



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA22/10279

Date and time of decision: 27 June 2022 21:33:00
J McLeod, 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 male from Sri Lanka's Northern Province. He arrived in Australia [in] October 2016 and applied for a Safe Haven Enterprise Visa (SHEV) on 22 April 2016. He claims that if he is returned to Sri Lanka, he will be harmed by Sri Lankan authorities due to his actual and imputed connections with the Liberation Tigers of Tamil Eelam (LTTE) and an imputed anti-government opinion, resulting from a myriad of factors in his demographic profile and life history.
2. On 25 November 2016, a delegate of the Minister for Immigration (the delegate) found the applicant was not owed protection and refused the grant of visa. This decision was affirmed by the IAA on 28 July 2017. [In] March 2022, the Federal Circuit and Family Court of Australia remitted the matter, by consent, for the IAA's reconsideration.

Information before the IAA

3. I have had regard to the material given by the Secretary (the review material) under s.473CB of the *Migration Act 1958* (the Act).
4. The IAA received further information including submissions, statements, medical reports and country information from the applicant and his representatives on 19 December 2016 ahead of the previous IAA review, and on 31 March 2022, following the Court's remittal.
5. To an extent, the information provided reiterates some of the applicant's claims and country information already before me in the review material and raises arguments against the delegate's and previous IAA decision. I do not consider these aspects of the submissions to be new information; I have had regard to those aspects. I have also had regard to the letter the applicant provided from his [mental health service] support worker – this was already provided to the delegate; it is not new information.
6. However, a substantial amount of new information was also provided; this is detailed below.

Medical information

7. In 2016, the applicant provided new information relating to his mental health including a letter and counsellor reports from the applicant's [Organisation 1] counsellor dated 24 October 2016, 19 December 2016 and 28 March 2022. The counsellor refers to having treated the applicant from April 2016 – October 2017 to address his symptoms of Post-traumatic stress disorder (PTSD). In 2022, the applicant provided more new information including radiology reports and a letter and consultation notes from his General Practitioner which relate to his claimed injuries and scarring, ongoing mental health problems and some general health issues.
8. I am satisfied that all this new information is credible personal information in the relevant sense. It goes to evidencing the applicant's claimed war injuries and addresses his PTSD including the ways his symptoms manifest, and some difficulties he may have experienced in the PV interview. It also serves to show his symptoms have been ongoing, countering an earlier report before the delegate that his symptoms had resolved, and shows that he continued to experience problems deriving from his other injuries in the years following the delegate's decision. These matters are all pertinent to the review. I am satisfied there are exceptional circumstances to justify considering this new information.

New claims

9. To the delegate, applicant maintained he had never joined the LTTE or fought with them, though he had twice been taken by force – once for training, and once (after being set-up and recaptured) in punishment after escaping and refusing to join them. He also claimed the serious injuries to his [body] were sustained from being shot while escaping from the LTTE, and in shelling incidents in the course of his civilian life. He claimed that at the end of the war, despite not actually having been in the LTTE, he was sent for rehabilitation, after which he was released but constantly harassed by authorities, culminating in his decision to flee Sri Lanka in September 2012.
10. To the IAA, he has maintained parts of these claims but has also raised new claims. He now claims that he was in fact an LTTE member, recruited by force, and that he fought on the front line, and it was there (not escaping from the LTTE), that he was shot. He maintains his claims made to the delegate about being re-captured by the LTTE in a set-up while he was trying to flee to India, and jailed and harmed by them. However, he now claims that rather than being released by the LTTE following his punishment, he was sent back to fight before suffering further injury and returning to medical care. When his Commander was killed in battle, he and many others including civilians, surrendered to the Sri Lankan Army (SLA). He managed to pass through without being identified as a cadre by removing any LTTE identifiers, and (as he also claimed to the delegate) because his hair had grown long and he carried a civilian's baby, pretending to be its father. However, when he arrived at [Camp 1], he was interrogated and stripped, showing his visible scarring, and was identified as a cadre. He was then taken to [Camp 2] where he was beaten and tortured. As he also claimed to the delegate, he was sent for rehabilitation (though he now also claims he was given an injection before his release) and was released around a year later but was subject to weekly questioning and reporting and was beaten. He claims that on 10 September 2012, he was badly beaten and told there would be further investigations about him, and being terrified, he left Sri Lanka. He also now claims that since his departure, the authorities have been looking for him. While he was en route to Australia, his father was taken for interrogation and beaten, and the authorities visited his family five times in 2016 looking for him.
11. As is evident from the above, the new information was peppered amongst claims the applicant made to the delegate and still maintains. Essentially, what is new, is the information relating to actually being an LTTE member, fighting with them and being injured in battles, being tortured in [Camp 2] before being taken for rehabilitation, receiving an injection in rehabilitation, and his family's problems with the authorities after he left the country.
12. The applicant claims he was too frightened and traumatised to reveal these details before. He claimed he had been advised by other asylum seekers not to reveal parts of his story, or any membership of a militant organisation. He claims that he became aware of people's perception of the LTTE as terrorists, and feared he would be labelled as such. And he worried about ASIO's involvement, and being immediately deported. He also claims that when questioned in Australia about LTTE involvement, he had flashbacks of being questioned about this by the Sri Lankan army, who had tortured him. The applicant's representative has pointed to the applicant's mental health issues. The representative has also referred to the common reluctance of refugees to disclose traumatic experiences and involvement in militant organisations, and of their distrust of authorities figures and adverse impacts on their memory and cognition.
13. I have some concerns about aspects of the applicant's explanation. I note the applicant was represented during the SHEV process and the delegate discussed with him the importance of

providing a full account of his claims upfront. The delegate even drew direct relevance to the issue, asking the applicant why he would be of adverse interest to the authorities when he hadn't fought with the LTTE. I also note that [a health service provider] reported in January 2016 that following counselling the applicant's symptoms of PTSD had "resolved over time" (although as otherwise I have noted that later records suggest his symptoms continued or reoccurred). And while the applicant did not specify exactly when his family were visited in 2016, the information does not suggest the visits occurred after the delegate's decision, which wasn't made until November of that year. All these things give me cause for concern. At the same time, however, I am mindful of the difficulties applicants face in putting forward their claims for protection - especially claims regarding involvement in, and fighting for, militant organisations - and I am aware of the context the applicant provides in his statements regarding the concerns about how LTTE members were perceived and the feared potential consequences of their admission. It would not be so in every case, but I am prepared to accept the applicant was so affected here. I am satisfied that applicant's new claims are personal to him, I consider they are capable of being believed and that they may have affected the delegate's consideration of his claims. I consider that some of the new claims in fact address some information gaps and lend more weight and plausibility to aspects of the applicant's earlier claims, and all his new claims cover and relates to information that is pertinent to the review. I am satisfied that s.473DD(b)(ii) is met and that there are exceptional circumstances to justify considering the new claims.

Country information

14. In its submission to the IAA in 2016, the applicant's then representative referred to the 30 November 2016 Concluding Observations of the UN Committee against Torture (the CAT report). And in 2022, the representative has referred to various other reports, all published after the delegate's decision ranging from 2017-2022. All this new country information post-dates the delegate's decision and provides updated information on the situation in Sri Lanka. It also addresses the situation for persons of the profile the applicant now claims to have, in his new information. Considering all of this, I am satisfied that s.473DD(b)(i) is met and that there are exceptional circumstances to justify considering these reports.¹
15. In the previous IAA review on this case, the Reviewer obtained new information regarding Sri Lankans who have departed Sri Lanka illegally and sought asylum abroad from the then recent country report on Sri Lanka published by the Department of Foreign Affairs and Trade (DFAT) on 24 January 2017². However, an updated version of this report published on 23 December 2021 was among those the applicant's representative provided to the IAA in 2022. I have found above that this updated report from DFAT meets the s.473DD criteria and given I am able to have regard to this updated version which provides updated advice about the situation facing illegal departees and returned asylum seekers, I am not satisfied there are exceptional circumstances to justify considering the new information the IAA obtained from the now older report from 2017.

Request for interview

16. It was submitted to the IAA in 2016 and 2022, that the applicant be interviewed. However, applicant has now had two opportunities to provide further information to the IAA - in 2016,

¹ For clarity, I am satisfied that the document sent to the IAA titled "Sri-Lanka-OHCHR-Report-12-Jan-2021" is the same report as that which the representative refers to in their submission as follows: Human Rights Council, 'Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka', 19 March 2021.

² Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report - Sri Lanka", 24 January 2017, CISED50AD105

and 2022, and this new information is being considered. No explanations have been proffered as to what further information the applicant would wish to provide at an interview beyond discussing the new claims regarding his LTTE involvement, which I have considered and for reasons set out below, are not in dispute. While I have considered exercising my discretion, I am not satisfied the circumstances warrant inviting the applicant for an interview.

Applicant's claims for protection

17. The applicant's claims as clarified to the IAA, can be summarised as follows:

- He is a Tamil Hindu citizen of Sri Lanka.
- He was born in [year], [in Location 1] in Jaffna district in the Northern Province but was repeatedly displaced due to the war.
- In 2007, while living with his aunt in Kilinochchi and working for an LTTE owned business, he was forcibly taken to an LTTE training camp and around four months later, he fought against the SLA, including on the front line.
- In November 2007 he was shot, shattering his [arm]. He was taken to Kilinochchi hospital. He later continued his recovery at an LTTE medical camp and returned to the hospital periodically. He feared being forced to fight again after he recovered so he escaped.
- He attempted to leave for India, but was set-up and recaptured by the LTTE. He was questioned, jailed, and badly mistreated for around two months. On release, he was sent back to the fighting.
- He suffered further injuries and was returned to LTTE medical care.
- When his Commander was killed in battle, he, and many others including civilians, entered the government-controlled territory and surrendered to the SLA. He managed to pass through without being identified as a cadre by removing any LTTE identifiers, and because his hair had grown long and he carried a civilian's baby, pretending to be its father. He was taken to [a specified] checkpoint then to [Camp 1] where he was questioned by the Criminal Investigations Department (CID) and stripped, showing his visible scarring. He denied having LTTE involvement, but the CID concluded that he must have been an LTTE cadre.
- He was taken to [Camp 3] and [Camp 2] where he was beaten and tortured. Again, they did not believe his denials of LTTE involvement. He was then taken for rehabilitation, spending around a year across three rehabilitation centres. He was given an injection and his health deteriorated; others died. He was released [in] May 2010.
- He was then required to report weekly to the SLA who questioned him about his past and present. Another LTTE cadre informed on him. He was hit on the head and still suffers headaches and mental problems from this.
- [In] September 2010, he was summoned by the SLA. He was badly beaten and told there would be further investigations about him. Being terrified, he left Sri Lanka.
- Since leaving Sri Lanka, the authorities have been looking for him. While he was en route to Australia, his father was taken for interrogation and beaten, and the authorities visited his family five times in 2016 looking for him.

Factual Findings

18. The applicant has provided several pieces of documentary evidence to support his claims as to his identity and background. While there are some differences in the names recorded on these documents, I consider they arise from transliteration issues; they are not of concern. I accept the applicant is a Tamil Hindu from [Location 1] in Jaffna district, Northern Province of Sri Lanka. I find Sri Lanka is the receiving country for the purpose of this review and that he would return to [Location 1].
19. I have considered the applicant's claims, and the accompanying evidence he provided about his mental state including suffering post-traumatic stress disorder (PTSD) arising from torture and trauma suffered in Sri Lanka, and anxieties relating to his visa determination. The applicant referred to having suffered mental health issues in his SHEV application, indicating they first developed when he was forcibly recruited by the LTTE. He referred to his ongoing difficulties during the SHEV interview, as did his representative, and he has provided evidence from his doctors and counsellors indicating he had been receiving counselling and support in the years prior to lodging his application and following. I note that in January 2016, his doctor reported his PTSD symptoms had resolved over time but later letters from his counsellors, including one as recent as March 2022 indicates he continues to experience significant symptoms related to PTSD. I accept the applicant suffers from trauma related injuries and PTSD and I have taken this into account when considering his evidence.
20. The applicant's claims have developed from the claims he raised during the primary assessment process. While he earlier denied that he fought with the LTTE, he now claims he was an LTTE fighter who was injured in battle and correctly identified as a cadre by the Sri Lankan authorities who actively tried to find him after he left the country. I consider the applicant has embellished on some aspects. However, I do accept his claims as to his forced recruitment and fighting with the LTTE and sustaining injuries in battle. I also accept that at the end of the war, he was processed through [a specified] checkpoint, then detained in places including [Camp 3] and [Camp 2] where he was mistreated. I accept he was identified as an LTTE cadre and sent for rehabilitation, and that on his release, he was directed to be open about his LTTE involvement, and not to mention any mistreatment at the hands of the authorities. I accept he was required to report to the SLA weekly following his release, and that he was questioned and mistreated when he reported. While I do have concerns about his not having raised his LTTE involvement in the primary assessment stage, I accept that he was frightened about the potential consequences and I in fact consider the new information he provided about those matters provides a more plausible account of the applicant's history, both in terms of his own biographical narrative, and when considered with the country information before me. I also place some weight on the documentary evidence the applicant provided relating to his injuries and his detention and release from rehabilitation.
21. Country information indicates that the LTTE did engage in forcible recruiting of young Tamil males in the area and time claimed. And as the SLA advanced and the LTTE's remaining territory began to shrink, around the time the applicant claims towards the end of the war, civilians were given an opportunity to exit the warzone and enter government held territory. They were met and screened at designated checkpoints before being transported to detention camps in the north, where further efforts were made to identify those that had been involved in the LTTE. Such individuals were then separated out and taken to rehabilitation centres.³

3 International Truth & Justice Project Sri Lanka, "A Still Unfinished War: Sri Lanka's Survivors of Torture and Sexual Violence 2009-2015", 1 July 2015, CISEC96CF12945; Office of the United Nations High Commissioner for Human Rights, "Report of the OHCHR Investigation on Sri Lanka (OISL) (A/HRC/30/CRP.2)", 16 September 2015, CISEC96CF13358

According to reports from DFAT and the OHCHR, surrendees (who, the 2005 Emergency Regulations defines as those who, at the end of the armed conflict, were selected at the screening points and taken into the custody of military and police forces for rehabilitation and/or for further investigation because of their real or suspected links with the LTTE) such as the applicant could be detained for 12 months, extended up to two years without judicial review or access to legal representation.⁴ There were reportedly around 12,000 surrendees and in 2012, UNHCR reported that it had mostly been former LTTE combatants who underwent rehabilitation.⁵ Given the applicant's age, ethnicity, former residence in Kilinochchi area, his work for the LTTE owned business and his scarring and injuries, it is not implausible that he so was identified and sent for interrogation and rehabilitation, during which time he suffered mistreatment including some torture.⁶

22. The applicant claimed while detained in rehabilitation he was injected with a substance and that while his health deteriorated after having it, other detainees who had also been injected had died. While I am prepared to accept the applicant received some kind of injection while in rehabilitation, the fact that it was poison or intended to have adverse effects is not substantiated in any country information before me and nor has the applicant provided any medical evidence suggesting any of it had any long-term impact on his health or that it could have been a factor contributing to his current ailments. On the evidence, I do not accept the applicant was injected with a poisonous substance which caused his health to deteriorate or others to die.
23. I accept that in April/May 2010, the applicant was released from rehabilitation and returned to [Location 1], Jaffna. I accept he was then required to report weekly and inform on his movements, and that he was subject to a certain level of surveillance and home visits. I also accept that on a number of occasions during his reporting visits, he was pressured to turn informant or spy and he was also mistreated. I note such things were documented in the ITJP and UHCHR reports⁷ provided by the representative and it plausible when considered against other country information.⁸
24. I accept that close to the time he departed, the applicant failed to report on time, and he was summoned to the SLA office [in] September 2012. I accept he was beaten and threatened with further investigations. Although this does not seem substantially different from the other occasions the applicant has described, I accept that because of the ongoing reporting,

4 DFAT, "DFAT Thematic Report People with Links to the Liberation Tigers of Tamil Eelam", 3 October 2014, CIS2F827D91260; Office of the United Nations High Commissioner for Human Rights, "Report of the OHCHR Investigation on Sri Lanka (OISL) (A/HRC/30/CRP.2)", 16 September 2015, CISEC96CF13358

5 Office of the United Nations High Commissioner for Human Rights, "Report of the OHCHR Investigation on Sri Lanka (OISL) (A/HRC/30/CRP.2)", 16 September 2015, CISEC96CF13358; DFAT, "DFAT Country Information Report Sri Lanka", 23 December 2021, 20211223094818; Committee Against Torture (CAT), "Concluding observations on the fifth periodic report of Sri Lanka", 30 November 2016; DFAT, "DFAT Country Information Report – Sri Lanka", 18 December 2015, CISEC96CF14143; UN High Commissioner for Refugees (UNHCR), "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012, CIS29707

6 International Truth & Justice Project Sri Lanka, "A Still Unfinished War: Sri Lanka's Survivors of Torture and Sexual Violence 2009-2015", 1 July 2015, CISEC96CF12945; Office of the United Nations High Commissioner for Human Rights, "Report of the OHCHR Investigation on Sri Lanka (OISL) (A/HRC/30/CRP.2)", 16 September 2015, CISEC96CF13358; Committee Against Torture (CAT), "Concluding observations on the fifth periodic report of Sri Lanka", 30 November 2016

7 International Truth and Justice Project (ITJP), "Sri Lanka: Torture & Sexual Violence by Security Forces 2020-21", September 2021; OHCHR, "Human Rights and Counter-Terrorism: UN Special Rapporteur on The Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism Concludes Visit to Sri Lanka", 2017

8 Office of the United Nations High Commissioner for Human Rights, "Report of the OHCHR Investigation on Sri Lanka (OISL) (A/HRC/30/CRP.2)", 16 September 2015, CISEC96CF13358; DFAT, "DFAT Thematic Report People with Links to the Liberation Tigers of Tamil Eelam", 3 October 2014, CIS2F827D91260; United States Department of State (USDOS), "Sri Lanka 2015 Human Rights Report", 13 April 2016, OGD95BE926320; UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012, CIS29707

harassment and monitoring by the Sri Lankan security forces, the applicant's family became concerned for his safety and arrangements were made for the applicant to leave Sri Lanka. I accept he then left illegally, by boat.

25. The applicant claims that since leaving Sri Lanka, the authorities have been looking for him. In the new information given to the IAA in 2016 the applicant claimed that while he was en route to Australia, his father was taken for interrogation and beaten, and he also said the authorities had visited his family five times in 2016 looking for him. I find the applicant has embellished here. I note that in his Entry interview conducted a few months after his arrival in January 2013 he said the authorities sought him through his father, who denied knowledge of his whereabouts. He said they later returned and when his father admitted the applicant had gone to Australia, they took him to the camp, took his details and then let him go. He made no mention of this in his written SHEV application lodged in April 2016, nor in his PV interview on 25 October 2016 or in the month between then and when the decision was made on 25 November 2016. Nor he did he mention the authorities had interrogated and beaten his father, or that that they were still looking for him and visited his family five times in 2016. I note as well that the applicant has not suggested to the IAA that the 2016 visits occurred after the delegate's decision. I have considered the reasons proffered for the delay in raising the claims that were raised as new information with the IAA, but the applicant had claimed from the outset that he had been forcibly recruited by the LTTE, spent a year in rehabilitation and was subject to weekly reporting, surveillance, and harassment, that he left Sri Lanka in breach of his reporting obligations and that he would be wanted by the authorities on return. Given this context, while I accept his proffered reasons for initially hiding the extent of his LTTE involvement and fighting from the delegate, I see no reason the applicant would not have mentioned the authorities' efforts to locate him after his departure. I consider that had the authorities interrogated and harmed his father and continuously sought his whereabouts in the three to four years since his departure from Sri Lanka as he is now claiming he would have referred to this, even if only briefly. Notably too, in the new information provided to the IAA in 2022, the applicant has not indicated the authorities looked for him at any time since 2016. There is also no indication that the applicant's family have been served with any warrants or formal documentation indicating any proceedings against the applicant. I have considered reports⁹ provided by the applicant's representative, and the submissions as to his mental health, I note he claims he has mental problems from being hit by the Sri Lankan authorities. However, I am not satisfied that the applicant's mental health issues are a reason this was never mentioned, and nor, as I noted above, do I accept the other facets of the applicant's explanations relating to his delayed claims when it comes to this issue. Given all of this, and noting the country information discussed below about the Sri Lankan authorities' change in security focus since the applicant left in 2012, I am not satisfied the authorities interrogated and harmed his father or that they were continuously searching for the applicant into 2016, nor beyond. I do not accept he is a subject of ongoing search or interest now.

Refugee assessment

26. 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-

⁹ NSW Service for the Treatment and Rehabilitation of Torture and Trauma Survivors (STARTTS), "Working with Refugees: A Guide for Social Workers; Sanjida Khan,¹† Sara K. Kuhn,²† and Shamsul Haque, "A Systematic Review of Autobiographical Memory and Mental Health Research on Refugees and Asylum Seekers", 2021; Thomas Hoare, Andrew Vidgen, Neil Roberts, "In their own words: a synthesis of the qualitative research on the experiences of adults seeking asylum. A systematic review of qualitative findings in forced migration", 2017

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

27. 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.

28. The applicant left Sri Lanka in 2012 while the country was under the rule of the Rajapaksa family, who were instrumental in the LTTE’s demise and oversaw the mistreatment of LTTE members and Tamil civilians.¹⁰ He left having already been identified as an LTTE cadre with significant scarring and injuries, and having been subject to detention in [Camp 3] and [Camp 2], and a year of rehabilitation across three facilities, followed by surveillance and harassment and weekly reporting obligations which he breached when he left the country illegally. He had suffered torture and multiple traumas and it is understandable that he would not want to return, and that he now also feels a heightened apprehension with Gotabaya Rajapaksa and his allies in power.

29. In the year the applicant left Sri Lanka, the UNHCR advised that former LTTE combatants or cadres may, depending on the specifics of the individual case, have been in need of international protection.¹¹ However, I am not satisfied this is the case for the applicant now, nor for the last several years. Given the myriad of changes the country has seen in the 13 years since the war ended and almost a decade since the applicant left, I am satisfied that he will be returning to a very different set of circumstances, one in which his profile and personal history and circumstances will not lead to his facing a real chance of harm.

30. The country information indicates that the security situation has substantially improved, including for persons of the applicant’s profile and circumstances.

31. There was a change of government a few years after the applicant left and former President Maithripala Sirisena ruled with much more liberal governance, for almost five years. It is true that Sirisena did not make good on all his promises, but credible sources report that under his

10 International Truth and Justice Project (ITJP), “The Case Against Jagath Jayasuriya”, 29 August 2017

11 UNHCR, “UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka”, 21 December 2012, CIS29707

leadership, there was a proactive approach to reconciliation and the advancement of human rights, the excesses of executive and military power were curbed and efforts were made to introduce measures for greater transparency and accountability of government institutions.¹² However, as the applicant's representative has rightly pointed out, the country is again under the rule of the Rajapaksa family (this time with Gotabaya as President) and under the current Rajapaksa regime, much of Sirisena's efforts have been rolled back or abandoned, and in some cases have moved in the opposite direction.¹³ Even so, the situation is different from when the Rajapaksas previously ruled and the reporting does not indicate that Tamils, including those of the applicant's demographic and personal circumstances are suffering persecutory or significant harm, for these characteristics themselves, or for any imputation of anti-government, or pro-LTTE or separatist sentiment. It has long been the case that being a person of Tamil ethnicity, including when originating from a former LTTE controlled area does not of itself warrant protection, and neither is it necessarily warranted for all those evidencing past membership or connection to the LTTE.¹⁴

32. Nowadays, and for the past few years at least, the government's focus has shifted to identifying those with outstanding court orders, arrest warrants or criminal cases against them, and those active in Islamic extremism or *post-conflict* separatism including those who may otherwise be considered a threat to the Sri Lankan state by reason of their committed activism in pursuit of the establishment of a separate Tamil state in Sri Lanka.¹⁵
33. It is not disputed however, that the current Sri Lankan authorities still harbour some doubts about whether the LTTE is truly finished, and that they remain concerned (as was the Sirisena government) over the LTTE's potential re-emergence, and to separatist tendencies in general.¹⁶ The government reportedly still collects and maintains sophisticated intelligence on former LTTE members, supporters and other separatists including through 'stop' and 'watch' databases, with the 'stop list', naming those with extant court orders, arrest warrants or impound passport orders and the 'watch list', naming others of interest for things such as suspected terrorist, separatist or criminal activities.¹⁷

12 OHCHR, Human Rights and Counterterrorism: UN Special Rapporteur on The Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism Concludes Visit to Sri Lanka (2017); Report presented pursuant to Human Rights Council resolution 40/1 sent to the IAA under document title "Sri-Lanka-OHCHR-Report-12-Jan-2021"

13 UK Upper Tribunal (Immigration and Asylum Chamber), "KK RS and Secretary of State for the Home Department", 27 May 2021, 20210601113225; DFAT, "DFAT Country Information Report Sri Lanka", 23 December 2021, 20211223094818; Amnesty International, "Old Ghosts in New Garb: Sri Lanka's Return to Fear", 2021; Amnesty International, "The UN Human Rights Council Must Step up Efforts to Advance Accountability for Serious Violations in Sri Lanka", 14 January 2021

14 UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka", 21 December 2012, CIS29707; UK Home Office, "Country Information and Guidance – Sri Lanka: Tamil Separatism", 28 August 2014, CIS29809; UK Home Office, "Country Information and Guidance, Sri Lanka: Tamil separatism (version 3.0)", 1 August 2016, OGD7C848D77

15 UK Upper Tribunal (Immigration and Asylum Chamber), "KK RS and Secretary of State for the Home Department", 27 May 2021, 20210601113225; UKHO, "Country Policy and Information Note. Sri Lanka - Tamil Separatism", Version 7.0, 17 June 2021, 20210624114752; DFAT, "DFAT Country Information Report Sri Lanka", 23 December 2021, 20211223094818; UK Home Office, "Country Information and Guidance, Sri Lanka: Tamil separatism (version 3.0)", 1 August 2016, OGD7C848D77

16 DFAT, "DFAT Country Information Report Sri Lanka", 23 December 2021, 20211223094818; UK Upper Tribunal (Immigration and Asylum Chamber), "KK RS and Secretary of State for the Home Department", 27 May 2021, 20210601113225; UKHO, "Country Policy and Information Note. Sri Lanka - Tamil Separatism", Version 7.0, 17 June 2021, 20210624114752

17 DFAT, "DFAT Country Information Report Sri Lanka", 23 December 2021, 20211223094818; UK Upper Tribunal (Immigration and Asylum Chamber), "KK RS and Secretary of State for the Home Department", 27 May 2021, 20210601113225; UKHO, "Country Policy and Information Note. Sri Lanka - Tamil Separatism", Version 7.0, 17 June 2021, 20210624114752; DFAT, "DFAT Country Information Report - Sri Lanka", 18 December 2015, CISEC96CF14143

34. The Sri Lankan government is still engaged in addressing former LTTE membership, although DFAT advises that the vast majority of high and low-profile former members would already have come to the attention of the authorities and been dealt with. DFAT suggests that any remaining high-profile former members (individuals who held senior positions in the LTTE's military wing and civilian administration or members of the leadership) would likely be arrested, prosecuted, imprisoned, and rehabilitated and any remaining former low profile LTTE members (including, inter alia former combatants such as the applicant), might be detained and sent for rehabilitation and then monitored. There are also continued reports of police monitoring and harassment against some Tamils with actual or imputed LTTE links. DFAT's sources report this includes former LTTE members, including those considered low-profile, who are monitored to guard against the LTTE's re-emergence. But while DFAT notes that testimonies to the ITJP refer to frequent visits by police, visits to family members, threats and seizure of mobile devices, DFAT assesses that the incidents of violence involving former LTTE members, has reduced since the end of the war and that while they may now be monitored, Tamils with former links to the LTTE, and who are not politically active, are generally able to lead their lives without concern for their security as a result of their past association with the LTTE.
35. And while there are, as the applicant's representative points out, recent examples of Tamils held under the Prevention of Terrorism Act (PTA), these are sporadic and feature allegations of *recent or current* activities including resurrection/recreation or promotion of the LTTE or separatist campaigns, commemorations marking the end of the war and 'religious extremism'.¹⁸ Persons involved with these matters, along with human rights defenders and journalists are the government's focus nowadays rather than those with historical links to the LTTE, even in combat roles.¹⁹ In this respect I note that the ex-LTTE members featured in the ITJP's 2021 report provided by the representative²⁰ had also been involved in post-war protests or commemoration events in the north and electioneering against Gotabaya Rajapaksa. DFAT has said it is not aware of returnees from Australia to Sri Lanka being charged under the PTA and overall, the evidence does not suggest that that the PTA has been recently employed against members of the Tamil community in general or even ex-LTTE members in general, or those who have absconded from monitoring or reporting obligations.
36. DFAT assesses that ordinary Tamils living the north and east are at low risk of official harassment, that violence is not common against those being monitored and Tamils with former links to the LTTE, and who are not politically active, are generally able to lead their lives without concern for their security as a result of their past association with the LTTE. DFAT also assesses that Tamils face a low risk of official or societal discrimination based on ethnicity or caste, including in their ability to access employment or housing.²¹
37. Thousands of Tamil refugees and failed asylum seekers have returned from Australia and other places in recent years. DFAT has reported it is not aware of any returnees from Australia being charged under the PTA or detained for matters other than illegal departure in 2021. While failed asylum seeker returnees have reported receiving monitoring visits and phone calls from the CID, others reported no monitoring or harassment and said they had no protection concerns. DFAT understands most returnees are not actively monitored long term, and as mentioned above, where it does occur, it does not tend to involve physical violence.

18 DFAT, "DFAT Country Information Report Sri Lanka", 23 December 2021, 20211223094818; The Guardian, "Tamils fear prison and torture in Sri Lanka, 13 years after civil war ended", 27 March 2022

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

20 ITJP, "Sri Lanka: Torture & Sexual Violence by Security Forces 2020-21", September 2021

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

38. I accept the applicant's scarring and injuries may be visible upon return, but the country information does not indicate that this of itself would warrant protection and while it points to his LTTE combat history, I am satisfied that this, his places of detention (including among others [Camp 3] and [Camp 2]) and his rehabilitation will already be known to the authorities, or readily found in their records. His scarring and LTTE cadre profile were identified by the authorities immediately after the war, and consequently, he was one of around 12,000 people who underwent the rehabilitation program. He was rehabilitated for a year in three separate youth rehabilitation centres, until he was released in April 2010, and given a Release Certificate, a copy of which is before me. Given all of this and having regard to the shift in the authorities' security focus, I do not accept the representative's assertions that the applicant's scarring will lead to coercive questioning involving physical abuse or torture, or that he may face harm on discovery of his history in the notorious detention camps or rehabilitation. Nor do I accept the assertion that the applicant will likely be detained and sent again for rehabilitation; I find this misinterprets DFAT's advice which was given in reference to *remaining* former members who – unlike the applicant - have not already come to their attention.
39. Following his rehabilitation, the applicant was subject to the post-rehabilitation reporting regime, which was then routine, and that post-war environment, the associated mistreatment was not uncommon. On the evidence, the applicant was able to live at home and was never prosecuted or charged under the PTA, or otherwise, and there is no indication that the applicant's family have been served with any formal documentation indicating proceedings against the applicant, or that he was the subject of interest to any authorities beyond some local SLA officers. Nor is there evidence to suggest anyone beyond those local officers would take issue with his not turning spy. I have found that there has not been an ongoing search for him even from those officers, and this, along with the changed country situation and security focus and the passage of time since these events, leads me to conclude that he is not actively wanted by the SLA or other authorities. The country information does not suggest that the PTA has been used against those who absconded from past monitoring or reporting obligations, and nor does it suggest they face other harms.
40. I do, however, accept that as a low-profile former LTTE member and returnee, the applicant may be monitored after returning to his home area in the north. But the evidence does not indicate he has been the subject of ongoing attention for his past activities in Sri Lanka and he has not engaged in any type of post-war political activities in support of the LTTE or any separatist or pro-Tamil causes, or any activities against the Sri Lankan government during his time in Australia, despite having the opportunity to do so here. Given this, and the fact that he not indicated he is interested in engaging in any such activities in the future including in relation to politically sensitive issues, I am not satisfied that he will do so on return. Given this, and the government's shifted security focus to post-war activism and threats, I am not satisfied he would now or in the reasonably foreseeable future be subject to any arrest warrants, judicial action (apart from for his illegal departure), or would now be subject to anything beyond monitoring, which, given the information discussed above, would not involve serious harm. Having regard to the applicant's past experiences and overall profile together with country information regarding the changed country conditions of Sri Lanka, I am not satisfied that the applicant faces a real chance of harm (apart from monitoring which would not be serious harm) now or in the reasonably foreseeable future.
41. As a returned asylum seeker, on arrival at Colombo airport, the applicant may – along with other returnees - be subject to investigative processes and checks into his identity and background by Sri Lankan authorities seeking to identify those with criminal or terrorist backgrounds and extant court orders and arrest warrants. He may be interviewed and have his details checked against immigration and intelligence databases, criminal and court records and

with the police and others from his local area. While it may take several hours, DFAT has stated it is not aware of detainees being subjected to mistreatment during this processing at the airport, of any returnees from Australia being charged under the PTA, or of any returnees in 2021 being detained for matters other than illegal departure.

42. I accept that during the airport processing procedures, the applicant will likely face questioning to verify his identity, and about his departure and long absence in Australia. I accept that his personal history including his LTTE fighting, his detention in [Camp 3] and [Camp 2], his rehabilitation and post-rehabilitation reporting which he breached when he left, will be revealed, or already known. In this circumstance, it is likely that he will undergo more than the perfunctory questioning put to other returnees. However, I am satisfied the applicant will be able to produce his identification documents and rehabilitation certificate, and, even considering his mental state, to answer questions put to him. Given his completed rehabilitation and release, and that there are no indications of his engaging in pro-Tamil or anti-government causes, or with any Tamil diaspora groups, and noting the change in the security focus since the applicant left Sri Lanka, I consider the authorities will quickly determine that the applicant does not appear on their stop lists and is not a criminal or security risk of any kind.
43. On the evidence, I am not satisfied that the questioning/investigation or returnee processing itself amounts to serious harm or that the applicant would for any reason face a real chance of suffering anything amounting to serious harm during returnee processing. I note the representative's submission that the UK Home Office advises that individuals detained by the Sri Lankan authorities face a reasonable likelihood of harm but in context, this advice is in reference to persons such as journalists, those who have given evidence implicating the authorities to the Lessons Learned and Reconciliation Commission, those known to have expressed separatist views and those who appear on a stop list (none of which apply to the applicant), as opposed to those questioned and held awaiting court transfer during the returnee and illegal departee processing. Similarly, while the OHCHR refers to the use of torture, this is in the context of those arrested and detained on national security grounds, and I am not satisfied there is a real chance of this in the applicant's case.
44. While he may be visited and monitored on return to [Location 1], given the authorities have already detained, rehabilitated and released the applicant, and he has not been engaged in post-war separatism or pro-Tamil/LTTE or anti-government causes in the diaspora, and that I do not consider he would be otherwise viewed as a security or criminal concern or a threat to the unitary Sri Lankan state, I am not satisfied there is a real chance of his being detained or otherwise harmed.²² Nor do I consider the monitoring itself would amount to serious harm.
45. I accept that when the applicant departed Sri Lanka back in 2012, he did so illegally by boat and the updated 2021 DFAT information²³ suggests that even as a mere passenger, he will face legal consequences for his illegal departure under the Immigrants and Emigrants Act (I&E Act). He may be briefly detained awaiting Magistrates' availability before appearing in the Negombo Courts and then his case could take several years to resolve, requiring him to travel to reappear in these courts periodically (perhaps every three to six months and each time at his own expense) for bail hearings. There is provision for custodial sentences but DFAT is unaware of any prison sentences imposed solely for illegal departure. In practice, a fine (typically LKR 50,000-200,000 or AUD350-1400) is always imposed and this can be paid in instalments. Those

22 UK Upper Tribunal (Immigration and Asylum Chamber), "KK RS and Secretary of State for the Home Department", 27 May 2021, 20210601113225; DFAT, "DFAT Country Information Report Sri Lanka", 23 December 2021, 20211223094818

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

who still cannot pay may be imprisoned for 14 days. DFAT advises that while the fine itself may be low, the cumulative costs of repeatedly travelling to appear in court over the protracted length of the court proceedings can be high.²⁴

46. I am mindful that undergoing the airport processing and being in the custody of the authorities for his judicial processes may be confronting and challenging for the applicant, given his history with the authorities and his mental health. However, the information provided does not indicate that the applicant requires round-the-clock medical care or that he would not be able to safely participate in these processes. I do not accept his mental health or mental state is such that it will prevent him from being able to safely participate in this process. I am satisfied too, that any period of questioning and processing and awaiting court transfer will be brief and the evidence does not indicate that he or any returnees would be denied necessary medical care during this period, nor if held while waiting to face court. I am also not satisfied that any difficulties the applicant may face would be due to any systematic or intentional conduct by the Sri Lankan authorities. Having considered the medical evidence and other health related information about the applicant I am not satisfied on the evidence that any part of the returnee processing or illegal departure procedures will lead to a real chance of him suffering serious harm.
47. While I accept the protracted judicial process and fine will be disruptive and potentially expensive while the applicant is trying to reintegrate, I take into account that he would be returning to [Location 1], where his family reside, and I do not accept he would not have their support on his return. I am not satisfied the applicant could not pay his fines, even if by instalment (which is an option), and manage arrangements for his travel and court appearance/s, or that he would face serious harm arising from financial hardship in the reasonably foreseeable future. Nor am I satisfied that the potentially lengthy judicial process, the imposition of a fine or any other costs associated with his court appearance/s would constitute serious harm. I note the concerns raised in some reports given by the representative regarding overcrowded prisons and COVID-19 but I am not persuaded that any poor and overcrowded prisons in Sri Lanka arise from systematic and discriminatory conduct on the part of the authorities and I consider there is only a remote chance the applicant will find himself in such a situation. For the sake of clarity, I find that there is only a remote chance that the applicant would be detained at all and that any period of detention would be brief while undergoing returnee processing and awaiting the court process relating to his illegal departure, and that none of this would involve serious harm.
48. The evidence does not indicate that he would be mistreated or harmed while waiting or in any part of the returnee or judicial process. Additionally, I am satisfied the arrest and judicial processes and penalties the applicant may face regarding his illegal departure would result from the lawful prosecution of a crime and there is no evidence before me that these are discriminatory on their terms, are applied in a discriminatory manner or are selectively enforced. It does not amount to persecution for the purpose of ss.5H(1) and 5J(1) of the Act.
49. I accept the applicant may face challenges reintegrating back into his community in the north. DFAT states as much and its sources have characterised former LTTE members as the most vulnerable and neglected segment of the Tamil population. Unemployment amongst the cohort is high as they generally lack the skills to find and hold meaningful employment. Anecdotal evidence also indicates that mental illness linked to the war is prevalent among former LTTE members and those with disabilities sustained during the war receive minimal

²⁴ DFAT, "DFAT Country Information Report Sri Lanka", 23 December 2021, 20211223094818

state support, if any at all. DFAT also refers to there being limited reintegration assistance for returnees and their practical challenges finding suitable employment and reliable housing.²⁵

50. However, DFAT also advises that most former LTTE members released from rehabilitation have been accepted back into their communities in the north and east as the community acknowledges that many people were forced to participate in LTTE activities against their will. DFAT assesses that low-profile former LTTE members face a low to moderate risk of societal discrimination, and that they can readily access government services. The applicant would be returning to [Location 1], where his parents and some siblings still reside and while he states they are suffering due to COVID and the broken economy, he has not indicated that they have been treated differentially in these contexts, or that they are unable to work or sustain themselves. Nor has he suggested he would be unable to work at all on account of his mental health or physical injuries and health. I accept that with his background and the country in economic crisis, the applicant will face difficulties in the employment market, but I am not satisfied on the evidence that his family members would not be able to offer him some support both financially and with accommodation, and in helping him to re-establish connections in the community to support his reintegration and path to employment. And while I note there is a factor of employers' reluctance to hire former LTTE members for fear of inviting monitoring, the evidence does not suggest that this is so pervasive as to be systematic, or that former members are unable to obtain any employment. I am not satisfied there is a real chance the applicant will be denied employment or capacity to earn a livelihood or denied access services in Sri Lanka for any reason. Similarly, information from DFAT refers to possibilities for welfare assistance and while there is poor quality targeting, resulting in the exclusion of many needy households, the evidence does not suggest that government assistance would not be available. The country information does not support a finding that Tamils even with the applicant's background are denied employment or denied access to welfare or basic services or the capacity to earn a livelihood of any kind which threatens the capacity to subsist.
51. I have considered the applicant's ongoing need for mental health treatment mental health and some ongoing issues he has with his physical injuries (for example, the medical records indicate the applicant has some difficulties with shrapnel still embedded in his leg). The country information indicates that Sri Lanka's public health system offers universal free health care, although the quality of care and facilities differs amongst regions with lower outcomes in the north and east. The World Health Organisation notes that while some medicines are free of charge, the health system has not appropriately evolved to meet Sri Lankan society's changing demands and out-of-pocket costs for medications can cost considerably. There are also gaps in mental health services and DFAT describes a significant, ongoing need for psychosocial support in the north and east.²⁶ Clearly, there are shortcomings in the country's healthcare and mental healthcare system, however the country information does not indicate persons with the types of physical health issues or psychosocial issues of the applicant would lead to a person suffering serious harm in current day Sri Lanka, nor in the reasonably foreseeable future. Nor does it indicate that treatment for such conditions in Sri Lanka is intentionally withheld from persons of any ethnicity or profile, or for any reasons. I am not satisfied that should it be required, the applicant would be denied treatment or necessary medications for his physical or mental health. I accept the applicant may face some difficulties due to the availability of services and his adjustment to the healthcare system in Sri Lanka. However, I am not satisfied that any difficulties he may face in obtaining the treatment and support that he needs would be as a result of systematic and discriminatory conduct on the part of the government or anyone.

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

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

52. I accept the applicant may be generally concerned about COVID-19 in Sri Lanka. However, I consider it too speculative on the evidence before me to conclude that the COVID-19 situation in Sri Lanka will in the reasonably foreseeable future, worsen to the point of treatment not being available to the applicant, should he contract COVID-19 and require treatment. And while I note DFAT's 2019 comments about health outcomes being worse in the north and east (a former conflict areas), I am not satisfied this is because of discrimination along ethnic or any other lines or that it would lead to the denial of necessary health and care services. I have addressed above some concerns about COVID-19 in prisons and I note concerns have also been raised in the materials given to the IAA about the Sri Lankan government's militarised and heavy-handed approach to managing the virus. However, I am not satisfied on the evidence that the COVID-19 response leadership and measures being taken in response indicate there is a real chance that the applicant would be denied treatment on the basis of his Tamil ethnicity, his LTTE background or any other profile factors. I am not satisfied there is a real chance he would be denied treatment.

53. In summary, while I accept the applicant will face challenges on his return to Sri Lanka and his reintegration into his community, I am not satisfied that even as a Tamil ex-LTTE fighter who was detained in notorious camps, refused to turn informant or spy, and absconded from his post-rehabilitation monitoring, and departed illegally and sought asylum in Australia, the applicant will face any discrimination, monitoring or other treatment that will amount to serious harm. I have considered the applicant's profile and circumstances as a whole and I am not satisfied he faces a real chance of persecution now, or in the reasonably foreseeable future.

54. I am not satisfied he has a well-founded fear of persecution in any part of Sri Lanka.

Refugee: conclusion

55. 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

56. 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

57. 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.

58. 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.
59. As set out above I accept that the applicant will be subject to returnee processing including routine checks and interviews, and – given his background - some additional questioning. I accept he may be held for a period and charged and subject to judicial proceedings for his illegal departure. However, even with all that this would entail (and which is set out above), I am not satisfied the applicant will be subject to mistreatment during any part of these processes. I am not satisfied from the information before me that there is – in any part of these processes, and even having regard to the applicant's LTTE fighting involvement, his rehabilitation and noting his illegal departure also breached his reporting obligation, and even if detention conditions are poor– any intention to inflict severe pain or suffering, or pain and suffering that could reasonably be regarded as cruel and inhuman, or extreme humiliation. Nor I am satisfied there is a real risk of the death penalty being carried out, the applicant being arbitrarily deprived of his life or tortured in these circumstances. Having regard to these matters and the applicant's individual profile and circumstances, I am not satisfied the applicant faces a real risk of significant harm from any of this.
60. I accept the applicant may face some discrimination and may be monitored after his return. However, I am not satisfied that there is a real risk that any such discrimination or monitoring would involve any acts or omissions at the official or societal level which would result in any harm that would constitute significant harm as defined in the Act.
61. I have accepted that the applicant may experience difficulty obtaining employment, particularly with Sri Lanka's broken economy as he puts it. I have also accepted he may have difficulty obtaining access to health or welfare services but I am not satisfied that this would amount to deprivation of life, the death penalty, and nor am I satisfied he will be subject to torture, or cruel or inhuman or degrading treatment or punishment as defined, or that any harm he may experience would be intentionally inflicted. I am not satisfied that the applicant would experience significant harm in relation to these matters.
62. As for COVID-19, as noted above, it is too speculative to conclude that the COVID-19 situation in Sri Lanka will in the reasonably foreseeable future, worsen to the point of treatment not being available to the applicant, and I am not satisfied there is a real risk he would be denied any necessary health or care services (for COVID or any reason), should he need it. Nor am I satisfied that a prevalence of COVID-19 in poor and overcrowded prisons in Sri Lanka arise from intentional conduct on the part of the authorities, and nor do I consider the heavy-handed militarised-style response to COVID-19 is intended to inflict any type of significant harm, as defined. I am not satisfied there is a real risk that the applicant will be subject to the death penalty or be arbitrarily deprived of his life because of the COVID-19 situation in Sri Lanka. Nor am I satisfied there is a real risk he will be subject to torture, or cruel or inhuman or degrading treatment or punishment, or any form of significant harm, as defined for the purposes of the complementary protection criteria.
63. I have otherwise found the applicant would not face a real chance of any harm from the authorities, or from any persons on return. Based on the same information, and for the same reasons, I am not satisfied he faces a real risk of harm, including significant harm from anyone in connection with those claims.

64. After having regard to all the applicant's circumstances, and the country information noted above, I am not satisfied that he faces a real risk of suffering significant harm on return to Sri Lanka.

Complementary protection: conclusion

65. 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.