



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA22/10375

Date and time of decision: 25 November 2022 08:51:00
M Oakman, 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 referred applicant (the applicant) claims to be a Tamil of the Catholic faith from the Eastern Province, Sri Lanka. He arrived in Australia [in] November 2012 and lodged an application for a Safe Haven Enterprise visa (SHEV) (XE-790) on 29 February 2016. On 24 November 2016 a delegate of the Minister for Immigration (the delegate) refused to grant the visa. On 8 August 2017 the IAA affirmed the delegate's decision not to grant the applicant a protection visa.
2. The applicant sought judicial review of the IAA's decision. [In] August 2022 the Federal Circuit and Family Court of Australia, by consent, quashed the IAA's decision and remitted the matter to the IAA for the review to be determined according to law. The basis for that decision was the IAA's decision was affected by jurisdictional error of the kind described in *AUS17 v Minister for Immigration and Border Protection (2020) 269 CLR 494* at [12]. Specifically, the IAA failed to assess the applicant's claim that he would be prevented from practising his religion in Sri Lanka, which was new information, against the criterion in s.473DD(b)(ii) of the *Migration Act 1958* (the Act).

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the Act.
4. On 23 December 2016 the IAA received an email from the applicant's former legal representatives containing submissions and further information. On 4 January 2017 the IAA received another copy of the same material in the post. On 16 September 2022 the IAA received an email from the applicant's current legal representatives containing submissions and further information. On 20 September 2022 the IAA received another emailed copy of the same material. On 3 October 2022 the IAA received an email from the applicant's current legal representatives containing further material and submissions in relation to that material. To the extent the various submissions refer to information that was before the delegate, and contain argument, I consider this does not constitute new information and I have had regard to it.
5. The material also contain further information some of which was not provided to the delegate. It consists of:

Provided in 2016

- Applicant's statement dated 21 December 2016. The statement contains a mix of information that was before the delegate and some information that was not. In the statement the applicant says that he fears he will be prevented from practising his religion if returned to Sri Lanka. This claim was not before the delegate and is new information (*practising his religion new information*). He refers to country information reports in the statement, including quoting extracts. Some of this country information was not before the delegate and it is new information (*2016 new county information*).

Provided in 2022

- Applicant's statutory declaration dated 16 September 2022. The statutory declaration provides a mix of information that was before the delegate, clarifications or expansions of the same, and new information. I accept the characterisation of the information in

the various paragraphs of the statutory declaration as set out in the applicant's accompanying submissions. That is, paragraphs 10 and 11 contain new information about more recent developments in Sri Lanka (*2022 statutory declaration new country information*) and paragraph 12 contains a new claim in relation to the applicant's mental health (*mental health new information*).

- Letter of support dated 12 September 2022 from the applicant's pastor. This letter was not before the delegate and is new information (*pastor's letter new information*).
 - Letter from the applicant's GP dated 12 September 2022. This letter was not before the delegate and is new information (*GP's letter new information*).
 - Country information dating from 2021 in relation to Sri Lanka; and dating from 1988 in relation to [events] in the Maldives. This country information was not before the delegate and is new information (*2022 new country information* and *1988 Maldives new country information*, respectively).¹
 - English translation (from a NAATI certified translator) of a [January] 1997 memorial notice, for the applicant's stepbrother, together with a copy of the notice in Tamil. The Tamil language version of the memorial notice was before the delegate and, noting the applicant's submissions, I accept that this translation is not new information and I have had regard to it.
6. The mental health new information relates to a new protection claim based on the deterioration in his mental health since after the IAA's 2017 decision etc. The GP's letter new information confirms the applicant has been treated by the GP since 2019 for depression, as well as being referred for counselling. This new material post-dates the delegate's decision. On its face, all the new material is credible personal information. The state of the applicant's mental health is a new protection claim made by the applicant and it was not considered by the delegate. The new protection claim may have affected consideration of his claims in relation to his risk profile in Sri Lanka. I am satisfied that s.473DD(b) is met and there are exceptional circumstances to justify considering the mental health new information and the GP's letter new information.
7. The practising his religion new information is a new protection claim made by the applicant. The pastor's letter new information confirms, among other things, the applicant has continued to practise his religion in Australia. To summarise his 21 December 2016 statement, the new claim is that because the Sri Lankan Army (SLA) made it very difficult for him to practise his religion in 2012 when he was in Trincomalee, together with various pro-Buddhist actions by the Sri Lankan Government, his biggest fear is that he will be prevented from practising his religion freely if forced to return to Sri Lanka. The delegate considered, and discussed at the applicant's SHEV interview, the applicant's religion and whether he may face harm as a result. The pastor's letter is dated after the date of the delegate's decision, and to that extent the letter could not have been provided to the delegate as it did not exist. However, the information about the applicant's religious observance contained in the letter appears to relate substantially, albeit not exclusively, to the applicant's attendance at the pastor's church from 2013 to 2015 when the pastor left the area. The letter also appears to have been obtained at the applicant's request. On that basis, I am not satisfied that this new material could not have been given to the delegate prior to a decision being made. However, on its face the new material is credible personal information. The delegate did not accept that the applicant was at risk of harm because of his religion if returned to Sri Lanka. The new protection claim may have affected consideration of his claims in relation to his risk profile if

¹ [Details deleted].

returned to Sri Lanka. I am satisfied that s.473DD(b)(ii) is met and that there are exceptional circumstances to justify considering the practising his religion new information and the pastor's letter new information.

8. The 2022 statutory declaration new country information and the 2022 new country information all post-dates the delegate's decision. They concern developments in Sri Lanka since 2019 onwards. They are much more recent country information than the material considered by the delegate in 2016, some six years ago. I am satisfied that s.473DD(b)(i) is met and that there are exceptional circumstances to justify considering the 2022 statutory declaration new country information and the 2022 new country information.
9. The 2016 new country information and the 1988 Maldives new country information all pre-dates the delegate's decision. The delegate considered a range of other country information in assessing the applicant's claims, including a quantity of material provided by the applicant's former legal representatives with his SHEV application, at his SHEV interview, and after the SHEV interview. The country information before the delegate includes reports on the incidence of torture, the treatment of Tamils, the treatment of returnees and the then Sirisena government's policies, in Sri Lanka up to 2016 and information about [events] in the Maldives. The material contained in the new country information is neither personal information in the relevant sense, nor am I satisfied that it may have affected consideration of the applicants' claims. The applicant has not satisfied me as to the matters in s.473DD(b)(i) or (ii) for this material. I am also not satisfied that there are exceptional circumstances to justify considering the 2016 new country information and the 1988 Maldives new country information.
10. In his statutory declaration dated 16 September 2022, the applicant asks that if there is anything the IAA would like to know more about, he be given an opportunity to discuss that at an interview given the time that has passed since he was last able to participate in an interview about his case. The legislative framework governing the IAA provides for an exhaustive statement of the natural justice hearing rule. The IAA is required, subject to Part 7AA, to review a matter without accepting or requesting new information and without interviewing the applicant (s.473DB). The IAA can obtain new information from an applicant, including at an interview, but can only consider that information in exceptional circumstances. The IAA is considering the submissions made by the applicant in 2016 and 2022, as well as a range of new information provided by the applicant, including the applicant's statement dated 21 December 2016 and his statutory declaration dated 16 September 2022. It is not apparent why he could not provide any further or additional details in writing as part of the submissions made, or why he was unable to provide such information in the 2016 statement and 2022 statutory declaration. I have decided not to exercise my discretion to interview the applicant.
11. On 8 November 2022 the IAA wrote to the applicant in relation to a DVD that his former legal representative produced at his SHEV interview with the delegate on 24 October 2016, based on the recording of that interview. The DVD was not in the referred material provided by the Department to the IAA, and the Department subsequently advised that they do not have a copy of the DVD. The IAA stated that if the applicant still wished to rely on the contents of the DVD he should provide a copy by 15 November 2022, which was subsequently extended to 22 November 2022 at the applicant's request. On 22 November 2022 the applicant's current legal representatives advised they were unsuccessful in obtaining a copy of the DVD from the former legal representatives. The recording of the interview indicates that the DVD contained information that was general and not specifically related to the applicant. Given neither the Department nor the applicant has a copy of the DVD available; that a range of

other country information was before the delegate at the time, including a quantity of hard copy country information provided by his former legal representatives; and that the material is now some six years old, I have decided to proceed on the information before me without taking any further action to obtain a copy of the general information that was contained on the DVD.

Applicant's claims for protection

12. The applicant's claims can be summarised as follows. He fears persecution and harm, if returned to Sri Lanka, based on his:
- Tamil ethnicity;
 - Christian faith, including that he will be prevented from practising his religion freely;
 - Ties to his stepbrother, a former fighter and then electoral candidate for the People's Liberation Organisation of Tamil Eelam (PLOTE);
 - Anti-government or pro-Tamil political opinion;
 - Return as a failed asylum seeker;
 - Mental health;
 - Cumulative profile; and
 - Increased risk due to recent changes in the situation in Sri Lanka.

Factual findings

Receiving country

13. Based on the documents and oral evidence given by the applicant, I accept that the applicant is a national of Sri Lanka. I find that the applicant's receiving country is Sri Lanka.

Background

14. The applicant was born in [year] in M, Trincomalee, Eastern Province, Sri Lanka. He and his family moved to another address in Trincomalee in 1983 where he lived until 1990 when they were displaced for a few months due to fighting. In September 1990 he and his family went to India where they lived in various refugee camps. The applicant returned to Trincomalee in Sri Lanka in March 2012. He returned to India in August 2012 and left India for Australia in October 2012. He has never married and has no children. His father is deceased. His mother [and specified family members] live in Sri Lanka and another brother is living in [Country 1]. He had [specified family members], his stepsiblings live in Sri Lanka although they sometimes work overseas. He attended school in Sri Lanka up to [grade] ([in specified years]) and in India up to [grade] ([in specified years]). He also completed a [degree] in India ([in specified years]). He worked in India as a labourer (2004-2008) and in marketing and financial jobs (2008-2012). He started work in Australia in 2016. He reads, writes, and speaks Tamil and English. He is Tamil and Catholic.

Problems in Sri Lanka etc

15. In summary, the applicant claims he is a Christian. His father had previously been married and had [specified children]. His father's marriage to his mother resulted in [specified] children. One of the applicant's stepbrothers is N, who was a member of PLOTE, supported the ideals of the Liberation Tigers of Tamil Eelam (LTTE) and believed they should be united. N was also a politician and a candidate at the parliamentary elections but was killed before the elections were held. N was shot and killed by an unidentified armed group.
16. The applicant says that between [year] and 1983 he and his family lived in M in Trincomalee. In 1983 there was an outbreak of communal violence by Sinhalese against Tamils, and he and his family moved to K in Trincomalee. In 1990, there was more communal violence between the Sinhalese and Tamils in Trincomalee and as a result they moved to Jaffna, where the family lived until September 1990. At that time the applicant was [age]. Because of the fighting between the SLA and the LTTE, and with the LTTE taking control of Jaffna, his parents feared he would soon be a target for recruitment by the LTTE and his family decided to move to India. For 22 years from September 1990 to [March] 2012, he lived in Tamil Nadu in different refugee camps. In the refugee camps, they were treated as second class citizens by the Indians and Indian authorities. They lived a hand to mouth existence in harsh living conditions. The camps were strictly controlled by the Indian authorities and there were curfews imposed. Whenever there were major LTTE incidents in Sri Lanka, the camps would come under increased attention. Because all the people in the refugee camps were Sri Lankan Tamils, they were always suspected of having links to the LTTE. Just before the end of the war in Sri Lanka there were many hunger-strikes and protests arranged by Tamil politicians, and he participated.
17. He claims his stepbrother N joined PLOTE after the 1983 communal violence against Tamils. N was a soldier and fought against the Sri Lankan authorities. In 1988 there was an attack [in Region 1] by an armed group that included N. N was jailed in [Region 1] until 1994 when he was released and sent back to Sri Lanka. In Sri Lanka N continued his work politically, and gave up arms, with N contesting an election in the [named] area. Because of this election involvement, N was abducted by unidentified people [in] May 1996 and shot and killed. N was well known in Trincomalee and other Tamil areas but not necessarily in the rest of Sri Lanka. N has the same surname as the applicant. The applicant never saw N after 1990. He and his family never lived with their stepfamily, with his mother and stepmother not getting on. However, the stepsiblings were in contact, visiting and calling each other at times.
18. The applicant says that when the civil war officially ended in May 2009, the Indian authorities were threatening to return all Sri Lankan refugees back to Sri Lanka and in March 2012, the UN High Commissioner for Refugees (UNHCR) were very active in organising the return of Sri Lankans back home. He had great reservations of returning to Sri Lanka, given what had happened after the war ended in Sri Lanka. However, he wanted to get married and start his life in Sri Lanka, he also missed his family. His mother, father and [brother] had returned to Sri Lanka in 2003 during the peace talks and although his mother and father returned to India in 2007 when the war flared again, his [brother] stayed in Sri Lanka where he married and started a family. The UNHCR organised his return to Sri Lanka and, together with his [sibling], he left India [in] March 2012. When they arrived at the airport in Sri Lanka, they were separately questioned by intelligence officers from about 10am to 8 or 9pm, while [one] brother and family waited outside for them. The intelligence officers mainly, and repeatedly, questioned the applicant saying he had been living in India for many years, many LTTE people fled there, and had he come across them and what assistance had he given them. After they

were released and joined his [brother], they also met some people from the UNHCR who gave them some cash, and then went to Trincomalee where he lived at his [brother's] home.

19. He claims that when he got to Trincomalee, things had changed since 1990. There was a sense of danger, as the people he spoke to expressed fear and confirmed that things were not as safe and peaceful as made out by the Indian and Sri Lankan authorities. He was told that there had been a lot of kidnappings, murders, disappearances, and the presence of white vans. There were also many military camps, checkpoints, and Sinhalese colonies in Trincomalee. Every day he could see the SLA going on security rounds; the SLA rounded up many Tamil youths; and Tamil youths were being sent to rehabilitation camps. On one occasion he was fortunate to avoid being taken in a round up, as it occurred where he was living but he happened to be at his stepbrother's place at the time. There were constant checks of ID cards and therefore he could go nowhere. Although his questioning had been completed at the airport, the CID often came and questioned him and were monitoring him. The CID would sometimes come two to three times a week to question him about what assistance he provided the LTTE, did he support the LTTE, what was happening in the camps in India with the LTTE, if there was LTTE activity in the area at the time, and told him he would be okay if he provided information. There were also Tamil militant groups present who sided with the government and were collecting information for them. The church the applicant attended was in an area under SLA control and when attending church, he had to pass checkpoints and that is when he would be questioned and harassed. He was also fearful while attending church because in 2012 the government was actively involved in heavily promoting Buddhism in the north and east, and Buddhist monks had come into the area espousing ideas that all Tamils should return to India and Buddhists should be able to build there temples anywhere in the north. The applicant did not have a National Identity Card (NIC) which made life difficult for him and guaranteed that he would be picked up by the police or SLA and then be detained and come under suspicion. Therefore, his uncle approached Muslim agent and paid him money to get an NIC, when you otherwise had to have been living in the area for six months and then had to wait 45 days before receiving the NIC. They paid the agent 100,000 Sri Lankan Rupees, and the applicant got a passport and NIC. Given his experiences in the short time that he had been in Trincomalee, his uncle and family advised him to return to India and he did so [in] August 2012. The agent arranged for someone to accompany the applicant through the airport in Sri Lanka, travel to India with him, and handle his passport which was retained by the agent. As he paid money to obtain the NIC and passport he is not sure if they are genuine.
20. The applicant claims that on returning to India, he wanted to be registered as a refugee, however the authorities in India refused to do so as he had already left India and then chosen to return. He went and lived in a place with relatives and friends and was in hiding while arrangements were made for him to depart India. He could not return to Sri Lanka, because of the issues he faced and so he left India in a boat that was bound for Australia [in] October 2012.
21. The applicant says that in 2019 Gotabaya Rajapaksa was elected President of Sri Lanka, which was not a welcome outcome for the Tamil people. The Rajapaksas committed war crimes against Tamils during the war and the applicant fears their return to power will see a return of oppression. There was also a coup in Sri Lanka in July 2022, which led to President Rajapaksa fleeing the country, however he recently returned. Even though he is no longer President, he still has a lot of influence and power; they control the SLA and have tightened their control over other parts of the government over the years. In the recent protests the SLA engaged in much violence against the Sinhalese population, and he can't imagine what they would be willing to do to Tamils. He regularly attends church in Australia and would

continue to do so in Sri Lanka, which adds to his fears of being stopped, harassed, detained and harmed by the authorities.

22. He provided supporting material including identity documents; birth and death certificates; memorial notice; Indian refugee documents; UNHCR repatriation letter; supporting letters; and country information.
23. The Department of Foreign Affairs and Trade (DFAT) reported that incidents of extra-judicial killings, disappearances and kidnapping occurred frequently in Sri Lanka during the war, particularly in the north and east, and assessed that there are credible reports of torture carried out by Sri Lankan security forces both during the war and in its immediate aftermath. Many Tamils, particularly in the north and east, reported being monitored, harassed, arrested or detained by security forces during the war.² The UNHCR and other country information indicated that post-war, arbitrary detentions were widely reported, as well as reports of detainees being interrogated, including incidences of torture, with the detainees usually civilians suspected of LTTE links, particularly in the north and east.³ The Sri Lankan authorities possessed extensive powers to arbitrarily detain and arrest people under the *Emergency Regulations* (Sri Lanka) and under the *Prevention of Terrorism Act 1979* (Sri Lanka) (PTA), including permitting extended administrative detention of up to 18 months, and those powers were in wide use by the authorities during the war and in its aftermath.⁴ Additionally, at the time of the applicant's return to Trincomalee in 2012, the Sri Lankan authorities were carrying out a number of security operations in the Trincomalee area seeking to round up people with suspected past links to the LTTE and former LTTE cadres.⁵ The UNHCR indicates that the Sri Lankan refugees they assisted to return to Sri Lanka from India were subject to somewhat lengthy questioning at the airport by immigration officials and then by intelligence officers, with the UNHCR only having access to them after the questioning was finished; and that many of those returnees reported later visits to their homes by the Sri Lankan authorities.⁶ Country information also confirms that in November 1988 about 70 PLOTE members were involved in an unsuccessful coup [in Region 1]; and PLOTE aligned leaders and political candidates were targets of assassinations in the 1980's and 1990's.⁷
24. In assessing the applicant's evidence, I have taken into account difficulties of recall over time, the scope for misunderstanding in interpreted material, cross cultural communication issues, and the problems people who have lived through trauma may experience in presenting their story in a cohesive narrative. The applicant has been largely consistent about his background, history, time in India, his stepbrother N, and events in Sri Lanka when he returned in 2012. His claims are also generally consistent with the county information. I accept his family,

² DFAT, "DFAT Country Information Report Sri Lanka" 18 December 2015, CISEC96CF14143.

³ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012, UNB0183EA8; "Sri Lanka – Update on torture since 2009", Freedom From Torture, 6 May 2016, CIS38A8012881; and "Silenced: survivors of torture and sexual violence in 2015", International Truth & Justice Project Sri Lanka (ITJP), 7 January 2016, CIS38A801275.

⁴ Danish Immigration Service "Human Rights and Security Issues concerning Tamils in Sri Lanka", 71, 1 October 2010, CIS19345; UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012, UNB0183EA8; and country information provided by the applicant including 'Plight of Tamil detainees under Sri Lankan Judiciary'.

⁵ "220 Tamils arrested in SLA combing in Trincomalee," TamilNet, 25 April 2012, CX285874; "TNA demands release of arrested Tamil youth in a letter to President Rajapaksa," The Island, 30 April 2012, CX288190; "Govt. tracking down ex-LTTE cadres who avoided post-war rehabilitation 38 taken for questioning", Island, The, 5 May 2012, CX286456; and "Fears for Tamil detainees in Sri Lanka," BBC, 4 May 2012, CX286446.

⁶ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012, UNB0183EA8.

⁷ [Details deleted.]

address, education, and employment histories as set out in his SHEV application and at the SHEV interview, including that he is Tamil, and a Catholic and regular churchgoer. I accept his stepbrother N was in PLOTE, took part in the 1988 [Region 1] coup, was imprisoned, returned to Sri Lanka where he was active in politics including contesting an election in 1996 when he was abducted and killed by an unidentified armed/militant group; that the applicant attended protests in India towards the end of the war; and that he was subject to adverse attention from the authorities in Sri Lanka, when he returned there between March and August 2012, except as discussed below.

25. Although I generally accept the applicant's claims, I am not satisfied that his evidence is without some exaggeration or embellishment. In particular, I have concerns about his claim that he may have left Sri Lanka illegally in 2012 when he returned to India because his documents, including the passport, he obtained from the agent may not be genuine. The applicant said in his arrival interview that when he left Sri Lanka to return to India in 2012, he did so legally with his passport. In his SHEV application (at Part C, Questions 50 and 58) he indicated he left Sri Lanka in 2012 legally, using a passport in his name. In his SHEV application statement, he referred to obtaining his NIC and passport through an agent he paid but did not suggest the documents may not be genuine. At his SHEV interview he first mentioned that he was not sure if his NIC and passport were genuine as he had paid to obtain them and subsequently submitted to the IAA that he was therefore concerned he may have departed illegally. I do not consider it credible that the applicant indicated he travelled legally from Sri Lanka to India in 2012 on his passport in his arrival interview and SHEV application, then in his SHEV interview first expressed a concern as to the genuineness of that passport (and NIC). I do not consider it credible that the applicant would not in any event be aware from the moment he obtained them whether the NIC and passport he obtained were genuine or not. Country information indicates that the Sri Lankan authorities collect and maintain sophisticated intelligence, including stop and watch lists, and departure procedures at the airport include checking passports against the relevant department's database,⁸ and I do not consider it credible his departure checks would not have alerted the Sri Lankan authorities if he was not travelling on a genuine passport. I am not satisfied that his later expressed concerns about his passport have substance, and I prefer and accept his evidence in the arrival interview and SHEV application that he left Sri Lanka in 2012 legally using his own passport.

Mental health

26. The applicant says that his mental health has deteriorated since around the time his case was last considered by the IAA decision in 2017. He has been seeing a named counsellor for a few years. He feels his mental health would become worse if sent back to Sri Lanka. He provided a letter from his GP, dated 12 September 2022, that confirms the GP has been treating the applicant for depression since 2019 and the GP had referred him for counselling. Given there is only the applicant's assertion to support his claim that his mental health will worsen if returned to Sri Lanka, I am not satisfied that is the case. However, based on the GP's letter, I accept that the applicant suffers from depression and has been receiving treatment including counselling, and that if returned to Sri Lanka, he may continue to seek treatment for his depression.

⁸ DFAT, "DFAT Country Information Report Sri Lanka" 18 December 2015, CISEC96CF14143; and UK Home Office (UKHO), "Country Information and Guidance. Sri Lanka: Tamil separatism. Version 2.0", 19 May 2016, OGD7C848D17.

Asylum Seeker and return to Sri Lanka

27. The applicant claims to have left India in October 2012 to travel to Australia in a boat organised by a smuggler. I find that, if he were to return to Sri Lanka, he may be considered a failed asylum seeker by the Sri Lankan authorities.
28. The applicant lived in Trincomalee, at different addresses when he lived in Sri Lanka, including for the period of his return in 2012. His mother and sister live together in Trincomalee, and his [brother] also lives in Trincomalee. Given those factors, I am satisfied that the applicant will return to Trincomalee, Eastern Province, if he returns to Sri Lanka.

Refugee assessment

29. 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

30. 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.
31. Country information indicates that Tamils maintained they were subject to longstanding, systematic discrimination in university education, government employment, housing, health services, language laws and naturalisation procedures.⁹ As discussed above, incidences of extra-judicial killings, disappearances and kidnapping occurred frequently in Sri Lanka during the war, particularly in the north and east, there are credible reports of torture carried out by Sri Lankan security forces both during the war and in its immediate aftermath, and many Tamils, in the north and east in particular, reported being monitored, harassed, arrested or detained by security forces during the war and under the previous Rajapaksa government.

⁹ US Department of State (USDOS), 'Country Reports on Human Rights Practices for 2021 Sri Lanka', 12 April 2022, 20220413123300.

32. The previous Rajapaksa government ended in 2015 with the election of (now former) President Sirisena.¹⁰ In its most recent report,¹¹ DFAT said that the Sirisena government promised a new era of corruption free government and embarked upon a path of reconciliation with the Tamil minority that appeared to make some progress. However, In November 2019, Gotabaya Rajapaksa was sworn in as Sri Lanka's President, choosing his elder brother Mahinda Rajapaksa (the former President until 2015), as his Prime Minister. DFAT notes that the UN Office of the High Commissioner for Human Rights (OHCHR) in a January 2021 report expressed concern that while Sri Lanka seemed to be on a new path towards advancing reconciliation, accountability and human rights, the developments since November 2019, have reversed that direction and, instead, threaten a return to patterns of discrimination and widespread violations of human rights experienced in past decades. Other country information has expressed similar concerns about the Gotabaya Rajapaksa Government, describing it as posing a threat to Sri Lanka's battered democratic institutions and political stability, and expressing concern Sri Lanka risks rapid slide back toward authoritarianism and Sinhala majoritarian rule.¹²
33. Notwithstanding the OHCHR's and other commentators concerns about the possible future direction, the report from DFAT, overall, suggests that conditions for Tamils in Sri Lanka have substantially improved since the applicant was last in Sri Lanka. In particular, DFAT assesses that non-Muslim Sri Lankans, including Tamils, face a low risk of official or societal discrimination based on ethnicity or caste, including in their ability to access employment or housing. There is no official discrimination based on ethnicity in public sector employment. DFAT indicates the security situation, particularly in the north and east, has improved significantly since the end of the war. The Government no longer restricts travel to the north and the east. Military involvement in civilian life has decreased overall since the end of the war. The number of incidents of extrajudicial killings, disappearances, and abductions for ransom, including incidents of violence involving former LTTE members, has reduced since the end of the war. The risk of torture perpetrated by either military, intelligence or police forces has decreased since the end of the war. DFAT assesses that Sri Lankans face a low risk of torture overall. DFAT assesses that surveillance of Tamils in the north and east continues, however, physical violence against those being monitored by the authorities is not common and ordinary Tamils living in the north and the east of Sri Lanka are at low risk of official harassment. DFAT also assesses that, while they may be monitored, Tamils with former links to the LTTE are generally able to lead their lives without concern for their security as a result of their past association with the LTTE.
34. The UK Home Office indicates the Sri Lankan Government does not regard the entire cohort of Tamil diaspora as either holding separatist views or being politically active in any meaningful way. Returnees who have no entry on the general security database, or whose entry is not such as to have placed them on either a stop list or the watch list, will in general be able to pass through the airport unhindered and return to their home area without being subject to any further action by the authorities.¹³
35. The US Department of State (USDOS) notes, as discussed above, that Tamils in Sri Lanka maintained they were subject to longstanding, systematic discrimination in a number of areas. Among other things, it also notes that a lack of accountability for conflict-era abuses

¹⁰ DFAT, "DFAT Country Information Report Sri Lanka" 18 December 2015, CISEC96CF14143.

¹¹ DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818.

¹² Alan Keenan, 'Sri Lanka: Prevention Should Be at Heart of New Human Rights Council Resolution', International Crisis Group (Article, 25 February 2021) [submissions to IAA].

¹³ UKHO, "Country Policy and Information Note. Sri Lanka - Tamil Separatism", Version 7.0, 17 June 2021, 20210624114752.

persisted and records that there were 236 documented complaints to the Human Rights Commission of Sri Lanka (HRCSL) about torture, assault or both, together with 64 complaints from prisoners, in 2021. However, the USDOS also indicates that there were no reports of disappearances by or on behalf of government authorities in 2021; and civilian officials maintain control over the security forces. USDOS indicates that the HRCSL has wide powers and resources, but notes rights groups assess the HRCSL did not operate independent of and without interference from the government following the passage of the 20th Amendment to the Constitution.¹⁴ DFAT also noted that the OHCHR had also expressed concern that the 20th Amendment in Sri Lanka was eroding the independence of institutions including the HRCSL.¹⁵

36. Since those reports from DFAT, UKHO and USDOS were published, there have been recent major developments in Sri Lanka. In the face of a deepening economic crisis, protests against the Gotabaya Rajapaksa government, and Rajapaksa family, occurred from around April 2022, calling for the Rajapaksas to step down. After months of protest, during which Mahinda Rajapaksa resigned as Prime Minister and was replaced by Ranil Wickremesinghe, protesters occupied the Presidential Residence on 9 July 2022. President Gotabaya Rajapaksa subsequently fled Sri Lanka and resigned as President, and Prime Minister Wickremesinghe was confirmed as the new President by a vote in Parliament.¹⁶ The New York Times reports that Gotabaya Rajapaksa returned to Sri Lanka on 2 September 2022, suggesting that the Rajapaksa family remains deeply entrenched; a crackdown by President Wickremesinghe on the protests and their organisers has deflated the momentum for political reform; and had been told by an organiser of the original protests that smaller demonstrations continue because the economic crisis was still crippling people's daily lives.¹⁷
37. The applicant submitted that, among other things, if he were returned to Sri Lanka now, he would be entering a situation of heightened security, tension, paranoia, and repression. That Sri Lanka is a country where unrest and violence have, for decades, been cyclical and subject to rapid deterioration after periods of apparent stability, as is the case now. The country information provided by the applicant indicates that the economic crisis continues; although smaller demonstrations occur, the large protests that led to Gotabaya Rajapaksa fleeing, have ceased following a crackdown; and Gotabaya Rajapaksa has since returned suggesting the Rajapaksa's power may be entrenched. Although I accept that there is an increased level of instability and uncertainty following the events of July 2022, the country information provided by the applicant does not suggest a rapid deterioration of conditions in Sri Lanka is likely and what may occur following the events of July and Gotabaya Rajapaksa's return remains speculative. Overall, I am satisfied the DFAT 2021 report and its assessments and observations in relation to improvements in conditions for Tamils and the general country conditions in Sri Lanka, despite it being prepared before the protests against, subsequent fall of, and aftermath of Gotabaya Rajapaksa's presidency, remain generally valid.
38. DFAT notes the public health system in Sri Lanka offers universal free health care though the quality of care and facilities vary on a regional basis, particularly between urban and rural areas. Although some free medications are available, 26 per cent of out-of-pocket expenses for patients in the health system are for medicines. Some mental health services are offered, but there are gaps. Local sources suggest there is a strong mental health focus with a good

¹⁴ US Department of State (USDOS), 'Country Reports on Human Rights Practices for 2021 Sri Lanka', 12 April 2022, 20220413123300.

¹⁵ DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818.

¹⁶ Mujib Mashal and Emily Schmall, "Showdown at the Mansion Gates: How Sri Lankans Rose Up to Dethrone a Dynasty", New York Times (online, 12 August 2022) [submissions to IAA].

¹⁷ Skandha Gunasekara and Mujib Mashal, "Sri Lanka's Ex-President Returns Home, Just Weeks After Being Ousted", New York Times (online, 3 September 2022) [submissions to IAA].

cohort of trained counsellors and active NGOs; but there are limited registered psychologists and psychiatrists; and there is a significant ongoing need for psychosocial support in the north and the east. Local sources have also reported to DFAT that mental illness still carries a stigma and elicits a strong sense of pity in Sri Lankan society. The family unit can often bear primary responsibility for caring for those with mental illnesses, due to the lack of adequate services in most parts of the country. Children with mental illnesses have been bullied. However, overall, stigma has declined considerably over the last 15 years and Sri Lankans can now access counselling services more freely, where available.¹⁸

39. I accept that the applicant suffers from depression and may seek to access to treatment, if returned to Sri Lanka. I accept from the country information that the applicant may face some stigma in association with his mental health if returned to Sri Lanka. Although facing some societal stigma in relation to his mental health, whether in the form of negative attitudes, a level of social isolation or otherwise, may be hurtful and/or upsetting, I am not satisfied it amounts to significant ill treatment or any other type of harm that may be regarded as serious harm. DFAT indicates that some mental health services are available in Sri Lanka, including counselling, but there are gaps and variations depending on location. I also accept that the current economic crisis may impact on the availability and accessibility of mental health services. However, the report from DFAT, and the other material before me, does not identify discrimination as an issue in relation to accessing the medical and mental health services that are available in Sri Lanka (with the possible exceptions of those who are from the LGBTI community, HIV positive or from female-headed households). I am not satisfied that any challenges or difficulties the applicant may face accessing treatment for his depression would involve systematic and discriminatory conduct for one or more of the reasons mentioned in s.5J(1)(a) of the Act.
40. I am not satisfied that the applicant's fear of harm in Sri Lanka, whether on account of his Tamil ethnicity and background, because of his stepbrother N, his attending protests in India, his adverse treatment when in Sri Lanka in 2012, as a Catholic and regular churchgoer, or for any other reasons, is well-founded.
41. I accept that the applicant lived in areas of Sri Lanka that at times during the war were controlled by the LTTE. I accept that his stepbrother N was a member of PLOTE, including as a fighter and political candidate, as discussed above. I accept that he attended some protests at his refugee camp in India towards the end of the war. I accept that when he returned to Sri Lanka in 2012, he was subject to adverse attention from the Sri Lankan authorities including questioning, harassment and monitoring. However, having regard to the information before me, I am not satisfied the applicant faces a real chance of harm in relation to those matters now or in the reasonably foreseeable future.
42. First, the more recent DFAT, UKHO and USDOS reports do not suggest that being of Tamil ethnicity would by itself give rise to a need for protection; and, as the now dated UNHCR report¹⁹ noted in 2012, being from an area that was previously controlled by the LTTE did not in itself result in a need for protection. The applicant was not an LTTE member and left Sri Lanka for India when he was [age] and did not return until after the war was over. His stepbrother N was in PLOTE from 1983 or so as a fighter, took part in the PLOTE coup attempt in [Region 1] in 1988, was jailed there, and returned to Sri Lanka in 1994 where he was involved in politics until he was killed by an unknown militant group in May 1996. The

¹⁸ DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818.

¹⁹ UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012, UNB0183EA8.

country information on PLOTE indicates it was basically in conflict with the LTTE from 1985 onwards, was aligned with the Sri Lankan government from about 1987, and many of the targeted attacks on PLOTE leaders and politicians were carried out, or suspected of being carried out, by the LTTE.²⁰ Although N initially fought with PLOTE against the Sri Lankan authorities, given PLOTE was in conflict with the LTTE from 1985, the pro-government history of PLOTE from 1987, and N's involvement with them up to 1996, I am not satisfied that N could properly be described as pro-LTTE or well known for having anti-government opinions as is suggested in the submissions to the IAA, nor that the Sri Lankan authorities would be at all likely to view N as pro-LTTE or holding anti-government opinions. It is now some 26 years since N was killed and any adverse interest the Sri Lanka authorities, and the unknown militant group that killed N, may have had in N and his connections, family or otherwise, will have long since dissipated. In any event, the applicant does not claim that any of his family or stepfamily members who have been living in Sri Lanka have ever been approached or questioned by the Sri Lankan authorities, or anyone else, about N. Similarly, the applicant did not claim that he was asked about N on any of the occasions he was questioned during his return to Sri Lanka in 2012. Notwithstanding the submissions to the contrary, I am not satisfied that the Sri Lankan authorities, or anyone else, would have any adverse interest in the applicant because of his relationship with his stepbrother N, if returned to Sri Lanka.

43. Secondly, although the applicant was questioned, harassed, and monitored by the Sri Lankan authorities on his return between March and August 2012, he was not arrested, charged, taken to court, imprisoned, subjected to any formal detention under the PTA or sent to rehabilitation, by the authorities. The country information indicates that such incidents were, unfortunately, not uncommon at that time as part of the widespread monitoring and harassment of Tamils in the north and east. As discussed above, Sri Lankan Tamils who returned from India around that time with the assistance of the UNHCR were all subject to lengthy questioning at the airport and many received follow up visits once at home. Similarly, the country information discussed above suggests he arrived in Trincomalee at a time when the authorities were conducting security operations, including rounds ups, of Tamils with suspected former LTTE links or who were LTTE cadres. In short, the applicant's experiences at the time were similar to those experienced by many other Tamils in the north and east, by Tamils returning from India with the assistance of the UNHCR, and in an area where a number of security operations were being undertaken at the time. I am not satisfied that they indicate the authorities held any interest in the applicant beyond the general harassment and monitoring of Tamils, including those who had returned from India through the UNHCR and while pursuing security operations in the Trincomalee area, that was occurring at the time. I am not satisfied he was personally of adverse interest to the Sri Lanka authorities at the time he left Sri Lanka in August 2012.
44. Thirdly, it is now more than ten years since the applicant was in Sri Lanka and during that time the general situation and country conditions for Tamils in Sri Lanka have substantially improved. The Sri Lankan authorities do remain sensitive to the potential re-emergence of the LTTE and to separatist tendencies in general.²¹ UKHO indicates that a significant role in sur place Tamil separatist activities is likely to be of adverse interest to the Sri Lankan authorities, and a number of factors need to be considered in determining what may be viewed as significant.²² DFAT assesses the authorities may monitor members of the Tamil diaspora returning to Sri Lanka depending on their security risk profile and assesses that

²⁰ "People's Liberation Organization of Tamil Eelam", Mapping Militant Organisations [Stanford University], 30 July 2013, CIS36DE0BB2418; "Political Handbook of the World 2015 - Sri Lanka", DC: CQ Press, 1 January 2015, CISEC96CF12933.

²¹ DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818.

²² UKHO, "Country Policy and Information Note. Sri Lanka - Tamil Separatism", Version 7.0, 17 June 2021, 20210624114752.

those with leadership positions in Tamil diaspora groups, among others, would be of particular interest to the authorities. DFAT understands from multiple sources that some returnees have been subject to monitoring, especially those in the north and the east with suspected LTTE links, but DFAT understand that most returnees, including failed asylum seekers, are not actively monitored on an ongoing or long-term basis. Some Tamils who had failed to secure asylum in Australia and since returned to the Northern Province told DFAT that they had no protection concerns, had not experienced harassment by the authorities nor received monitoring visits.²³

45. The applicant was not of any adverse interest to the Sri Lankan authorities at the time of his departure from Sri Lanka in August 2012, other than as part of the general monitoring and harassment of Tamils etc that was occurring at the time. No one has shown any adverse interest in, or otherwise made enquiries about, him since his departure from Sri Lanka in August 2012. Although the applicant attended some protests in his refugee camp in India towards the end of the war in 2009, he did not claim to be an organiser or to have any role other than attending. The applicant has not been involved in any pro-Tamil separatist or pro-LTTE diaspora activities in Australia. I am not satisfied that the applicant's profile is one that places him at a real chance of harm. Nor am I satisfied that it will be increased by the fact that the applicant has lived outside Sri Lanka for 22 years in India and ten years in Australia. Nor am I satisfied, given his profile, there is a real chance that he will be monitored because of his time living outside Sri Lanka and/or as a Tamil asylum seeker.
46. Country information indicates that the Gotabaya Rajapaksa government had a large Sinhalese Buddhist support base and maintained support by engaging in religious polarisation; and there has been an increase in anti-Muslim violence in Sri Lanka since the 2019 Easter Sunday terrorist attacks.²⁴ DFAT assess that while local laws or official policies generally do not discriminate on the basis of religion, non-Buddhists face a low to moderate risk of official discrimination from government authorities. DFAT assesses that Christians in Sri Lanka face a low risk of official discrimination; that evangelical Christians in Sri Lanka face a moderate risk of societal discrimination, and Roman Catholics (who comprise some 80 per cent of Christians in Sri Lanka) and other mainstream Christian denominations face a low risk of societal discrimination. DFAT states the number of incidents targeting evangelical Christians has remained largely static over recent years and is highest in Buddhist-majority regions in the North Central, South and Western provinces. DFAT assesses that Christians face a low threat of violence from homegrown Islamic extremist groups, although this could change if such groups were to expand in membership and strengthen their international links.²⁵ Other country information confirms that evangelical Christians continue to face pressure in Sri Lanka today, though not on the scale of the anti-Muslim campaigns.²⁶ I accept that the applicant is Catholic, a regular churchgoer, and would continue to attend church if he returned to Sri Lanka. Neither the applicant's Catholic religion or the pastor's letter dated 12 September 202 that he supplied, suggest that the applicant is or would be perceived as an evangelical Christian. DFAT defines 'low risk' as where it is aware of incidents but has insufficient evidence to conclude they form a pattern. I am prepared to accept that as a Tamil Catholic, and regular church attendee, in Sri Lanka the applicant may in the future face minor incidents or manifestations of discriminatory conduct. However, overall, I am not satisfied

²³ DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818.

²⁴ Alan Keenan, "'One Country, One Law': The Sri Lankan State's Hostility toward Muslims Grows Deeper", International Crisis Group (Article, 23 December 2021) [IAA submissions]; and DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818.

²⁵ DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818.

²⁶ Alan Keenan, "'One Country, One Law': The Sri Lankan State's Hostility toward Muslims Grows Deeper", International Crisis Group (Article, 23 December 2021) [IAA submissions].

that any societal or official discrimination the applicant may face as a Catholic and regular churchgoer in Sri Lanka will amount to serious harm; nor am I satisfied that there is a real chance that he will be subjected to or be caught up in an anti-Christian attack, now or in the reasonably foreseeable future, if returned to Sri Lanka.

47. The applicant does not have a profile that country information suggests would lead to a real chance of harm, now or in the reasonably foreseeable future, for his Tamil ethnicity, his background, his depression, his stepbrother N, his attending protests in India in 2009, as a Catholic and regular churchgoer, or for any other reason. I do not consider that at the time of his departure the Sri Lankan authorities had any adverse interest in the applicant, except as part of the general monitoring and harassment of Tamils that was occurring at the time. Nor that he would be of any adverse interest to the Sri Lankan authorities, or anyone else, or that he faces a real chance of suffering harm for that reason, if he returned to Sri Lanka. I am not satisfied he faces a real chance of harm for reason of his ethnicity, background, his depression, because of his stepbrother N, because of his living, and activities, in India and Australia, as a Catholic and regular churchgoer, or for any other reasons, if returned to Sri Lanka, now or in the reasonably foreseeable future.
48. I accept that, on his return to Sri Lanka, the applicant may be identified by the authorities as a failed Tamil asylum seeker.
49. Entry and exit from Sri Lanka is governed by the *Immigrants and Emigrants Act 1949 (Sri Lanka)* (IE Act). Under the IE Act it is an offence to depart other than from an approved port of departure. No charges are imposed against children under 12 years of age or those persons who were younger than 12 at the time of the alleged offence.²⁷ Given the applicant was under 12 years of age when he travelled by boat to India with his family in 1990, and that he departed legally by air from Sri Lanka to India in August 2012 using his own passport, I am not satisfied that the applicant is at risk of prosecution under the IE Act.
50. Advice from DFAT is that upon arrival in Sri Lanka, unsuccessful asylum seekers are interviewed by the Chief Immigration Officer. They may also be interviewed by other agencies, including the CID, the State Intelligence Service, and Sri Lankan Navy Intelligence, depending on the circumstances of their departure and personal histories. These agencies check returnees' travel documents and identity information against immigration databases, intelligence databases and the records of outstanding criminal matters. Those who departed illegally will be referred to the CID and taken to court in Negombo where they are bailed and released. For returnees travelling on temporary travel documents, police undertake an investigation to confirm the person's identity, to see whether someone was trying to conceal their identity due to a criminal or terrorist background or trying to avoid court orders or arrest warrants. This often involves interviewing the returning passenger and contacting their claimed home suburb or town.²⁸
51. I accept that the applicant may be considered a failed Tamil asylum seeker on his return. DFAT is not aware of mistreatment of returnees during processing at the airport.²⁹
52. Taking into account my findings about his profile, and the country information, I am not satisfied that the applicant will be at risk of adverse attention or that he faces a real chance of harm from the Sri Lankan authorities when scrutinised on his return to Sri Lanka, whether when processed at the airport or on his return home.

²⁷ DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818.

²⁸ DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818.

²⁹ DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818.

53. The Sri Lankan authorities may monitor members of the Tamil diaspora returning to Sri Lanka depending on their security risk profile. I have found that the applicant's profile is not one that places him at a real chance of suffering harm. As discussed above, I am also not satisfied that with his profile there is a real chance that the applicant will be monitored because of his background, his long periods of absence from Sri Lanka in India and Australia, or as a failed Tamil asylum seeker, if returned.
54. DFAT indicates that bureaucratic inefficiencies present a significant challenge to reintegration for returnees. Limited job opportunities in the north and the east further contribute to difficulties in securing jobs and housing. DFAT assesses that reintegration issues are not due to failure to obtain asylum, but rather due to the employment and accommodation difficulties returnees may face. Some Tamils who had failed to secure asylum in Australia and returned to the Northern Province told DFAT they were able to reintegrate into their communities and find employment. DFAT understands that returnees may face financial difficulties reintegrating into their communities, including due to sale of their belongings to fund irregular ventures overseas, but do not experience societal discrimination for seeking asylum elsewhere. Overall, DFAT understands that societal discrimination is not a major concern for returnees, including failed asylum seekers. Some Tamils who had failed to secure asylum in Australia and since returned to the Northern Province told DFAT they had not experienced significant societal discrimination following their return. DFAT assesses returnees face a low risk of societal discrimination upon return to their communities.³⁰ I accept that the current economic crisis in Sri Lanka may make it more difficult for the applicant, in common with anyone else looking for work in Sri Lanka, to obtain employment.
55. As discussed above, if returned to Sri Lanka, the applicant will be returning to the Trincomalee area. He has [his specified family members] and mother living in the area, and another brother in [Country 1]. His brother in Sri Lanka has a house and his mother lives with his sister in another house. His [brother] is self-employed in [a named industry] and the brother in [Country 1] works in [another industry]. Both brothers help support his sister and mother. When the applicant returned to Sri Lanka in 2012, he lived at his [brother's] house. He has remained in contact with his family. The applicant is well educated and has work experience in several different jobs in India and Australia. Although he suffers from depression, he has not suggested, nor does the GP's letter indicate, that it has impacted on his ability to work. He has shown himself to be resilient and resourceful by adapting to life in Australia, after living in India and Sri Lanka. Given those factors, I am not satisfied that the applicant would be unable to re-establish and re-integrate himself in the Trincomalee area. As discussed above, DFAT assesses that a returnee faces a low risk of societal discrimination upon return to their communities. I appreciate that low risk is not the same as no risk, however, considering all the applicant's circumstances, including the family he has in Trincomalee, I am not satisfied he faces a real chance of harm as a failed Tamil asylum seeker, if returned to Sri Lanka.
56. Having considered the applicant's circumstances and profile as a whole, in the context of the country conditions in Sri Lanka I am not satisfied that the applicant faces a real chance of persecution now or in the reasonably foreseeable future. The applicant does not have a well-founded fear of persecution within the meaning of s.5J.

³⁰ DFAT, "DFAT Country Information Report - Sri Lanka", 23 December 2021, 20211223094818.

Refugee: conclusion

57. 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

58. 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

59. 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.
60. 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.
61. I accept that, if he returns to Sri Lanka, the applicant may face some low level of official and societal discrimination as a Catholic and regular churchgoer. However, based on his profile and the evidence and country information discussed above, I am not satisfied that there is a real risk that any conduct of acts or omission that he may face or be subjected to in this regard will amount to severe pain or suffering, or pain and suffering that could reasonably be considered as cruel or inhuman or degrading in nature, nor will it amount to extreme humiliation. I am not satisfied that it amounts to the death penalty, arbitrary deprivation of life or torture. I am not satisfied that any discrimination the applicant may encounter as a Catholic and regular churchgoer amounts to significant harm as defined in ss.36(2A) and 5 of the Act.
62. I accept that, if he returns to Sri Lanka, the applicant may face some social stigma because of his depression. As acknowledged above social stigmas may at times be hurtful and/or upsetting, however, I am not satisfied on the evidence that any hurt and upset he may suffer from social stigma, whether separately or in combination with any discrimination he may face as a Catholic and regular churchgoer, will amount to severe pain or suffering, or pain and suffering that could reasonably be considered as cruel or inhuman in nature. Similarly, social stigmas may be hurtful and upsetting but, whether considered separately or also in combination, they do not amount to extreme humiliation. I am not satisfied that it amounts to the death penalty, arbitrary deprivation of life or torture. I am not satisfied that any social stigma suffered by the applicant because of his depression, whether considered separately or also in combination, amounts to significant harm as defined in ss.36(2A) and 5 of the Act.

63. Based on the country information discussed above, I accept that the applicant may face some difficulty in accessing treatment for depression in Sri Lanka. However, I am satisfied from the same country information that any difficulties the applicant may have in accessing such treatment does not amount to significant harm as it is due to a lack of institutional capacity and resourcing rather than an intention to cause or inflict extreme humiliation or pain or suffering that can reasonably be regarded as cruel or inhuman in nature, or severe pain or suffering. I am also not satisfied there is a real risk of torture or an arbitrary deprivation of life or the death penalty.
64. Otherwise, I have found that there is not a real chance of harm to the applicant, now or in the reasonably foreseeable future, based on his profile and history, if he is returned to Sri Lanka. As 'real chance' and 'real risk' involve the same standard,³¹ it follows that I am also satisfied that there is no real risk of significant harm if he is returned to Sri Lanka.
65. Having considered the applicant's circumstances individually and cumulatively, I am not satisfied that he faces a real risk of significant harm.

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.

³¹ *MIAC v SZQRB* (2013) 210 FCR 505.

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

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

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

...

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

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature; but does not include an act or omission:
 - (c) that is not inconsistent with Article 7 of the Covenant; or
 - (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

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

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

...

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

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

...

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

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant; but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

5H Meaning of refugee

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

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

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

...

5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
 - (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
 - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
 - (c) the real chance of persecution relates to all areas of a receiving country.

Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.

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

5K Membership of a particular social group consisting of family

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

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

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

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

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

5L Membership of a particular social group other than family

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

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

5LA Effective protection measures

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

...

36 Protection visas – criteria provided for by this Act

...

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

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

...

Protection obligations

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

Determining nationality

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