



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA19/07575

Date and time of decision: 6 January 2020 08:39:00
M Anderton, Reviewer

Decision

The IAA affirms the decision not to grant the referred applicant a protection visa.

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 473EC(2) of the Migration Act 1958 and replaced with generic information which does not allow the identification of a referred applicant, or their relative or other dependant.

Background to the review

Visa application

1. The applicant is a Tamil Hindu from Jaffna, Sri Lanka who arrived in Australia by boat [in] October 2012.
2. On 28 December 2016 he applied for a safe haven enterprise visa. His claims revolved around his 2006 abduction and sexual assault, and fear of harm from authorities being suspected as LTTE, from his scars (due to self-harm) and mental health issues which are managed by treatment. He also claims to fear harm because he departed Sri Lanka illegally by boat in 2006, went to India and in 2010 went to [Country 1] and would be considered a failed asylum seeker.
3. On 22 November 2019 the delegate refused the visa application because he was not satisfied the applicant was a refugee or that he faced a real risk of significant harm upon return to Sri Lanka.

Information before the IAA

4. I have had regard to the review material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
5. On 23 December 2019 the applicant's representative provided submissions and new information. It was submitted while the delegate accepted the applicant had been abducted and sexually abused, the delegate did not give proper consideration to the claims about his scarring or his mental health and the impact if interrogated by government agents. It was submitted in this particular case the applicant has such poor mental health and obvious scarring that interrogation would cause him such pain and mental harm that it would reach the level of significant harm. It was submitted the decision was similar to another decision and the level of duplication calls into question whether the delegate genuinely turned their mind to the country information. It was submitted the delegate failed to consider the claims cumulatively. It was submitted the applicant's fears are Convention based on his Tamil ethnicity, his imputed political opinion as a LTTE supporter or member, as a western returnee, failed asylum seeker, Tamil male from Northern Province with obvious scarring that appears to be the result of torture, and a person with poor mental health who has previously self-harmed and had suicidal ideation. The submissions are not new information and I have had regard to them.
6. The new information was country information (news reports) about Rajapaksa's election and the concerns that the Tamil population hold given the election. It was submitted the information could not have been given before the decision as an extreme amount of time had elapsed between the interview (11 May 2017) and the decision, which made the provision of the adverse information to the applicant for comment imperative for procedural fairness to be accorded. It was submitted the information was credible and relevant information and of high probative values which goes to the heart of the applicant's claims.
7. While the country information pre dated the delegate's decision, it was by only a few days. Further, it is more recent country information about the November 2019 elections, which was not considered by the delegate. I am satisfied it is credible personal information about Rajapaksa and his election and Tamil concerns which may have affected the consideration of

the decision. Given the information is recent and relevant to the current political situation in Sri Lanka, I am satisfied there are exceptional circumstances to consider the information. I have considered the information.

Applicant's claims for protection

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

- He is a Tamil born in [Town] in Jaffna. He speaks Tamil and is clearly Tamil in appearance.
- His father was an [occupation 1] (who studied at university) and fisherman. He passed away [in] 2001. His mother and all his siblings live in India. One sister who is married to a man in [Country 2] was in Jaffna and was visited by police as she was new in the area and they asked where she was from. She is in India now trying to organise her visa to [Country 2].
- During the war, in 1995 – 1996 he remembers planes flying overhead and dropping bombs. And on the way home saw dead bodies. The event really affected him and he still remembers it even though he was very young.
- The applicant stayed in Jaffna for 8 years until the fighting started in the area. His mother took them to different areas to avoid the war. They were refugees in an LTTE area. Eventually they travelled to India in 1996 and lived in a refugee camp until 2000.
- In January 2004 they were issued emergency travel documents and returned to Sri Lanka. They stayed in Trincomalee because his cousins were living there. He worked as a fisherman with his cousin from 2004 – 2006.
- In April 2006 when standing outside the house near the shops he was abducted in a white van. He believes they were Karuna group because they controlled that area and the abductors spoke Tamil. They were all Tamil except for one person. They beat and punched him. A Sinhalese person sexually abused [him]. They questioned him about who he knew in the LTTE, who he was supporting and who his contacts were.
- After 6 days they dropped him about 3 to 4 km from his house. He walked home.
- His mother told him that she had got some people together to help try to find him. She paid a policeman to get him out. They have no way of knowing why he was released or if the policeman was responsible for his release.
- He did not go to the doctor or hospital, was physically able to get better but was more traumatised and needed rest at home. It was hard for him mentally and he could not talk to anyone about it.
- They stayed in Sri Lanka for about one month to 40 days. He [things to] burn himself when he remembered what happened to him. He was also drinking a lot.
- He was in India from 2006 until 2010. They found out his cousin, P had been shot. He had been taken before they left Sri Lanka. He was also a fisherman.
- In India they had no rights and could not get work easily so he decided in 2010 he and friend took a boat for Australia. The boat ran out of fuel in [Country 1]. They were taken to a camp. He was interviewed by UNHCR. The boys on the boat told him to say they left from Sri Lanka, not India. He was rejected, but one of them was accepted by the UNHCR. That person had said they had left from India. According to the applicant's statement the UNHCR decision(not before me) notes he was detained and assaulted by

police and CID in 2006. He told them he returned to Sri Lanka in 2010 and was taken away in a van and released by his grandmother and fled to [Country 1]. However this is not true and he told them this because he had to tell them that he came from Sri Lanka, not India. After he was refused, one of the boys, P wrote a letter in Tamil to the UNHCR which said the applicant was in the LTTE. That was not correct and he has never been in the LTTE.

- He remained in the camp for over 2 years and left by boat for Australia.
- The horrible things that happened to him in Sri Lanka haunt him and it is really affecting him. If he were to go back to Sri Lanka he could not escape these thoughts and thinks he would be driven to suicide and hurt himself again. He was very close to killing himself in Sri Lanka.
- He has no family in Sri Lanka apart from one sister who is departing in a month for [Country 2]. He has nowhere to go or live. His family could not help him or stop him from suicide thoughts.
- He believes Sri Lankan authorities will arrest and question him. He has not been in Sri Lanka since 2006 and is scared they will question him and think he is LTTE because he has been outside Sri Lanka. He is scared the same things will happen to him again. He never wants to see Sri Lanka again. He cannot seek protection as it was either the government or Karuna group that sexually tortured him.
- He believes authorities will harm him and he would also harm himself if returned to Sri Lanka.
- It was submitted the applicant has a well-founded fear of persecution as a Tamil, persons imputed with pro LTTE or separatist opinion, male Tamils from the north, Tamil males with war like scarring, Tamil males from the north with torture like injuries, and a failed asylum seeker/returnee from a western country who left Sri Lanka illegally.
- It was submitted the applicant's mental health issues would result in significant harm upon return due to self-harm or suicide, the medical system failing to provide any or adequate care, Sri Lankan society refusing him access to services, including employment and accommodation, society insulting, humiliating and degrading him and will require access to mental health services, and he will be questioned by authorities and detained in inadequate prison facilities.

Refugee assessment

9. 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

10. 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.
11. I accept the applicant is a Tamil male originally from Northern Province, Sri Lanka and is Sri Lankan. I accept he lived in India and in Trincomalee. I find the receiving country is Sri Lanka.
 12. I accept the applicant may have seen upsetting things during the conflict and that the family were displaced due to the conflict and went to India and lived in a refugee camp. I accept that they returned to Sri Lanka with UNHCR assistance in 2004, but returned to India in 2006 and lived in refugee camp. I accept the applicant left India in 2010 by boat and landed in [Country 1] after running out of fuel. I accept the applicant then applied to UNHCR, but his application was refused. The applicant stated he had lied to UNHCR as the other boys on the boat had said he had to say the boat had come from Sri Lanka, not India. I accept he spent over two years in an immigration detention camp in [Country 1]. The applicant stated he bribed officials to release him and was able to then take a boat to Australia in October 2012.
 13. The applicant has consistently claimed that in April 2006 he was abducted, beaten and sexually abused and detained for 6 days. Although the delegate did not ask the applicant for details about this experience, the applicant provided a detailed statement. The applicant also provided a counsellor's report from [Organisation] dated [May] 2017 which indicated that the applicant had received thirteen sessions of counselling in 2013 and participated in 12 session of a therapeutic group program in 2014. It stated the applicant had disclosed details of the event to her and that after the abduction he began self-harming by burning [himself]. The applicant provided photos of [scars] on his arms.
 14. Country information also indicates that white van abductions were not uncommon in Trincomalee in 2006. Given the applicant's consistent claims, detailed statement, disclosure to the counsellor and country information, I accept the applicant was abducted, beaten and sexually abused and detained for 6 days in April 2006. I accept he has [scars] which are self-inflicted.
 15. I do not accept that his reporting of his experience to UNHCR (or Australian immigration for that matter) puts him at risk of harm from Sri Lankan authorities. I do not accept that authorities would know what he said his application. Even if they did, the applicant's claims to UNHCR were rejected. Further, van abductions during the conflict were well known. Further, as discussed below many failed asylum seekers have been returned to Sri Lanka without facing harm.

Tamils

16. The applicant was not LTTE and did not have any LTTE links or associations. However, it was submitted he would be imputed with LTTE profile given his ethnicity, age, scarring and lengthy absence from Sri Lanka. It was submitted the authorities would be more suspicious of him given he was interrogated and left in 2006 during the war and had not returned since. It was submitted the applicant would be subject to intense background checks and given his profile as a Tamil male from the north who has physical signs of harm, who has not been in the country for over 10 years and who has been detained in the past and sexually assaulted, he would be listed on the intelligence database. Alternatively, if not on the database the local authorities would be able to identify him as someone perceived to be an LTTE supporter. It was submitted those who are considered to hold political views continue to be at risk. It was submitted that authorities continue to be concerned about Tamil uprising and maintain an interest in those who lived overseas since the war.
17. I accept that at least until the end of the civil war in 2009 Sri Lankan citizens of Tamil ethnicity suffered disproportionately at the hands of the Sri Lankan authorities, particularly in North and East areas. I accept there are continuing detentions and torture against Tamils who may be suspected LTTE or criminals, even since the end of the war. I am mindful of the information that people with significant links to the LTTE or perceived to have such links may still face a real chance of harm, if returned to Sri Lanka.
18. I do not accept the applicant's abduction, detention and sexual assault in 2006 means the applicant will be imputed as an LTTE supporter or with anti-government views. He has not been involved in any such activities or associations. He stated while he thought about joining the LTTE after the sexual assault, they left Sri Lanka and returned to India because his mother was worried about him. They left within 40 days of the assault and he has not returned and has had no such associations. Further, I note the applicant stated he was taken by Tamils (albeit the sexual assault was by the one Sinhalese person there) and thought it was the Karuna group.
19. Further, the applicant has been absent from Sri Lanka since early 2006 and therefore not present during the height of the war from 2006 to 2009 which indicates he would be even less likely to be considered LTTE profile. Further, his absence from Sri Lanka can be accounted for by his residence in Tamil Nadu refugee camps in India until 2010 (and his family's continued presence there.)
20. Further, many thousands fled to Tamil Nadu, India due to the war. According to DFAT approximately 95,000 Sri Lankan Tamils live as refugees in Tamil Nadu, India. Of these, about 60,000 live in camps run by the Tamil Nadu Government. I note also that there was no claim the applicant was of interest to authorities there and he did not reside in a 'special camp' in Tiruchirappalli, Tamil Nadu, managed by the Tamil Nadu Prisons Department, which include former LTTE members, refugees with formal criminal convictions and those awaiting court hearings. I consider this further reinforces my view that the applicant would not be of adverse interest to Sri Lankan authorities now or in the reasonably foreseeable future.
21. Further, I note country information about Sri Lankans returning from Tamil Nadu, India that returnees are glad to have returned to Sri Lanka and would recommend return to other refugees. Further, they were not aware of returnees being subjected to rehabilitation for real or perceived links to the LTTE since 2015.
22. I note DFAT information that people with war-related scarring are more likely to attract adverse attention from the Sri Lankan authorities. An NGO, Freedom From Torture, reported in 2011 that an unidentified number of people were detained by the Sri Lankan authorities in

April or May 2009 because their scarring was deemed evidence of LTTE membership. However, as noted by DFAT these date from the immediate end of the war and DFAT is unaware of more recent evidence of individuals being detained because of scarring. Further, the applicant was not in Sri Lanka at the height of the war. I do not accept they are war like scarring as they are [deleted]. Further, the applicant's scars can be explained by his self-harm without disclosure of the traumatic event or counsellor report if need be. I do not accept the applicant faces a real chance of harm due to his scarring.

23. Further, given the authorities have sophisticated intelligence about those of interest, including suspected separatist or criminal activities and LTTE, and the applicant's lack of profile or LTTE association or criminal activities, I do not accept that he will be on an intelligence database, subject to intense background checks or questioning or known or suspected LTTE supporter by local authorities or anyone.
24. I do not consider his cousin's death in Sri Lanka during the conflict in 2006 means the applicant is at risk of harm upon return. The event is remote in time and in the context of the conflict, which ended in 2009.
25. The DFAT and UK Home Office and UNHCR reports in the review material indicate that the overall situation for Tamils in Sri Lanka has improved considerably since the end of the civil conflict in 2009 and even more so since 2015. I have considered the recent election of Rajapaksa and news reports about Tamils' concerns and increased fears and a recent van abduction. A report of a Swiss embassy employee abduction is under investigation with concerns also about its veracity. I note the reports also state that Rajapaksa assured fair treatment for all and said he will serve all Sri Lankans disregarding race or religion. Rajapaksa acknowledged he would govern not only for those who voted for him but those who did not. I am not satisfied that the (improvement) trajectory for Tamils will change. Even considering the recent election of Rajapaksa, I do not accept that the applicant faces a real chance of harm. Further, I do not accept the applicant has a profile or will be of adverse interest to authorities.
26. I do not accept the applicant faces a real chance of harm on the basis of his ethnicity, age, origin, past experiences, or lengthy absence from Sri Lanka.
27. I have considered the information about employment and accommodation difficulties upon return. While the applicant's mother and siblings are in India, I note the applicant is an adult who has managed to live in Australia without family and found employment. The applicant has worked as a fisherman and [occupation 2] in Sri Lanka and India, and a [occupation 2] in Australia. Even considering his past experience and mental health vulnerability (discussed below), I do not accept the applicant faces a real chance of harm upon return in re-establishing himself in Sri Lanka, finding employment and accommodation.
28. Further, the applicant's cousin still lives in Sri Lanka. While he may not be in contact with him now, I do not accept that the applicant could not reconnect with him. I note also his cousin gave him employment on his boat previously and the applicant's family resettled in Trincomalee in 2004 to be closer to the applicant's mother's family.

Mental Health

29. I have considered the counsellor report dated [May] 2017 and accept the applicant has had mental health issues. The report noted his symptoms indicated PTSD and anxiety. It noted that he had received counselling in 2013 and attended group sessions in 2014. I accept he has

self-harmed. The report stated he does not want to engage in that behaviour and it is one of the reasons he sought counselling. The applicant said at the protection interview in May 2017 the last time he had done that was two years prior (ie. 2015). The report noted his symptoms had improved considerably with counselling and group therapy and reduced his shame and anxiety. It noted also he would relapse if conditions of safety were reduced.

30. While I accept the applicant may be fearful of returning to Sri Lanka given his past experience, the situation there now is different to what it was in 2006. The conflict ended in 2009 and according to DFAT reports abductions have considerably reduced since the end of the war. DFAT assessed that reports of a small number of abductions involving white vans in 2016 and 2017 likely referred to incidents where police did not follow protocol during arrest. DFAT understands that such disappearances are no longer common. Further, the applicant does not have any profile of interest for abduction. I do not accept the applicant faces a real chance of abduction, harm or being targeted or being unsafe.
31. The report indicated the applicant had counselling and therapy in 2013 and 2014. It indicated that he would relapse if conditions of safety were reduced. The applicant has not claimed he takes any medication or that he continued counselling or therapy sessions. I do not accept he would be driven to suicide or face serious harm as the applicant has received counselling and he has managed to live and support himself for many years since in India and Australia. While the report noted he would relapse if conditions of safety were reduced, I am not satisfied that he will be unsafe upon return to Sri Lanka (even when questioned upon return). I am not satisfied on the material before me that he will need counselling or assistance upon return to Sri Lanka.
32. I have also considered the submissions about mental health stigma and concerns the applicant will face discrimination in employment and accommodation and from society. DFAT further assesses that traditional attitudes toward mental illness act as a significant barrier to treatment. However, the applicant has sought and received counselling in Australia which considerably improved his symptoms. As noted above, there is no evidence before me that he has had any counselling type assistance since 2014. Given he has been treated and, on the evidence before me, has not sought treatment for some years, while I do not underestimate the applicant's past trauma, I am not satisfied that he needs any further mental health treatment. The applicant has also lived and worked in Australia and India supporting himself and I do not accept that he faces a real chance of discrimination or Sri Lankan society refusing him employment or accommodation.
33. In any event, I consider the applicant could access mental health services in Sri Lanka if he so wished. While there has been improvement in quality and availability, DFAT assess mental health services remain inadequate overall, particularly in war affected areas. However, the DFAT report noted the government is devoting progressively greater attention and resources to mental illness. A National Mental Health Policy, adopted in 2005 and subsequently renewed in 2015, sits alongside a National Mental Health Action Plan. The Ministry of Health operates the National Institute of Mental Health in Colombo. The only state-run hospital dedicated to treating mental illness, it has 1,200 full-time staff and 1,500 beds. The National Institute of Mental Health admits over 8,000 patients annually. It operates a National Mental Health Helpline, launched in October 2018, and offered psychosocial support to those affected by the 2019 Easter Sunday terrorist attacks. Improving access to mental health services, including at the community level, is a government priority. As part of the effort they have deployed mental health workers to district level and in the Northern Province. District level hospitals have mental health facilities and some NGOS provide psychosocial support services including in Tamil areas. Further there is universal free health care. If he needed

assistance, I do not accept that he would not seek it, as he has done so before, or that he could not access services.

34. While the standards may not be the same as in Australia and resources may be more limited, the country information does not support that the applicant would be denied or unable to access services for any of the reasons in s.5J(1). The information does not indicate that the limitations on the availability of services are a result of discrimination. I do not accept he would be denied access to health care for any of his physical or mental health for any of the s.5J(1)(a) reasons.
35. While I note information about social stigma in relation to mental health, the applicant has received counselling in Australia and may not need any mental health assistance in Sri Lanka. In any event, I consider he has been able to live and work in India and Australia and I consider he could do the same in Sri Lanka, as he has before. Further, I do not accept that social stigma amounts to serious harm.
36. I do not accept the applicant faces a real chance of serious harm due to his mental health issues.
37. Even considering the applicant's mental health and past experience, I do not accept he faces a real chance of harm upon return from authorities or anyone. Looking to the reasonably foreseeable future and having regard to the country information, including the recent election of Rajapaksa and the applicant's circumstances, I do not accept the applicant faces a real chance of any harm in that regard.
38. Having considered the applicant's circumstances in light of the country information I do not accept that he faces a real chance of harm because of his race, ethnicity, age, background, his scarring, past experiences, cousin's death, lengthy absence from Sri Lanka, residence in India, [Country 1] or Australia, being a young male Tamil from Northern Province (and Trincomalee), and formerly LTTE controlled area, mental health issues or membership of any particular social group.

Failed asylum seeker

39. I accept that if the applicant returns to Sri Lanka, he would do so as a failed asylum seeker on a temporary travel document. I accept that he may face questioning at the airport as a returned asylum seeker or returnee.
40. The DFAT reports indicate that thousands of Tamils have been returned to Sri Lanka since the end of the Sri Lankan civil war, including from Australia and India, and claimed asylum. Although there have been reported instances of returnees being harmed, the information before me suggests those were people with substantial links to the LTTE or outstanding warrants and I have not accepted that the applicant has such a profile or would be perceived as such.
41. I do not accept that as a failed asylum seeker or returnee from Australia the applicant faces torture, arbitrary arrest, detention or any harm upon return. Credible country information indicates that there is no mistreatment upon arrival or questioning at the airport. All returnees are treated the same regardless of their ethnicity and religion and the laws are not applied in a way that is discriminatory or selectively enforced against any particular group of those returnees. I do not accept that Tamils are treated differently.

42. I accept he may receive a visit from authorities when he returns to home. Country information indicates the 49 per cent in the north received a visit. While the applicant is more likely to return to Trincomalee (the east), where he most previously lived, I accept that police visited his sister recently when she returned to Sri Lanka. The applicant did not claim there was any harm as a result and was an enquiry as she was new. I accept the same may occur for the applicant given his prolonged absence from Sri Lanka. However, as discussed above I do not accept that his past experience puts him at risk or raises his profile. Even considering the current situation in Sri Lanka, and any continuing mental health vulnerability, I do not accept the applicant would be targeted or attract adverse attention of authorities. Further, and in any event, I do not consider such a visit amounts to harm.
43. Even considering the applicant's past experience and I am not satisfied that the applicant faces a real chance of harm upon being questioned by authorities or checking with authorities about his identity or history.
44. Having regard to the country information in the material before me, I am not satisfied there is a real chance the applicant would face harm upon return by the Sri Lankan authorities or otherwise because of mental health issues or because he applied for asylum in Australia, or because he is a returnee from a Western country. I do not accept the applicant will be targeted or faces a real chance of harm upon return.

Illegal departure

45. The applicant departed from India in 2010 to eventually travel to Australia in 2012. He claims he departed Sri Lanka illegally in 2006 to travel to India. Given this occurred during the conflict when many thousands departed in the same way, I am not convinced that he will be subject to the Immigrants and Emigrants Act ("IAEA"). However, I have considered the possibility below.
46. The country information before me indicates that all returnees are treated the same regardless of their ethnicity and religion and the laws are not applied in a way that is discriminatory or selectively enforced against a particular group of those returnees. I do not accept that Tamils are treated differently.
47. While there are reports of arrests and torture, they were known as former LTTE members. As discussed above, I do not accept the applicant has an LTTE or anti-government profile. The country information is that returnees are not subject to mistreatment during processing at the airport. Even considering his past experience and mental health vulnerability, I do not accept the applicant faces harm from questioning. I note the applicant has received counselling and improved. Further, I do not accept that he will be unsafe upon return to Sri Lanka.
48. I find the applicant will be issued a fine and released. In the event he pleads not guilty, he will be released pending his court date and may have to return to court for future appearances. If he arrives on a weekend he may be held in an airport holding cell over the weekend while waiting to come before a magistrate. Country information is that bail is granted and the fine of between LKR 3000 to 20000 and can be paid in instalments. Even if held for a short period waiting for a magistrate, I do not accept the applicant faces a real chance of any harm. DFAT has assessed risk of torture or mistreatment to detainees is low, and considered with the applicant's profile and particular circumstances (including his mental health/past experience vulnerabilities), I do not accept the applicant faces a real chance of anything that would

amount to serious harm upon arrival, during questioning or possible brief detention or attendance at court.

49. Based on the country information and the applicant's circumstances I do not accept the applicant faces a real chance of serious harm on arrival in Sri Lanka or during the questioning process to establish identity, any criminal history and bail.
50. Furthermore, I do not accept that the IAEA provisions that deal with breach of the departure laws from Sri Lanka are discriminatory on their face, or disclose discriminatory intent or that they are implemented in a discriminatory manner. I find that the Sri Lanka departure laws are laws of general application and do not involve discrimination.
51. I am not satisfied, that questioning, arrest, detention at the airport and the application of a penalty such as a fine or possible repeated bail appearances for illegal departure amount to systematic and discriminatory conduct as required by s.5J.
52. I have considered cumulatively the applicant's past experience, scarring and mental health vulnerability, and effect on him being questioning at the airport, or possible short detention waiting for magistrate for illegal departure and penalties and appearances and visit as a returnee and social stigma. However, I do not accept the accumulation of those factors or harm amounts to serious harm. As discussed I consider the applicant has been treated in Australia and had ceased treatment in 2014. Further, I am not satisfied that there is a real chance he will relapse as I do not accept that he or conditions will be unsafe.
53. I have had regard to all of the evidence before me and I have considered the applicant's claims and personal circumstances individually and cumulatively. I am not satisfied the applicant has a well-founded fear of persecution from authorities, armed groups, society or anyone for reason or combination of reasons in s.5J(1)(a), now or in the reasonably foreseeable future, if he returns to Sri Lanka.

Refugee: conclusion

54. The applicant does not meet the requirements of the definition of refugee in s.5H(1). The applicant does not meet s.36(2)(a).

Complementary protection assessment

55. 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

56. 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.
57. Torture, cruel or inhuman treatment and punishment and degrading treatment or punishment are also defined in s5(1) of the Act.
58. I have considered the applicant's mental health issues and access to treatment and am not satisfied on the material before me that that he will need further assistance. He ceased counselling/therapy in 2014 and there was considerable improvement. Further, I do not accept that the conditions or he will be unsafe and therefore he relapse. Further, in any event, there is universal free health care available. While mental health services are scarce, the country information indicates there have been significant improvements in such services. Further, I am not satisfied any issues with mental health service access is intentionally inflicted.
59. Further, having regard to his circumstances, I am also not satisfied that social stigma about his mental health amount to significant harm. Further, as discussed above, I do not accept that he could not work or find accommodation or face a real risk of any significant harm upon return re-establishing himself in Sri Lanka.
60. I do not accept submissions that due to the applicant's poor mental health and obvious scarring that interrogation (or encounter with authorities) amounts to significant harm upon return. I do not accept the applicant's mental health is poor. The applicant ceased counselling/therapy in 2014 and there was considerable improvement. Further, and I am not satisfied that he will need further assistance or relapse as I do not accept he or the conditions will be unsafe. Further, as discussed above, I do not accept that he faces a real chance of harm due to his scarring. Further, the scarring is not warlike and can be explained as self-harm if need be. I have considered the effect of questioning and encounter with authorities, given the applicant's circumstances, but I do not accept that it amounts to significant harm.
61. Even considering the applicant's past experience, scarring and mental health vulnerabilities and his treatment and any questioning upon return as a failed asylum seeker, returnee or for illegal departure (including penalties or detention waiting for a magistrate) I am not satisfied they amount to significant harm as defined.
62. Having regard to the applicant's circumstances (including his past experience and mental health vulnerabilities), I am also not satisfied that the treatment, questioning, travel to court appearances, possible costs and penalties the applicant may face as an illegal departee amount to significant harm as defined.
63. Further, I do not accept that a visit from authorities or questioning amounts to significant harm as I do not accept the applicant is or will be of adverse interest to authorities. Even with past experience and mental health vulnerabilities I am not satisfied the applicant faces a real risk of significant harm as a result of such visit.
64. I am not satisfied that, individually or cumulatively, the treatment the applicant may encounter under the IAEA or as a returnee or failed asylum seeker (even considering his scarring, past experience and mental health vulnerabilities), would constitute significant harm as defined under ss.36(2A) and 5(1) of the Act.

65. I am not satisfied that, individually or cumulatively, any processes or circumstances the applicant may encounter, even given his past experience, mental health vulnerabilities or scarring, as a returning asylum seeker illegal departee, returnee or social stigma, or accessing medical care would constitute significant harm as defined under ss.36(2A) and 5 of the Act.

Complementary protection: conclusion

66. There are not substantial grounds for believing that, as a necessary and foreseeable consequence of being returned from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm. The applicant does not meet s.36(2)(aa).

Decision

The IAA affirms the decision not to grant the referred applicant a protection visa.

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly

...

cruel or inhuman treatment or punishment means an act or omission by which:

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature;

but does not include an act or omission:

- (c) that is not inconsistent with Article 7 of the Covenant; or
- (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

degrading treatment or punishment means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:

- (a) that is not inconsistent with Article 7 of the Covenant; or
- (b) that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

receiving country, in relation to a non-citizen, means:

- (a) a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or
- (b) if the non-citizen has no country of nationality—a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.

...

torture means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant;

but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

5H Meaning of refugee

(1) For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a refugee if the person:

- (a) in a case where the person has a nationality—is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or
- (b) in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Note: For the meaning of ***well-founded fear of persecution***, see section 5J.

...

5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
 - (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
 - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
 - (c) the real chance of persecution relates to all areas of a receiving country.
Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.
Note: For effective protection measures, see section 5LA.
- (3) A person does not have a well-founded fear of persecution if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country, other than a modification that would:
 - (a) conflict with a characteristic that is fundamental to the person's identity or conscience; or
 - (b) conceal an innate or immutable characteristic of the person; or
 - (c) without limiting paragraph (a) or (b), require the person to do any of the following:
 - (i) alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith;
 - (ii) conceal his or her true race, ethnicity, nationality or country of origin;
 - (iii) alter his or her political beliefs or conceal his or her true political beliefs;
 - (iv) conceal a physical, psychological or intellectual disability;
 - (v) enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
 - (vi) alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.
- (4) If a person fears persecution for one or more of the reasons mentioned in paragraph (1)(a):
 - (a) that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and
 - (b) the persecution must involve serious harm to the person; and
 - (c) the persecution must involve systematic and discriminatory conduct.
- (5) Without limiting what is serious harm for the purposes of paragraph (4)(b), the following are instances of **serious harm** for the purposes of that paragraph:
 - (a) a threat to the person's life or liberty;
 - (b) significant physical harassment of the person;
 - (c) significant physical ill-treatment of the person;
 - (d) significant economic hardship that threatens the person's capacity to subsist;
 - (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
 - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.
- (6) In determining whether the person has a **well-founded fear of persecution** for one or more of the reasons mentioned in paragraph (1)(a), any conduct engaged in by the person in Australia is to be disregarded unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.

5K Membership of a particular social group consisting of family

For the purposes of the application of this Act and the regulations to a particular person (the **first person**), in determining whether the first person has a well-founded fear of persecution for the reason of membership of a particular social group that consists of the first person's family:

- (a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in paragraph 5J(1)(a); and
- (b) disregard any fear of persecution, or any persecution, that:
 - (i) the first person has ever experienced; or

- (ii) any other member or former member (whether alive or dead) of the family has ever experienced;

where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.

Note: Section 5G may be relevant for determining family relationships for the purposes of this section.

5L Membership of a particular social group other than family

For the purposes of the application of this Act and the regulations to a particular person, the person is to be treated as a member of a particular social group (other than the person's family) if:

- (a) a characteristic is shared by each member of the group; and
- (b) the person shares, or is perceived as sharing, the characteristic; and
- (c) any of the following apply:
 - (i) the characteristic is an innate or immutable characteristic;
 - (ii) the characteristic is so fundamental to a member's identity or conscience, the member should not be forced to renounce it;
 - (iii) the characteristic distinguishes the group from society; and
- (d) the characteristic is not a fear of persecution.

5LA Effective protection measures

- (1) For the purposes of the application of this Act and the regulations to a particular person, effective protection measures are available to the person in a receiving country if:
 - (a) protection against persecution could be provided to the person by:
 - (i) the relevant State; or
 - (ii) a party or organisation, including an international organisation, that controls the relevant State or a substantial part of the territory of the relevant State; and
 - (b) the relevant State, party or organisation mentioned in paragraph (a) is willing and able to offer such protection.
- (2) A relevant State, party or organisation mentioned in paragraph (1)(a) is taken to be able to offer protection against persecution to a person if:
 - (a) the person can access the protection; and
 - (b) the protection is durable; and
 - (c) in the case of protection provided by the relevant State—the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system.

...

36 Protection visas – criteria provided for by this Act

...

- (2) A criterion for a protection visa is that the applicant for the visa is:
 - (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee; or
 - (aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or
 - (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (a); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant; or
 - (c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (aa); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant.
- (2A) A non-citizen will suffer **significant harm** if:
 - (a) the non-citizen will be arbitrarily deprived of his or her life; or
 - (b) the death penalty will be carried out on the non-citizen; or
 - (c) the non-citizen will be subjected to torture; or
 - (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
 - (e) the non-citizen will be subjected to degrading treatment or punishment.

- (2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:
- (a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or
 - (b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or
 - (c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

...

Protection obligations

- (3) Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.
- (4) However, subsection (3) does not apply in relation to a country in respect of which:
- (a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.
- (5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:
- (a) the country will return the non-citizen to another country; and
 - (b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.
- (5A) Also, subsection (3) does not apply in relation to a country if:
- (a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country.

Determining nationality

- (6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.
- (7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.