugees fear police harassment, does not point to discrimination or other harm to Sri Lankan Tamil refugees in Tamil Nadu.

68. Applicant 1 stated that the family have no right to return to India. That may be the case but under the s.5 definition, a country of former habitual residence is still a 'receiving country', regardless of whether it would be possible to return to it. Regardless of whether or not they can return there, the legislation requires the IAA to assess Applicants 3 and 4 against the relevant country or countries of former habitual residence, in this case India. Additionally, I note that the inability to re-enter a country where a person was habitually resident because that person has no right of entry does not, without more, constitute persecution.³³
69. Applicants 3 and 4 lived as children in Tamil Nadu and are not unfamiliar with the area. Applicant 1's mother and one of his brothers, and Applicant 2's father, one of her brothers and her sisters, continue to live in Tamil Nadu. Applicants 3 and 4 have remained in contact with their relatives in India. Country information indicates that registrations for the Sri Lankan refugee camps operating in Tamil Nadu closed in 2011,³⁴ and I am not satisfied that they would be confined to such a camp if returned to India. DFAT states Sri Lankan Tamils in India have limited work rights but indicates that refugees living outside the camps are generally better off and often run successful businesses.³⁵ Although Applicant 4 is currently a minor (at [age]), he would be returning with Applicant 3 who is an adult (at [age]). Both applicants are educated, and they have shown themselves to be resourceful and resilient by adapting to life in Australia after growing up in India. They both speak Tamil as well as reading, writing, and speaking English. While they are both young, they have grandparents, uncles, and aunts in India, and have remained in contact with them while in Australia. I am not satisfied there is a real chance that Applicants 3 and 4's capacity to subsist is threatened or they would otherwise suffer serious harm, if returned to Tamil Nadu, India. I accept that they may face some social stigma as Sri Lankan Tamil refugees. However, although social stigma, whether in the form of negative attitudes, a level of social isolation or otherwise, may be hurtful and/or upsetting, even taking into account their ages, I am not satisfied it amounts to significant ill treatment or any other type of harm that may be regarded as serious harm.
70. Having considered Applicant 3's and Applicant 4's circumstances, histories, and profiles as a whole, I am not satisfied that Applicants 3 and 4 face a real chance of persecution now or in the reasonably foreseeable future, if returned to India. Applicants 3 and 4 do not have a well-founded fear of persecution, if returned to India, within the meaning of s.5J.

³² DFAT, "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244.

³³ *BZADW v MIAC* [2013] FCCA 1229; *BZADW v MIBP* [2014] FCA 541.

³⁴ DFAT, "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244.

³⁵ DFAT, "DFAT Country Information Report: Sri Lanka", 4 November 2019, 20191104135244.

Refugee: conclusion

71. 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

72. 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

73. 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.
74. 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.

Sri Lanka

75. I accept that, if the applicants return to Sri Lanka, while re-integrating they may face some level of societal discrimination as returned asylum seekers, and also for their long period of residence in Tamil Nadu, in the form of social stigmas. As acknowledged above social stigmas may at times be hurtful and/or upsetting, however, I am not satisfied on the evidence that any hurt and upset the applicants may suffer from social stigmas, even taking into account the ages of Applicants 3 and 4, whether as individuals and/or as a family, will amount to severe pain or suffering, or pain and suffering that could reasonably be considered as cruel or inhuman in nature. Similarly, social stigmas may be hurtful and upsetting but it does not amount to extreme humiliation. I am not satisfied that it amounts to the death penalty, arbitrary deprivation of life or torture. I am not satisfied that any social stigmas suffered by the applicants as returned Tamil asylum seekers and/or for their long period of residence in Tamil Nadu, amounts to significant harm as defined in ss.36(2A) and 5 of the Act.
76. Otherwise I have found that there is not a real chance of harm to the applicants, now or in the reasonably foreseeable future, based on their profiles and history, if they are returned to Sri Lanka. As 'real chance' and 'real risk' involve the same standard,³⁶ it follows that I am also satisfied that there is no real risk of significant harm if they are returned to Sri Lanka.

³⁶ *MIAC v SZQRB* (2013) 210 FCR 505.

India

77. I accept that, if Applicants 3 and 4 return to India, they may face some social stigma as Sri Lankan Tamil refugees. As acknowledged above social stigma may at times be hurtful and/or upsetting, however, I am not satisfied on the evidence that any hurt and upset Applicants 3 and 4 may suffer from social stigma, even taking into account their ages, whether as individuals and/or as a family, will amount to severe pain or suffering, or pain and suffering that could reasonably be considered as cruel or inhuman in nature. Similarly, social stigma may be hurtful and upsetting but it does not amount to extreme humiliation. I am not satisfied that it amounts to the death penalty, arbitrary deprivation of life or torture. I am not satisfied that any social stigma suffered by Applicants 3 and 4 as Sri Lankan Tamil refugees amounts to significant harm as defined in ss.36(2A) and 5 of the Act.
78. Otherwise I have found that there is not a real chance of harm to Applicants 3 and 4, now or in the reasonably foreseeable future, based on their profiles and history, if they are returned to India. As 'real chance' and 'real risk' involve the same standard,³⁷ it follows that I am also satisfied that there is no real risk of significant harm if they are returned to India.
79. Having considered the applicants' circumstances individually, as a family, and cumulatively, I am not satisfied that the applicants face a real risk of significant harm.

Complementary protection: conclusion

80. 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

81. 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 spouses and their dependent children.
82. 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

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

³⁷ *MIAC v SZQRB* (2013) 210 FCR 505.

Applicable law

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.