



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

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA21/10046

SRI LANKA  
IAA reference: IAA21/10047

Date and time of decision: 15 December 2021 16:48:00  
C Wilson, 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 father (applicant 1) and daughter (applicant 2) from Trincomalee, Sri Lanka. They arrived in Australia [in] September 2012 as unauthorised maritime arrivals. They tried to apply for Subclass 866 protection visas on 11 September 2013 but those applications were deemed invalid. They applied for Safe Haven Enterprise Visas (SHEV) on 24 August 2015.
2. A delegate of the Minister for Immigration and Border Protection (the delegate) refused the SHEV applications on 23 August 2016. The delegate accepted the applicants were Tamil, that a relative by marriage was a member of the Liberation Tigers of Tamil Eelam (LTTE), and the Karuna Group had abducted and beaten applicant 1 in 2008 to extort money from him for criminal reasons. The delegate did not accept applicant 1 was of adverse interest to the Karuna Group or the Sri Lankan authorities for an imputed association with the LTTE when he left Sri Lanka, nor that he would be on return. The delegate found applicant 1 did not have a well-founded fear of persecution or face a real risk of significant harm for reason of his ethnicity, LTTE relative, past beating by the Karuna group, actual or imputed political opinion, returning as a failed asylum seeker who had departed illegally, or because of the data breach in 2014.
3. The SHEV applications have been reviewed on two previous occasions.<sup>1</sup> By consent order dated 27 September 2021 the most recent review decision has been quashed and the matters remitted for reconsideration.

### Information before the IAA

4. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).

#### *Submissions and new information 2016*

5. In September 2016 the applicants provided written submissions, a letter from a general practitioner, and a statutory declaration from applicant 1.
6. The letter from the general practitioner [Dr A] in [City 1] is dated 21 September 2016 and is new information. It merely reports that the GP has seen a letter from Sri Lanka that says applicant 1 was admitted to hospital in Trincomalee on 28/12/10, discharged on 31/12/10 and arranged to be reviewed 20/01/11. The letter from the GP could not have been provided to the delegate because it wasn't written until after the delegate's decision was made. It contains credible personal information that arguably may have affected the consideration of applicant 1's claims, in that it is supporting evidence of his claim to have needed hospital treatment in late 2010. However, this information was already before the delegate, with copies of medical records from Sri Lanka provided with the SHEV application. [Dr A]'s letter merely repeats that information, and is not based on any personal or new information he has. Even though s.473DD(b) is met, I am not satisfied there are exceptional circumstances to justify considering new information in the form of the letter from [Dr A] that merely repeats information already known.

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<sup>1</sup> IAA16/00702-703; and IAA19/06332, 6349.

7. Applicant 1 provided a statutory declaration dated 18 September 2016 which contains comment on the delegate's decision, clarification of his claims and new information. He clarifies there wasn't just one boy travelling in the [vehicle] with [Mr B], there were different boys. I accept this evidence was given to the delegate through an interpreter, and I accept his explanation that he did not realise that when he was speaking of people accompanying [Mr B] it was perceived as him saying it was the same person each time. The new information in the statutory declaration includes the following: the abandoned building where he was beaten in 2010 was behind a police station and thus the authorities knew what was happening; and the homes he lived in with relatives in 2011 and 2012 are located in an uninhabited forest. The applicants' then representative argued the information in the statutory declaration is not new information, but merely further particulars and accordingly s.473DD should not apply. I do not agree with this submission in relation to the two pieces of information identified above. I find they are new information because it is information not previously known. I do not accept the new information could not have been provided to the delegate before the decision was made as it could have been included in his written application or raised at the SHEV interview. I have concerns about the credibility of this new information. Applicant 1 now says he was beaten in 2010 in an abandoned building behind the [Town] police station so the authorities must have known what was happening. He has not explained why he left this detail out of his application and SHEV interview. At the SHEV interview he said he was told to drive to an area with abandoned buildings, where no people were living. I do not accept he would not have added that in this abandoned area with no people living, there was in fact a police station and he was taken to a building just behind it. Similarly, I find the new information that he stayed with relatives who lived in uninhabited forests is not credible, for if they lived there the area was not 'uninhabited'. Applicant 1 has not satisfied me that these two pieces of information are credible, and I find they do not amount to credible personal information that may have affected the consideration of his claims. I find s.473DD(b) is not met and therefore I must not consider this information.
8. Applicant 1 also raised new information in the form of claims for his daughter. He fears he will be separated from his daughter upon their return to Sri Lanka if they are detained over a weekend before being produced before a court. He fears she may face sexual abuse during her detention. He also fears that after she is released she will be harassed by the authorities because she is a failed asylum seeker. I do not accept these claims could not have been raised earlier, but I accept s.473DD(b)(ii) is met because I consider it amounts to credible personal information that may have affected the consideration of the claims. However, in circumstances where in later submissions and statutory declarations new claims regarding applicant 2 are put forward in greater detail, I am not satisfied there are exceptional circumstances to justify considering this new information contained in applicant 1's 2016 statutory declaration.
9. In November 2016 the applicants provided a 21 page document containing extracts of country information. Some of the reports referred to in this document were before the delegate, but some were not and are new information. The country information that is new information pre-dates the delegate's decision. After the SHEV interview the applicants' then representative provided a submission containing extracts and references to country information they relied on. I am not satisfied this new country information that pre-dates the delegate's decision could not have been provided to the delegate before the decision was made. The new country information is not credible personal information that may have affected the consideration of the applicants' claims. I find s.473DD(b) is not met for the new country information referred to in this 21 page document and therefore I must not have regard to it.

*Submissions and new information 2019*

10. On 5 March 2019, following the consent remittal from the Federal Circuit Court of the first review, the applicants provided further written submissions and statutory declarations from both applicants 1 and 2. Although the further written submissions do not comply with the Practice Direction, in that they have been provided more than 21 days since the case was originally referred to the IAA, I have exercised my discretion to accept them because this is the first time submissions have been made in regard to applicant 2's claims, and for reason given below I am having regard to the new information provided by applicant 2.
11. The statutory declaration from applicant 1 dated 26 February 2010 contained further comment on the delegate's decision, clarification of his claims, and the following new information: that he was questioned and assaulted by the Indian and Sri Lankan armies during the 1980s and 1990s because his brother was an LTTE member; that he and the doctor agreed to write on the 2010 medical record that he was injured in a road traffic accident in case they got into trouble for naming the CID or Sri Lankan authorities; after the police came looking for him at home in 2015 his wife went to the Human Rights Commission to complain but they wouldn't accept the complaint; and that 8 months ago (mid 2018) someone speaking Sinhalese and broken Tamil went to the house late at night and told them to come outside.
12. In relation to the new information about his brother and being questioned for the LTTE connection, I do not accept this information could not have been provided before the decision was made. That it was not raises issues about the credibility of it. Applicant 1 says he did not include it in his application because it happened a long time ago and it was not the reason he left Sri Lanka. The applicant was asked at the SHEV interview if any members of his family were members of the LTTE and he answered no. He had an opportunity then to speak of his brother and the impact on the family, if those claimed events had occurred. Even though the claimed interrogations and assaults by the Indian and Sri Lankan armies are said to have occurred a long time ago, I do not accept something that significant would have been left out of his application or oral evidence, particularly as the claimed interrogations and assaults were said to have happened in the 1980s when he was still a minor and would have been traumatic if they occurred. For these reasons I am not satisfied this new information that he was questioned and assaulted by the Indian and Sri Lanka armies during the 1980s and 1990s is credible. I find it is not credible personal information that may have affected the consideration of the claims. As s.4733D(b) is not met I must not consider it.
13. I do not accept applicant 1 could not have provided the information that he and the doctor conspired to write on the medical record that he had been injured in a road traffic accident rather than being beaten by the CID. I accept it is plausible in the aftermath of the conflict that applicant 1 did not want a medical record to evidence an alleged assault by the Sri Lankan authorities. The applicant says he did not provide this information earlier because he couldn't read the English on the medical record and had forgotten that he asked the doctor to record that it was a traffic accident on the report. I consider this is a plausible explanation. I find the information is credible personal information, in the sense it is capable of being believed, and that it may have affected the consideration of his claims. I am satisfied there are exceptional circumstances to justify considering this information, given the importance of the medical record in relation to his claims to have been assaulted by the Karuna group or the Sri Lankan authorities in 2010.
14. There is no explanation why the new information that in 2015 the Human Rights Commission (HRC) refused to accept his wife's complaint could not have been provided prior to the

decision being made, and I do not accept that it could not have been. It may be credible personal information, but there is no explanation of how his wife's difficulty in lodging this complaint could have affected the consideration of his claims. Even if s.473DD(ii) is met, I am not satisfied there are exceptional circumstances to justify considering this new information. The information is brief, there is no information that his wife tried again to lodge complaints or why not, why this information was not provided earlier, or why the HRC refusing to accept a complaint in 2015 is relevant to his fear of harm in Sri Lanka. I have taken into account the submission that there are exceptional circumstances to justify considering this new information because of his poor English, that it may make a material difference to the decision, the disadvantages of the limited form of review, and that this is a court remittal. I am not satisfied this information would make a material difference nor that the other grounds amount to exceptional circumstances.

15. Applicant 1 provided new information that in mid-2018 someone speaking Sinhalese and broken Tamil went to the family house late at night, called for them to come outside, but the family did not as the wife thought it might be someone associated with the authorities. As this incident occurred post-decision, it could not have been provided before the decision was made. The information may also be personal credible information, in that it is capable of being believed that someone called out late at night to come outside. However without further information as to who came to the house or for what reason, it is not clear it may have affected the consideration of the claims. There was no consequence for the family in ignoring the call to come out. The person did not identify themselves, or come again in daylight hours, or try to force their way in. It is pure speculation that it may have been someone associated with the authorities. I have taken into account the circumstances raised by the applicants' including applicant 1's poor English, that it may make a material difference to the decision, the disadvantages of the limited form of review, and that this is a court remittal, and also that it could not have been provided before the decision was made. But I consider this new information is lacking in detail and context and I am not satisfied there are exceptional circumstances to justify considering it.
16. Applicant 2 provided new information in a statutory declaration. I consider all the information in the statutory declaration is new, as it is the first time applicant 2 has put forward any claims or information. The new information includes what her mother has told her about why applicant 2 left Sri Lanka with her father, discloses a number of sexual assaults she experienced between the ages of 7 and [Age 1], that she has received psychological help in Australia, and why she fears returning to Sri Lanka. Applicant 2 was [Age 2] when the SHEV application was lodged, and no claims were made on her behalf. This information could not have been provided to the delegate before the decision was made because her father may not have known it. I find it is credible personal information that may have affected the consideration of the claims. I am also satisfied there are exceptional circumstances to justify considering this new information as applicant 2 was under the age of 18 at the time of the delegate's decision and the first review, and has not previously had an opportunity to put forward her protection claims as an adult.

#### *Submissions and new information 2021*

17. On 4 October 2021 the applicants provided further written submissions. The applicants had been provided with a copy of the Practice Direction that advised submissions should be no longer than 5 pages, using font size at least 11 point with standard margins, and be provided within 21 days of the case being referred by the Department. The Practice Direction also advised the IAA will generally not accept any further submissions for a case following remittal by a court but will have regard to compliant submissions already provided. These new

submissions do not comply with the time limit or the formatting requirements, with the font size being less than 11 points. There are already 10 pages of submissions before me, from 2016 and 2019, and these have not been withdrawn by the applicants. Although both the 2016 and 2019 submissions were not compliant, in terms of time requirements and font size for the 2016 submissions, I have accepted them. In circumstances where the applicants continue to rely on the 10 pages of submission already provided, and the new submissions are not compliant with the Practice Direction, and the applicants were on notice the further submissions may not be accepted if not compliant, I have decided not to accept them.

18. The statement from applicant 1 dated 21 September 2021 contained further clarification of his claims and information previously provided, and comment on the delegate's decision and the IAA decisions. He again provides new information that he was taken for questioning and assaulted by both the Sri Lankan and Indian authorities in the 1980s and 1990s because of his older brother's LTTE membership. No further information has been provided, and I consider this repeated new information still lacks a plausible explanation of why this was not included in his SHEV application or told to the delegate. For the same reasons given above, I am not satisfied this information could not have been provided to the delegate, and I am not satisfied it is credible, and therefore is not credible personal information that may have affected the consideration of his claims. As s.4733D(b) is not met I must not consider it. He also provides new information that in fact he hid in the jungle near his relatives' homes when he was in hiding, not in their actual homes. There is no explanation as to why he did not provide this information to the delegate, and I do not accept it could not have been provided before the decision was made. I also do not accept it is credible that he would have lived in the jungle for an extended period of time. It is such an unlikely claim, that if it were true it is not plausible that he would have instead previously claimed he lived with relatives. I do not accept it is credible personal information that may have affected the consideration of his claims. As s.4733D(b) is not met I must not consider it.
19. His statutory declaration also contained new information that his family went to the police in 2019 for an unrelated incident and the police advised them the file on applicant 1 is still open and there are outstanding charges against him. I accept this information could not have been provided before the decision was made, as the family only went to the police in 2019. I have some concerns about the credibility of it, in particular why the police would tell the family there was an open file and outstanding charges against applicant 1 when the family went to the police for an unrelated matter. It is also unclear what case or outstanding charges are being alleged, as applicant 1 has not previously disclosed that he faced any charges in Sri Lanka. However I have decided there are exceptional circumstances to justify considering this new information as it goes to his core claim that he believes he has an adverse profile with the Sri Lankan authorities and this is more recent evidence that he relies on to make his case.
20. Applicant 2 provided a written statement with further new information including further details of the sexual abuse raised in the 2019 statutory declaration, information about her family in Sri Lanka, fears of returning to Sri Lanka, and an update on mental health care. She says some of this detail was not provided in the previous statutory declaration because she hoped she would be given an interview to provide further information. This information could not have been provided to the delegate before the decision was made because her father may not have known it, but also some of the information postdates the delegate's decision. I find it is credible personal information that may have affected the consideration of the claims. I acknowledge applicant 2 was under the age of 18 at the time of the delegate's decision and did not have an opportunity then to make her claims. She may also have been misinformed when she prepared her 2019 statutory declaration that she did not need to include all the details because she would be interviewed. For these reasons I am

satisfied there are exceptional circumstances to justify considering this new information in the statement.

21. The applicants provided a number of new country information reports dated from 2014 to 2020. I do not accept the 2014 report 'An Unfinished War: Torture and Sexual Violence in Sri Lanka 2009-2014' could not have been provided to the delegate before the decision was made, noting it predates the decision by 2 years. The nature of the document is country information to support the claims. It is not credible personal information that may have affected the consideration of the claims. In any event, I am not satisfied there are exceptional circumstances to justify considering a report from 7 years ago when there is other more recent information before me on torture and sexual violence in Sri Lanka, including the 2015 version of this report which was relied on by the delegate. As for the remainder of the reports, I am satisfied there are exceptional circumstances to justify considering new country information from 2017 to 2020 in circumstances where there has been a long period of time since the delegate's decision in 2016.
22. I have also obtained new country information in the form of the most recent Department of Foreign Affairs and Trade (DFAT) Country Information Report Sri Lanka dated 4 November 2019, and the Report of a Home Office fact-finding mission to Sri Lanka by the UK Home Office dated 20 January 2020. I am satisfied there are exceptional circumstances to justify considering this new information when it has been more than 5 years since the delegate's decision.

*Requests to be interviewed*

23. Applicant 1 requested an interview in 2016 in the event that his claims were considered to be not credible, and again in 2019 and 2021 he indicated he wished to explain in person the information in his statutory declarations. Part 7AA of the Act provides for a limited form of review on the papers. Except in limited circumstances the IAA must conduct a review on the papers without interviewing the person. I may exercise a discretion under s.473DC to invite a person to give new information at an interview, or in writing, but there is no obligation to do so. Applicant 1 has not indicated he has further new information that can only be put in an interview, or that has not already been ventilated by him in his two statutory declarations and one written statement he has provided to the IAA. Taking into account the limited form of review provided for by the Act and that he has had a reasonable opportunity to provide new information in written form to the IAA, I have decided not to exercise the discretion to invite him to an interview.
24. In the 2019 and 2021 submissions and her statements applicant 2 has requested that she be interviewed by the IAA because she was not interviewed by the delegate. I note no request was made of the delegate to interview her. It cannot be said that the delegate erred in circumstances where there was no request for applicant 2 to be interviewed nor any protection claims advanced by or on behalf of applicant 2. It wasn't until the second review that applicant 2 made her own protection claims, when she was over the age of 18 and no longer living in her father's household. Applicant 2 has provided two detailed statements and I have accepted these under s.473DD. There is no indication she has yet further new information that could only be given at an interview. She has no new information to provide in support of her father's claims. She concedes she was too young when they left Sri Lanka for her to have any knowledge of her father's claims. Taking into account the limited form of review provided for in Part 7AA of the Act, the decision to not make claims in the original SHEV application, that there was no error by the delegate in not inviting her to an interview, there is no indication there is further new information to provide, and that she has had a

reasonable opportunity to provide new information in written form to the IAA, I have decided not to exercise the discretion to invite her to an interview.

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

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25. When the SHEV application was before the delegate only applicant 1 made claims for protection, whilst applicant 2 applied as a member of his family unit. Since the delegate's decision applicant 2 has also made protection claims.
26. Applicant 1's claims can be summarised as follows:
  - He identifies as a Tamil Hindu although his father was Sinhalese. He is from Trincomalee and is married with 2 daughters and 1 son.
  - He worked in [Country] from 2004 to 2006.
  - When he returned to Trincomalee in 2006 he worked as [a] driver. His wife's cousin [Mr B] used him frequently as a driver to transport him but also sometimes to transport goods. The goods were sometimes groceries, and sometimes medical supplies [Mr B] asked him to collect from the chemist.
  - Applicant 1 became suspicious that [Mr B] might be in the LTTE. He asked his wife and she asked her family. They told her they had not heard from [Mr B] in sometime but they suspected he had joined the LTTE. Out of fear of being suspected of an LTTE connection himself applicant 1 distanced himself from [Mr B]. He last heard from [Mr B] in mid-2007.
  - In 2008 they learned that [Mr B] had carried out a suicide attack in [City 2]. They discreetly visited [Mr B]'s family to offer condolences. [Mr B]'s mother was taken for interrogation by the Criminal Investigation Department (CID) in Colombo.
  - The Karuna group was becoming more influential in Trincomalee. People started defecting from the LTTE to the Karuna group, including people [Mr B] had been involved with in the LTTE.
  - From October 2008 the Karuna group required all [drivers] to register with them. Shortly after he registered, 3 men came to applicant 1's house. They grabbed and hit him, and told him to report to the Karuna office the next morning. He went because he feared if he did not they would come to his house anyway. At the office they questioned him about his Sinhalese father, his connection to [Mr B], and also accused him of hiding weapons for the LTTE. He was held overnight and kicked and beaten during the questioning. To stop the beating he falsely confessed that he knew where weapons were. The next day his wife paid 1 lakh to a senior Karuna member to secure his release.
  - After this incident he spent 3 days in hospital and then went into hiding for 6 to 7 months before resuming work as [a] driver.
  - On 26 December 2010 3 people got in his [vehicle] and directed him to an abandoned building. He was tied up and interrogated about the weapons. He told them he had falsely confessed to knowing where weapons were. They beat him until he lost consciousness. He was left in his [vehicle] on the side of the road, then taken to hospital where he spent 4 days.



- Whilst in hospital he and his wife noticed men watching him. The doctor also noticed it and discharged him early to escape the men. He went to stay with his wife's family for 2 or 3 months, and then continued to stay in hiding at his mother's house.
- His wife and children were being harassed by men asking for him. The family decided he should leave Sri Lanka, and take his second daughter with him. The oldest daughter stayed to help his wife.
- Since leaving Sri Lanka people have come to his family home asking for him and threatening the family.
- His details have been released in the data breach so the Sri Lankan authorities will know he is in Australia and they will believe he has disclosed information about the mistreatment he suffered in Sri Lanka.
- If he is returned to Sri Lanka he will be detained at the airport because the authorities suspect he is involved in the LTTE and held weapons for them. He fears harm from the army, police and the CID.

27. Applicant 2's claims can be summarised as follows:

- She comes from a mixed race Tamil and Sinhalese family.
- When she was 7 or 8 [an Occupation 1] from the nearby [Workplace] sexually assaulted her a number of times. Her mother went to the [Workplace] to complain.
- At age 7 she was also assaulted by the owner of the local [store], as was her older sister. She told her mother but her mother feared retribution from the store owner so did not report the matter to the police. She believes this man targeted her because of her mixed ethnicity. He still lives in the area and she fears he will target her again if she returns.
- She was also assaulted by an older brother of a friend once, and her mother confronted the boy's family. The boy told her to 'watch her back' and she was fearful ever since he would seek her out to punish her.
- When she was [Age 1] the [Occupation 1] assaulted her again. A week after this assault her father told her he was taking her to Australia.
- As a child she thought she was targeted by the [Occupation 1] because she was mixed race, but now she believes it was because of her dad and uncle's involvement with the LTTE.
- As a young single mixed race woman she will be harassed and vulnerable to sexual assault, and may be killed. She cannot return to her home in Trincomalee and would be forced to live elsewhere as a single woman with no-one to protect her
- She will be imprisoned on return to Sri Lanka for leaving illegally. She would be targeted for sexual violence during the imprisonment.
- She no longer speaks Tamil or Sinhalese fluently, and her English language would make her stand out to the authorities.

### **Refugee assessment**

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28. 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**

29. 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.
30. I accept the applicants are citizens of Sri Lanka, based on the identity documents provided to the Department and the consistency and plausibility of their claimed citizenship. I find Sri Lanka is their receiving country. Applicant 1’s wife and 2 other children continue to live in Trincomalee, as does extended family including his 8 siblings and their families. Trincomalee is the only area in Sri Lanka that the applicants have lived at. Given their strong connection to Trincomalee, I find this is the area they are likely to return to.

#### *Applicant 1’s background*

31. Applicant 1 comes from Trincomalee in the Eastern Province. He is married with three children, one of whom came with him to Australia. He claims to be of Tamil ethnicity, although admits his father was Sinhalese and only his mother was Tamil. I note however his birth certificate says his mother was also Sinhalese, and his wedding certificate lists his ethnicity as Sinhalese. He says he grew up in a Tamil area and married a Tamil woman, and identifies as Tamil. He also claims however he is seen as Sinhalese by Tamil people, and as Tamil by the Sinhalese. Taking into account applicant 1’s identity documents, including his birth and marriage certificates, I consider applicant 1’s ethnicity is more likely to be Sinhalese than Tamil. However I accept that in marrying a Tamil woman his family is considered mixed race and applicant 1 may be imputed to have Tamil ethnicity.
32. Applicant 1 was educated to year 11 at school, but says his father withdrew him from school after year 11 due to concerns it was not safe to travel to school during the war. From 1988 to 2004 he did a variety of jobs including working on the family farm, running his own [store], [Occupation 2], and [Occupation 3]. From March 2004 to June 2006 he worked as a [Occupation 3] in [Country]. He returned to Sri Lanka in mid-2006 and then worked as [a] driver until December 2010. He claims not to have worked from December 2010 until departing Sri Lanka in September 2012 because of injuries sustained in an attack in 2010.

#### *LTTE connection through his brother*

33. Applicant 1 claims his older brother was a member of the LTTE, who was killed in around 1989 by the Sri Lankan Army. He claims this gives him a profile as an LTTE supporter.
34. The applicant provided little evidence of his older brother's LTTE membership. It is briefly mentioned on page 3 of his application form 790B where it simply states, 'my older brother was part of the LTTE'. But he did not raise it in his arrival interview in 2012, his SHEV interview in 2016, or mention it in his statement of claims in 2013 or 2015. In fact, when asked at the SHEV interview if any family members were LTTE members, and he was specifically asked if any brothers were, he said 'no'. He says he told the delegate at the SHEV interview that his brother was shot by the Sri Lankan Army in 1989, but the delegate did not ask him follow up questions and applicant 1 did not know if it was relevant to tell the delegate his brother was in the LTTE. This does not explain why when he was asked later in the interview answered 'no' to the question about any brothers being in the LTTE. I accept his brother may have been shot in the war in around 1989, but I consider the claim that his brother was a member of the LTTE may be an embellishment. It is not clear why a Sinhalese man would have joined the LTTE. I consider his brother was most likely killed as a civilian in the civil war in Sri Lanka, in which tens of thousands of civilians died.
35. If I am wrong on this point, and his older brother was in the LTTE, I do not accept this gave applicant 1 or his family an adverse profile. During and in the aftermath of the conflict, which ran from 1983 to 2009, family members of LTTE members faced monitoring, harassment and detention. When the war ended in 2009, thousands of LTTE members and suspects were taken into rehabilitation camps across the north and east of the country, yet no-one in applicant 1's family was ever detained. Even if applicant 1's older brother had been a member of the LTTE in the 1980s I find that 20 years later when the war ended applicant 1 and his family did not have an adverse profile for this reason. I consider applicant 1's ability to hold a passport and travel in and out of Sri Lanka to [Country] multiple times between 2004 and 2006 is evidence he was not of adverse interest because of his brother. If his brother was an LTTE member killed in combat in the 1980s, I consider it farfetched that the authorities would come to know of this connection now, or have an adverse interest in applicant 1 because of it.

*LTTE connection through [Mr B]*

36. Applicant 1 claims that when he worked as [a] driver a person called [Mr B], his wife's cousin, used him as a driver. When he started driving [Mr B] he did not know he was a member of the LTTE. He claims [Mr B] would hire him once a week or so to drive him somewhere, and sometimes would ask him to drive to suspicious areas near army bases or ask him to transport goods such as groceries or medical supplies from a pharmacy. He may also have transported weapons for him, although not knowingly. Sometimes [Mr B] travelled with another person. When applicant 1 became suspicious that [Mr B] was involved in the LTTE he asked his wife to find out. His wife spoke to relatives who said they also suspected [Mr B] was in the LTTE. Applicant 1 decided to distance himself from [Mr B] and stopped taking his requests to drive. His association with [Mr B] started in 2006 and lasted less than a year. Later in 2008 he heard [Mr B] had died in a suicide attack in Kandy, and he took his family to pay respects to [Mr B]'s family. [Mr B]'s mother was taken to Colombo for questioning, and was released after being held for 6 months
37. Applicant 1 claims that in late 2008 three men came his house and violently demanded he come to the Karuna office the next day. He complied with the request and he and his wife went to the office, because he feared they would just come to his house to get him anyway. He says he was questioned about his Sinhalese background and why he married a Tamil

woman. When the questioning became violent, his wife went to the police for help but they would not take the complaint. He was held overnight, beaten, tortured and interrogated. He was accused of transporting and hiding weapons for [Mr B] and the LTTE. To stop the beatings he falsely confessed that he knew where the weapons were. He was released the next day when his wife paid 1 lakh (LKR 100,000). He says he spent 3 days in hospital and did not drive again for 6 or 7 months.

38. Applicant 1 claims he was picked up again on 26 December 2010, taken to an abandoned building and again beaten, tortured and interrogated. He lost consciousness and woke up when he was being taken to hospital. He claims that in the hospital he was observed by a group of men, but managed to evade them by being discharged after a few days and then staying in hiding with his wife's relatives and then his mother. He does not know who interrogated him this second time, but believes it must have been the CID or some other authority as they spoke Sinhalese.
39. The Karuna group, which became the Tamil Makkal Viduthalai Pulikal (TMVP), was a paramilitary group that helped the Sri Lankan government fight the LTTE. It remains active but is now a disarmed group, engaged primarily in politics. The TMVP's founder was the LTTE's senior commander in the Eastern Province before he defected to the government in March 2004, and served as a member of parliament from 2008 to 2015. The Karuna group was involved in unlawful killings, enforced disappearances of suspected LTTE members, and other violent attacks during the war. Post war they were accused of harassing and intimidating suspected former members of the LTTE.<sup>2</sup> The International Truth and Justice Project Sri Lanka reports that the Karuna group raised a force of 200 men who committed extortion, torture, murder and the abduction of hundreds of ex-LTTE members, businessmen and contractors from 2005-2007, and did so with impunity from apprehension and prosecution. They were funded in part by the state but also funded themselves through extortion.<sup>3</sup>
40. Applicant 1 believes it was one of the people who would travel with [Mr B] that must have left the LTTE, joined the Karuna group, and told them applicant 1 had transported weapons for [Mr B]. If this is true, that person would also know applicant 1 was an unwilling transporter of weapons or anything else associated with the LTTE, and that he had stopped driving for [Mr B] in 2007. Having regard to country information on the violent activities of the Karuna group, and that applicant 1 claimed from his first interview with an officer of the Department (the arrival interview in 2012) that he was taken and beaten by the Karuna group for money, I accept he was detained and beaten by the Karuna group in 2008 and only released when his wife paid them money. It is plausible that during that detention they also asked him about [Mr B], given the reports that they harassed former suspected members of the LTTE. That they let him go however after money was paid, and did not harass him again, leads me to conclude he was not seriously suspected of LTTE links. The assault as described is more consistent with the type of violent thuggery the Karuna group were known for as a paramilitary group, including the extorting of money to fund themselves.
41. Although I accept he was beaten and extorted by the Karuna group in 2008, I have concerns about the credibility of his claim to have been taken again in 2010. He claims his [vehicle] was stopped by three unidentified men speaking Sinhalese who took him to abandoned building and beat him unconscious, asking again about weapons. He was In support of the 2010 attack he provided medical evidence, however that evidence states he was injured in a

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<sup>2</sup> DFAT, Country Information Report Sri Lanka, 4 November 2019.

<sup>3</sup> ITJP Sri Lanka, A Still Unfinished War: Sri Lanka's Survivors of Torture and Sexual Violence 2009-2015, 1 July 2015.

road traffic accident. Applicant 1 says he conspired with the doctor to put this on the medical record, as naming the CID as the perpetrator could cause trouble. Whilst this may be plausible, his further explanation that they also agreed to not include injuries to his [Body part 1] and [Body part 2], which he claims were beaten during the assault to the point he lost consciousness, is implausible. The medical evidence provided states he suffered an impact on the [Body part 3] and [Body part 4]. He received an x-ray and was given a sling and painkillers. There was no [Body part 1], or mention of damage to his [Body part 2]. He had follow up treatment in the orthopaedic dispensary for a fracture of the [Body part 4] and [Body part 3] bone. I consider it implausible the medical records would be so different to the actual injuries, particularly as to state he had a head injury would not have been inconsistent with a road traffic accident. If the CID or Karuna group or some other persons were watching him at the hospital, as claimed, the difference between his alleged injuries, and those recorded in the medical records, would have been obvious. I consider it is much more likely applicant 1 in fact suffered a road traffic accident in late 2010 rather than a second assault from the CID or Karuna group or any other group interested in him.

42. Even if I am wrong, and applicant 1 was taken for interrogation and was beaten by some unknown authority in 2010, I consider his treatment is inconsistent with the narrative that he was wanted for holding LTTE weapons. At a time when LTTE suspects were being disappeared or sent to rehabilitation, applicant 1 was taken to hospital. Although applicant 1 says he was watched in the hospital, he was able to leave. He was not detained in a rehabilitation centre where other LTTE suspects were, or arrested, or worse. He lived in the community without any further interactions with the Karuna group or CID or any other authority until he departed Sri Lanka in 2012. He says this is because he was in hiding, but his version of hiding was staying with his wife's relatives and then with his mother. I do not accept the Karuna group could not have found applicant 1 if they were interested in doing so. The Sri Lankan authorities collected and maintained sophisticated intelligence on former LTTE members and supporters, and I do not accept he could not have been found by the authorities if he was of interest. I note also that there is no evidence any of [Mr B]'s closer relatives continued to be of interest, after his mother was allegedly questioned at the time of the suicide bombing. I consider that even if there was suspicion in 2008-2010 that applicant 1 may know something about LTTE weapons because he used to drive [Mr B] around, I consider it farfetched that 13 years later applicant 1 still has a profile of adverse interest when he was in effect set free in 2010.
43. Applicant 1 claims he continues to be of interest to the CID, police and Sri Lankan authorities generally, but it is not clear to me that he was ever of interest to the authorities. Applicant 1 claims there is an open police file and outstanding charges, and says he knows this because his family were told this when they went to the police in 2019 for an unrelated matter. He does not say what that unrelated matter was, or why the police would tell his family there was an open file with outstanding charges. It is also not clear what those charges are. He does not claim to have ever been arrested or charged in Sri Lanka. He claims the authorities went to his family home at least 10 times between 2010 and 2012, and have continued to come from time to time since he left for Australia, but I consider this is an embellishment. As noted above, I do not accept he was in hiding to the extent that he could not have been found. I find that if there were an open investigation into him, he would not have been left in the community. If the Karuna group were working with the government when they first assaulted him in 2008, I do not accept he would have been let go. As noted above, that applicant 1 was let go does not suggest the police or any other authority had an interest in detaining and charging him. I do not accept he was of adverse interest during the period up to and when he departed Sri Lanka for Australia. I do not accept that when he left Sri Lanka

he was of interest to the Sri Lankan authorities for an imputed or actual association with the LTTE, or was imputed with a political opinion opposed to the Sri Lankan authorities.

44. I have considered whether cumulatively applicant 1 may be imputed with an association to the LTTE or a political opinion opposed to the Sri Lankan authorities if he returns to Sri Lanka. He may be an imputed Tamil, with an older brother may have been in the LTTE in the 1980s, boys from his village were in the LTTE, he had an association with an LTTE member [Mr B] in 2006-2007, and he was beaten by the Karuna group. Trincomalee in the Eastern Province was an area directly affected by the civil conflict. The LTTE established a de facto control of many Tamil-populated areas in the north and east, and Tamil populations were required to interact with the LTTE as a matter of course. During the conflict merely being a Tamil in the north or east raised suspicion of membership of or support for the LTTE in the view of the army and authorities generally.<sup>4</sup> The situation of applicant 1, where he knew people, including relatives and neighbours, in the LTTE and where he was forced to interact with them is not unusual. Being harassed, mistreated, even extorted by paramilitary groups, were unfortunately common during and in the aftermath of the conflict. I consider that even cumulatively his profile and experiences in Sri Lanka do not mark him as someone considered to have a strong association with the LTTE. I have had regard to his ability to hold a passport and travel to and from Sri Lanka multiple times during the conflict, without any problems at the airport. I have also had regard to the sophisticated monitoring of the Tamil population by the authorities and the mass detention of suspected LTTE members and supporters at the end of the conflict. But applicant 1, and his siblings, were not detained for an imputed LTTE association. If any association with the LTTE is now imputed to him, I consider it is the same imputed association as for other ordinary Tamils who lived in the north or east of the country at that time.
45. It is now more than 12 years since the conflict with the LTTE in Sri Lanka ended. The LTTE was comprehensively beaten and is a spent force. The Sri Lankan authorities remain sensitive to Tamil separatists, but there is no suggestion applicant 1 is a Tamil separatist nor has he engaged in any behaviour that would impute him to be separatist. In 2020 the UK Home Office reported that returning ex-LTTE cadres would only be of adverse interest if there was a pending criminal case against them, and that even mere membership of the LTTE would not make someone of interest.<sup>5</sup> I consider it is farfetched the Sri Lankan authorities would have an adverse interest in applicant 1 for a weak imputed association with the LTTE, when even former ordinary fighters with the LTTE are no longer of interest. I find applicant 1 does not face a real chance of harm because of any low-level imputed LTTE association. I make this finding taking into account the following factors individually and cumulatively: that he is of part Tamil ethnicity, from Trincomalee, who knew and had some association with LTTE members, and was beaten by the Karuna group. I also find any imputed low-level association with the LTTE because of his personal factors does not give rise to an imputed political opinion as being opposed to the Sri Lankan authorities, and I find he does not face a real chance of harm for this reason.

#### *Mixed race*

46. The applicants claim to be of mixed Tamil and Sinhalese race, and for this reason not to be fully accepted by either ethnicity. The type of discrimination applicant 1 claimed to have experienced was not being invited to Tamil events such as weddings, and similarly for his wife not be invited to Sinhalese events. If this type of social exclusion occurred, it may have been

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

<sup>5</sup> UKHO, Report of a Home Office fact-finding mission to Sri Lanka, 20 January 2020.

influenced by the civil conflict in the country at that time. In other respects applicant 1 appeared to be integrated with his wife's Tamil family, for example his driving work for [Mr B] and he, his wife and family living at various times with her relatives. I note also the mixed race and mixed marriage did not prevent applicant 1 from working in a variety of jobs, owning a home, or educating his children. If the applicants face any social ostracization in the future where they may not be invited to events, I consider this type of social exclusion does not amount to serious harm.

47. The Sri Lankan constitution provides that no citizen shall be discriminated against on the grounds of race, although historic policy and legislation did favour the Sinhalese community and discriminate against Tamils.<sup>6</sup> The 13<sup>th</sup> amendment to the constitution passed in 1987, finally granting official status to the Tamil language, alongside Sinhala. In 2012 the Trilingual Policy gave Sri Lankans the right to communicate in Sinhala, Tamil or English throughout Sri Lanka.<sup>7</sup>
48. In Sri Lanka different ethnic groups have tended to live in their own ethnic communities, although different ethnic groups live in closer proximity in urban areas. The Eastern province, where the applicants are from, has a mix of ethnicities, with Tamils comprising around 39%, Muslims around 37% and Sinhalese around 23% of the population. Tamils faced considerable discrimination and violence during the civil war, however the situation for Tamils generally has improved since the applicants left in 2012.<sup>8</sup> Tamils are not specifically targeted nor suffer persecution merely for being Tamil.<sup>9</sup> Tamils are disproportionately monitored and harassed by security forces, but the reports of harassment, detention and physical harm largely concern Tamils with profiles for being political activists, journalists, high-level ex-LTTE members or Tamil separatists; not ordinary Tamils. Monitoring of Tamils generally has reduced in Sri Lanka, although Tamils in the north and east report the authorities continue to monitor public gatherings and protests, and undertake targeted surveillance of individuals and groups associated with politically sensitive issues. There is nothing to indicate the applicants have or would involve themselves in protests, separatist activities, or other politically sensitive issues.
49. The applicants would be returning to Trincomalee, an area where there is a mix of Tamils and Sinhalese with Tamils being the slight majority. Applicant 1's siblings and extended family live in the area and there are no reports they have been targeted for their ethnicity. Whether the applicants are viewed as Tamil or mixed race because of the ethnic heritage or mixed marriage, I find they do not face a real chance of harm for reason of their ethnicity in Trincomalee.

#### *Illegal departure*

50. The applicants claim to fear harm as returning failed asylum seekers who departed Sri Lanka illegally. They claim they will be imprisoned on return for their illegal departure, and will face physical mistreatment whilst imprisoned.
51. It is an offence under Sri Lankan law to depart the country other than via an approved port of departure: ss.34 and 45(1)(b) of the Immigrants and Emigrants Act (I&E Act). The penalty for doing so can be up to 5 years imprisonment and a fine of LKR 200,000. DFAT reports that custodial sentences have only been imposed on persons facilitating or organising the boats,

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<sup>6</sup> See the 1956 Official Language Act, also known as the Sinhala Only Act.

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

<sup>8</sup> DFAT, Country Information Report Sri Lanka, 4 November 2019.

<sup>9</sup> UKHO, Report of a Home Office fact-finding mission to Sri Lanka, 20 January 2020.

and that mere passengers are only fined. The amount of the fine has been reported as between LKR 15,000 and LKR 20,000 (approximately AUD 122 to 163).<sup>10</sup>

52. The minimum age of criminal responsibility in Sri Lanka is 12 years old, so children over 12 can be charged with breaking the I&E Act.<sup>11</sup> I note applicant 2 was [Age 1] years old when she departed Sri Lanka and therefore may be charged under the I&E Act.
53. The following procedures are reported to routinely occur for persons arriving in Sri Lanka who left illegally: they are questioned at the airport and may be charged under the I&E Act; the police take their photograph, fingerprints, and a statement; checks are undertaken for any outstanding criminal matters; the police may make further enquiries if the returnee is a former LTTE member; returnees can be held at the Airport CID's office for up to 24 hours during processing; the returnee is taken to the closest Magistrate's Court; if a magistrate is not available, because it's the weekend or a public holiday, the returnee can be held for up to 2 days in an airport holding cell; and the magistrate normally grants bail for mere passengers on a people smuggling boat.<sup>12</sup>
54. DFAT reports that there are no reports of mistreatment during the processing of returnees who departed illegally. The UNHCR told the UK Home Office that returnees to Sri Lanka are no longer subjected to intensive questioning at the airport. The authorities are only interested in persons returning with outstanding criminal offences. The UK Home Office reports there was no distinction between Tamil and Sinhalese returnees.<sup>13</sup>
55. Many thousands of Sri Lankans have returned from Australia and other western countries after unsuccessfully seeking asylum. It is not an offence to seek asylum outside Sri Lanka. The Sri Lankan authorities are reported to have said refugees and failed asylum seekers are welcome to return. There is no information before me that such returnees are targeted merely for seeking protection or being failed asylum seekers. Tamil failed asylum seekers who returned to the Northern Province told DFAT they had no protection concerns and had not experienced harassment or monitoring.<sup>14</sup>
56. I do not accept the processing on return, being charged and convicted of an offence under the I&E Act, or the imposition of a fine, amount to serious harm under s.5J(5) of the Act. In the unlikely event the applicants are detained for a few days for returning on a weekend or public holiday I do not accept this possible short period of detention amounts to serious harm under s.5J(5) even if the holding cell is uncomfortable or the applicants are distressed by the detention. I do not accept the applicants will be imprisoned on return for their illegal departure, as they were mere passengers and not persons facilitating or organising the boat journey. I do not accept the applicants faces a real chance of harm on return to their home area because they are returning as failed asylum seekers who departed Sri Lanka illegally. Even considered cumulatively with their ethnicity, the claims regarding an imputed LTTE connection, and applicant 2's gender, I find they do not face a real chance of harm for being returning failed asylum seekers who departed Sri Lanka illegally.

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<sup>10</sup> DFAT, Country Information Report Sri Lanka, 4 November 2019.

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

<sup>12</sup> DFAT, Country Information Report Sri Lanka, 4 November 2019; UKHO, Report of a Home Office fact-finding mission to Sri Lanka, 20 January 2020.

<sup>13</sup> DFAT, Country Information Report Sri Lanka, 4 November 2019; UKHO, Report of a Home Office fact-finding mission to Sri Lanka, 20 January 2020.

<sup>14</sup> DFAT, Country Information Report Sri Lanka, 4 November 2019; UKHO, Report of a Home Office fact-finding mission to Sri Lanka, 20 January 2020.



### *Data breach*

57. A data breach occurred in February 2014 when confidential information in relation to persons in detention in Australia was briefly accessible on the internet. The information that was possible to access included names, dates of birth, nationality, gender, details about the detention, and whether other family members were detained.
58. The applicants claim that because their personal information was released in the data breach it will be assumed that they disclosed their mistreatment in Sri Lanka to the Australian authorities, giving rise to an imputed political opinion as being opposed to the Sri Lankan government.
59. It is not known whether the Sri Lankan authorities accessed the data released in the data breach. However, if the applicants are to return to Sri Lanka their return after an illegal departure and need to obtain temporary travel documents in Australia will give rise to an imputation in any event that they came to Australia as unauthorised maritime arrivals.
60. For the reasons given above, I do not accept seeking asylum raises an imputed political opinion nor do I accept they face a real chance of harm for reason of having sought protection in Australia. I do not accept the data breach increases their profile when considered cumulatively with their other claims and personal circumstances, nor do I accept the data breach on its own gives rise to a real chance or harm.

### *Applicant 2's claims*

61. Applicant 2 claims that she suffered a number of sexual assaults as a child in Sri Lanka between the age of 7 to [Age 1]. In her first statutory declaration from 2019 she claimed a Sinhalese [Occupation 1] sexually assaulted her a number of times when she was around 7 or 8. Her mother went to the [Workplace] to confront the [Occupation] but he threatened her mother he would come to the house and harm the family if she reported the matter to the police or told her husband. At [Age 1] she saw this [Occupation] again. He forced her into a car and sexually assaulted her again. When he took her home he, or possibly the other men with him, hit her mother. She says that since she has been in Australia she has seen a psychologist for phobias and the trauma she experienced in Sri Lanka. She has a mental health plan and has seen the psychologist 6 times.
62. In her statement from 2021 applicant 2 discloses further incidents of sexual abuse. She claims she and her older sister were sexually abused by the owner of the local [store], and this started from when she was about 7. She says she believes the store owner targeted them because they were mixed race. She finally told her mother, but her mother was scared to go to the authorities in case of retribution from the man and his family. She also discloses that as a young child the older brother of a friend sexually abused her on one occasion. Her mother confronted that family and the boy told applicant 2 to 'watch your back'. She lived in fear of him and his family ever since. She says she has seen a psychologist 6 times on her mental health plan, and had been saving the other 4 sessions she was funded for in case she became desperate. She says she has now learnt she can access further financially supported therapy sessions and intends to make more appointments.
63. Applicant 2 says she thought at the time she was targeted by the [Occupation 1] because she was mixed race, but now she believes it was because of her father and uncle's involvement with the LTTE. I consider this is unlikely. Her uncle, if he was involved in the LTTE, had died in 1989, nearly [Number] years before she was born. Her father's alleged involvement with the

LTTE, through his association with [Mr B], didn't occur until sometime after he returned from [Country], when she was about 9, which is after the sexual abuse began. Her father's absence, working in [Country] from the time she was 6 until the age of 8 may have left her vulnerable to abuse from paedophiles in her community, having regard to information from DFAT that female headed houses are vulnerable to gender based violence and sexual exploitation.<sup>15</sup>

64. Applicant 2 says she cannot return to live with her family because she will not be safe there from the persons who previously assaulted her. She fears the [store] owner will target her for abuse again if she returns to Trincomalee, because he continues to live in the local community. She also fears harm from the older brother of her friend who assaulted her once. Whilst it is understandable she fears seeing these men again, who caused her such trauma, I consider her fear they will abuse her again does not have an objective basis. These men took advantage of her when she was a vulnerable child, and if they still pose a risk it is likely to other children. There is no evidence the [store] owner, who also assaulted her sister, had ever targeted the sister as an adult. She says the brother of her friend told her to watch her back, and she was always scared of what he might do, but there is no evidence he or his family contacted or harmed her after her mother confronted the family about the abuse. I consider it implausible that man would have any adverse interest in her 15 years after than one incident. I do not accept there is a real chance they will sexually assault or otherwise harm her now or in the reasonably foreseeable future because they assaulted her when she was a young child. I do not accept it is not safe for her to return home to live with her family. I acknowledge a return to the town where she suffered sexual assaults will be traumatic, but there is nothing to indicate her mother and sister would not support her on her return.
65. In relation to the language issue, I accept she has likely spoken little Tamil or Sinhala since leaving Sri Lanka at [Age 1], but she may regain the language once she returns and I do not accept her speaking English in the meantime will attract adverse attention from the authorities. No evidence was provided by applicant 2 to support the claim that speaking English may attract adverse attention.
66. Sexual assault of women and girls in conflict situations is tragically common, and has been well-documented to have occurred in Sri Lanka during the conflict and its aftermath.<sup>16</sup> Sexual abuse of women and girls was perpetrated during the civil war by members of the Sri Lankan army and navy, but also by the LTTE, and other paramilitary groups.<sup>17</sup> In 2017 the UN Special Rapporteur on minority issues reported a decrease in the incidence of sexual assault by the military as it drew down in the north and east of the country. DFAT reported women living near military bases, particularly single women, still reported some sexual harassment by military personnel, although a local source told DFAT such harassment was not prevalent.<sup>18</sup>
67. DFAT reports violence against women occurs throughout Sri Lanka, across all ethnic groups and social strata. In 2016 it was reported that one in four women in Sri Lanka were sexually abused by the age of 18. The greatest risk of violence to women now is domestic violence. The government has committed to preventing the abuse of women and in November 2016 launched a national action plan to address gender-based violence.<sup>19</sup>

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<sup>15</sup> DFAT, Country Information Report Sri Lanka, 4 November 2019.

<sup>16</sup> UN, Report of the Secretary-General on conflict-related sexual violence, 23 March 2018.

<sup>17</sup> ITJP Sri Lanka, A Still Unfinished War: Sri Lanka's Survivors of Torture and Sexual Violence 2009-2015, 1 July 2015; DFAT, Country Information Report Sri Lanka, 4 November 2019.

<sup>18</sup> DFAT, Country Information Report Sri Lanka, 4 November 2019.

<sup>19</sup> DFAT, Country Information Report Sri Lanka, 4 November 2019.

68. The UK Home Office reports<sup>20</sup> Tamil female single head of household residing in the former conflict zone of Northern and North Eastern Sri Lanka may be at risk of sexual abuse and exploitation perpetrated by members of police, military and paramilitary state agents. The assessment of the risk is intensely fact sensitive in every case, and the case by case assessment is informed by the presence or absence of positive risk factors and decreasing risk factors. The positive risk factors include living in isolation, low socio-economic status, dependence on the distribution of government aid or services by security forces, and a perception of former LTTE membership, links or sympathies. I do not accept any of these factors are relevant to the applicants. I consider any perception of LTTE link is too weak to amount to a positive risk factor. The applicants' background does not indicate they had a low socio-economic status when they lived in Sri Lanka, and the attendance at university by the older sister indicates the family continues to have a reasonable standard of living. The support of male relatives or neighbours is said to be countervailing factor to reduce the risk, and there is nothing to indicate applicant 2 would not have the support of her father and brother, and possibly other male relatives such as the relatives her family live with.
69. The mother and sister continue to live in Trincomalee, and the sister has spent some time also in [City 3] at university. Applicant 2 says in around 2016 her sister was taking a bus to [City 3] when the police pulled the bus over. She says everyone was asked to show ID and a bus ticket, but her sister was the only one who was targeted and interrogated by the police. It is not clear if the sister was interrogated on the bus, or taken somewhere. In any event, she ran home and since that time has travelled with a male relative or friend when travelling to or from university.
70. There is no other information that her mother or sister have suffered any sexual violence or other harm for reason of their gender. There is no evidence that the [store] owner who assaulted applicant 2 and her sister as children has harmed the sister as an adult. There is no evidence any of the men or families her mother confronted about the abuse when applicant 2 was a child have made any threats to or had contact with her mother since. I note there is also no evidence applicant 2 has suffered sexual violence in Australia as an adult, or at all.
71. I accept that sexual violence against women occurs in Sri Lanka, and was particularly bad during the civil war. As noted about the greater threat now to women in Sri Lanka is partner violence. I note the risk can be higher for women living near military bases, however the prevalence of military bases in the east of Sri Lanka is decreasing and there is no evidence from the family still in Trincomalee that they have experienced any harassment from the military in their area. I note the family left behind in Sri Lanka moved in with relatives who are said to have a more secure property, and there is nothing before me to suggest they could not remain there with the applicants if they return and if they deem their own family house not secure or habitable. Upon the applicants return, the family will no longer be living in a female-headed household. As a young woman living with her family, including her father, I do not accept the chance of suffering gender based violence is more than remote.
72. There is nothing in the country information referred to above in relation to the treatment of returning illegal departees to suggest there is any risk of sexual assault during the airport processing or possible short detention whilst waiting to appear before a magistrate.
73. As a young woman in Trincomalee not living alone, with the support of her father and possibly other male relatives, I find applicant 2 does not face a real chance of sexual assault or other gender based violence, now or in the reasonably foreseeable future, even taking into

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<sup>20</sup> UKHO, Country Police and Information Note, Sri Lanka: Tamil Separatism, June 2021.

account that she suffered such assault as a child. I find she does not have a well-founded fear of persecution because of her gender, even when considered cumulatively with her ethnicity, past trauma, and returning as a failed asylum seeker who departed Sri Lanka illegally.

### **Refugee: conclusion**

74. 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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75. 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**

76. 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.
77. 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.
78. The applicants may be charged under the I&E Act on return to Sri Lanka, and if they are returned on a weekend or public holiday they may be detained in an airport holding cell for up to 2 days. I rely on country information referred to above to find they would not be mistreated during such processing and possible detention. In the unlikely event they are returned on a weekend or public holiday and are detained, I do not accept the detention itself amounts to significant harm or that there is real risk the applicants will face significant harm during the detention. The applicants may be distressed during the short detention, but I do not accept their distress amounts to torture, or cruel or inhuman treatment or punishment, or degrading treatment or punishment as defined in the Act.
79. Applicant 2 claims that being returned to Sri Lanka will cause a decline in her mental health and be a traumatic experience, as she will be returning to the place where she suffered childhood trauma. I do not accept however that such distress, even if it were debilitating, amounts to significant harm as defined in ss.36(2A) and 5(1). The definitions of 'torture', 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' all require an act or omission in the receiving country and an element of intention. Her mental distress may be a consequence of the removal, but is not a consequence of an act or

omission occurring in Sri Lanka. Applicant 2's mental distress would also not be the result of any intention, that is, an actual, subjective, intention on the part of a person to bring about suffering by their conduct.

80. In Australia applicant 2 has sought counselling and has claimed to have seen a psychologist 6 times. Although no medical reports have been provided to evidence that she suffers any mental illness, I accept the childhood sexual assaults, living in a conflict area, and leaving her home country at a young age are traumatic incidents. I accept she may want to seek psychological care in Sri Lanka as she has done in Australia. DFAT reports changes are being made in Sri Lanka to improve access to mental health services, but overall the services are considered inadequate.<sup>21</sup> I do not accept any difficulty applicant 2 may have in accessing mental health care in Sri Lanka would amount to significant harm. I find her inability to access care would be for the reasons of paucity of services, and not an act or omission of withholding care with the intention to inflict torture, cruel or inhuman treatment or punishment, or degrading treatment or punishment. I do not accept the inadequate mental health care system in Sri Lanka gives rise to a real risk of significant harm.
81. I have otherwise found the applicants do not face a real chance of harm for reason of any imputed LTTE connection from applicant 1's brother or association with [Mr B] or any other reason, their ethnicity, past harm from the Karuna group suffered by applicant 1, past sexual assaults suffered by applicant 2, returning as failed asylum seekers who departed illegally, or the data breach. 'Real chance' and 'real risk' has been found to equate to the same threshold. For the same reasons given above, I find the applicants will not face a real risk of significant harm for any of the reasons claimed, whether considered individually or cumulatively.

#### **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 parent and dependent child or a relative living in the same household who is dependent on the family head. It is not clear from the evidence before me that the applicants, who live separately in different states and have done so for some years, would meet the definition of being members of the same family unit, but as neither applicant met s.36(2)(a) or (aa) it was not necessary to seek further evidence nor make findings on this.

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<sup>21</sup> DFAT, Country Information Report Sri Lanka, 4 November 2019.

84. As neither 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.