



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA

IAA reference: IAA22/10408

Date and time of decision: 23 February 2023 11:27:00

M Currie, Reviewer

Decision

The IAA remits the decision for reconsideration with the direction that:

- there are substantial grounds for believing that, as a necessary and foreseeable consequence of the referred applicant being removed from Australia to a receiving country, there is a real risk that the referred applicant will suffer significant harm.

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 Sri Lankan citizen of Sinhala ethnicity and an adherent of the Buddhist faith. He arrived in Australia in March 2013 and lodged an application for a Safe Haven Enterprise Visa (SHEV) in July 2016.
2. In his protection visa application, the applicant's principal claim for protection was that in Sri Lanka he had faced harassment and persecution from the Sri Lankan Police and had been arrested and imprisoned on false charges for possession of illegal weapons. He was able to escape from custody, and thereafter lived in hiding. He feared to return to Sri Lanka because he believed the Police would resume their harassment of him. He also claimed that he had departed Sri Lanka illegally by boat and had been incorrectly identified as a crew member of the boat in which he travelled to Australia because he had assisted the captain of the boat to steer. He believed this would lead to him facing charges in Sri Lanka for breaches Sri Lankan immigration law. Finally, he argued that he had been affected by a 2014 Departmental data breach.
3. In November 2016, a delegate of the Minister for Immigration decided under s.65 of the *Migration Act 1958* (the Act) to refuse the visa, finding that Australia did not owe protection obligations to the Applicant. On 24 November 2016, the applicant's matter was referred to the Immigration Assessment Authority (IAA).
4. An IAA reviewer affirmed the delegate's decision on 27 July 2017. However, this decision was later quashed by the Federal Circuit and Family Court of Australia (FCFCOA) after the Department conceded that the initial IAA review had been affected by jurisdictional error. The Court remitted the matter back to the IAA for reconsideration of the applicant's claims for protection.
5. This is a *de novo* decision; my task is to consider the applicants claims for protection and the materials before me afresh. I am not bound by any earlier findings by the delegate, or the IAA.

Information before the IAA

6. I have had regard to the material given by the Secretary under s.473CB of the Act. In addition to material provided by the Secretary, a range of other information has been provided to the IAA by the applicant, or has been obtained by the IAA.

Information provided by the applicant

7. In December 2016, after the applicant's case was referred to the IAA, a migration agent, acting on behalf of the applicant sent a submission to the IAA (the 2016 Submission). The 2016 Submission argued that various findings made by the Departmental Delegate in the s.65 Decision were flawed. Specifically, the 2016 submission addressed the delegates findings in relation to the applicant's claim to have faced criminal charges in Sri Lanka; it argued that various aspects of the applicant's claim to have been identified as a crew member of the boat in which he travelled to Australia had been overlooked; and that the delegate did not adequately consider the applicant's claims about the 2014 Departmental data breach. To the extent that the 2016 Submission is argument, I have considered it.

8. I note that the 2016 Submission asserts that:
- The applicant was held in Australian immigration detention for more than 15 months after almost all other passengers on his boat were released. He believes that this was due to his decision to assist the boat's Captain to steer the boat.
 - The captain of the boat was known to Australian authorities as he had been to Australia in the past. For this reason, the captain was investigated by Australian Authorities.
9. While the applicant had put forward claims about steering the boat in his protection visa application, neither of these claims had been made before the delegate. They are new information.
10. Both of these claims relate to events which predate the delegate's decision. The applicant has not provided any explanation for why he did not make these claims to the delegate. Given that both claims relate to the applicant's beliefs about events which predated his protection visa application, they are claims which he had knowledge of. In the circumstances, I am not satisfied that these claims could not have been provided to the delegate before the s.65 Decision was made and so s.473DD(b)(i) is not met for either of these claims.
11. Both of these new claims relate to decisions or actions by the Department (firstly, how long should the applicant be held in immigration detention, and secondly, whether to investigate the captain of the boat). The applicant has not provided any independent evidence in support of these claims, and they appear to be merely speculative assertions on his part. The applicant has not provided any explanation for why he believes the Department made these decisions, or how he learned about the Department's reasons for making these decisions, or what information has led him to make these assertions. I also observe that these claims related to decisions by Australian officials in Australia which occurred around a decade ago, soon after his arrival in this country. Given these factors, in my view, these aspects of his claims have no bearing on the risks (if any) which would be faced by the applicant if returned to Sri Lanka. In the circumstances, I am not satisfied that these claims are credible personal information which may have affected the consideration of the applicant's claims for protection and so s.473DD(b)(ii) is also not met.
12. I have already noted that the applicant has not provided any explanation for how or why he made these assertions and has not provided or pointed to any independent evidence in support of these new claims. In the absence of such explanations or evidence and noting that I have found that neither of the limbs of s.473DD(b) are met, I am not satisfied that there are any exceptional circumstances to justify considering the applicant's new claims and so s.473DD(a) is also not met. As none of the limbs of s.473DD are met, I have not considered either of the new claims advanced by the applicant in his 2016 Submission.
13. In July 2017, the applicant's migration agent sent another email to the IAA. This email contained a five-page attachment which was a news report about a statement by the then United Nations Special Rapporteur on human rights and counterterrorism at the conclusion of his official visit to Sri Lanka. The news article was published by 'Ground Views – Journalism for Citizens' (the Ground Views article). The Ground Views article was not before the delegate, it is new information. The migration agents email asserted that the Ground Views article was relevant to the IAA's consideration of the applicant's protection claims since it canvassed the issues of "*police brutality*" and abuse of the "*Prevention and Terrorism Act*" in Sri Lanka.

14. The Ground Views article was published on 15 July 2017 and related to the United Nations Special Rapporteur's visit to Sri Lanka in July 2017. I am satisfied that the Ground Views news article could not have been provided to the delegate before the s.65 Decision was made and s.473DD(b)(i) is met. However, the Ground Views article relates to the general conditions in Sri Lanka, it is not credible personal information in the relevant sense, and so s.473DD(b)(ii) is not met for this article.
15. The Ground Views article relates to the Special Rapporteur's views about the progress that Sri Lanka has achieved in its law, policies and practice in the fight against terrorism since the end of its internal armed conflict. It contains an assessment of how the Sri Lankan security services employ their powers in Sri Lanka. This applicant's principal claims relate to claims that he faced harassment by police in the past and would face similar harassment in the future if returned to Sri Lanka. In the circumstances, I am satisfied that there are exceptional circumstances to justify considering the Ground Views article and so s.473DD(a) is met. As both limbs of s.473DD are met, I have considered the Ground Views article.

Further Information provided by the Department

16. Following the 2022 decision by the FCFCOA to refer the applicant's case back to the IAA the Secretary provided additional material to the IAA under s.473CB of the Act. These additional materials were documents in the possession of the Department which had not been provided to the IAA or considered in the original IAA decision.
17. The FCFCOA judgement noted that the Department had conceded that the first IAA decision was affected by jurisdictional error, since it did not consider a transcript of an interview that had been conducted with the applicant on 22 March 2013¹, soon after he arrived in this country.
18. The additional documents provided to the IAA by the Secretary included the transcript, and several other documents relating to other interviews with the applicant in 2013². It also included a Protection File Note³ which considered these interviews. I am satisfied that there are exceptional circumstances to justify consider all the documents provided to the IAA which relate to interviews conducted with the applicant in 2013 including the transcript and the Protection File Note soon after his arrival in this country. I have considered all of these documents (hereafter referred to collectively as: the 2013 interview material).
19. The Secretary also provided several other documents to the IAA, but these are duplicates of identity documents already before me, or are merely documents of an administrative nature, and in my view, do not have any bearing on, or relevance to, my consideration of the applicant's claims for protection. As these other documents are duplicates or are documents which I do not consider to be relevant, I have not considered the remaining documents which were provided by the Secretary.

Information obtained by the IAA.

20. In 2017, when the IAA first considered the applicant's case, the then IAA review obtained a 2017 report⁴ which had been published by the Department of Foreign Affairs and Trade

¹ Document titled: Screening Interview transcript

² Documents titled: Final File Note and CAB Interview

³ Document titled: Protection File note

⁴ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105

(DFAT). This report was part of a regular series of reports published by DFAT to assist decision makers who were required to make asylum seeker decisions about Sri Lanka. In the s.65 Decision, the delegate had considered two earlier DFAT reports from the same series which had been published in 2015⁵. The original IAA review noted that the 2017 DFAT report related to the treatment of persons who have departed Sri Lanka illegally and sought asylum while overseas and was satisfied that there were exceptional circumstances to justify considering the 2017 DFAT Report. For the same reasons, I am also satisfied that there are exceptional circumstances to justify considering the 2017 DFAT Report and have done so.

21. Since 2017, DFAT has published several further reports in the series about conditions in Sri Lanka. These reports were published in 2018⁶, 2019⁷, and 2021⁸. These reports contain information about conditions in Sri Lanka, and address issues including the treatment of returning asylum seekers and the security services in Sri Lanka. I am satisfied that there are exceptional circumstances to justify consider the DFAT reports from 2018, 2019 and 2021, and I have done so.

Third party information

22. In the materials provided by the Secretary under s473CB of the Act, there were several documents which related to information provided to the Department by an anonymous third party. These documents were provided to the Department before the delegates decision was made and appear to have been considered by the delegate in the s.65 Decision. The third-party information can be summarised as follows:
 - That in Sri Lanka he was known to be a dangerous person and is wanted by the Sri Lankan Police for committing armed robbery and murder.
 - He had been arrested in relation to these matters [in] August 2007, and that he later escaped from prison. He was also said to have escaped from the Army Special Forces at an unspecified time.
 - That he missed a court appearance in relation to his criminal case in [2015], as he was then in Australia. As a consequence of his failure to attend the court, the Sri Lankan Police detained his brother who resides in [Town 1].
 - That further information about him and his crimes is available from Police Stations located in Trincomalee and [Town 1] in Sri Lanka.
 - That he was aware of these issues, and had engaged a lawyer in [Town 1], Sri Lanka to represent him before the Sri Lanka courts.
23. In my view, the content of this material is prejudicial to the applicant, since it casts doubt on the applicant's claims about his life in Sri Lanka, his claims for protection, and on the reliability of the evidence he has previously provided. While the delegate appears to have considered this material, it does not seem that any of this information was put squarely to the applicant or that he was ever invited to comment on this material. Given the prejudicial

⁵ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Report - Sri Lanka", 16 February 2015, CISEC96CF1164; & Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report - Sri Lanka", 18 December 2015. CISEC96CF14143

⁶ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – 23 May 2018" CIS7B839411064

⁷ Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244

⁸ Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report - Sri Lanka', 23 December 2021, 20211223094818

nature of this material, I am of the view that the applicant should have been invited to comment on the third-party information.

24. Consequently, the IAA wrote to the applicant on 2 February 2023 and provided him with a summary of the third-party information. The correspondence noted to the applicant that that the information from the third party cast doubt on many of his claims about his life, and his claims about why he was seeking protection. The IAA correspondence noted that these issues may be the reason, or part of the reason why the IAA might affirm the delegate's decision. In the correspondence, the IAA invited the applicant to comment on the prejudicial material and its relevance to his claims for protection.
25. The applicant responded to the IAA's invitation on to comment via email on 16 February 2023. The applicant's email contained seven attachments in the Portable Document Format (PDF). These were: (1) a Covering letter which had been written by the applicant's migration agent on behalf of the applicant (the Covering Letter); (2) a copy of the IAA's written invitation of 2 February 2023 (the IAA Invitation); (3) a form, signed by the applicant relating to the appointment of the migration agent (the appointment form); (4) a three page Statutory Declaration signed by the applicant on 11 February 2023 (the 2023 Statutory Declaration); (5) a 36 page PDF document titled '*Annexure A*', which when examined was found to contain what a number of separate Sri Lankan court documents which have been compiled into a single PDF (Annexure A); (6) a four page PDF document titled '*Annexure B*' which also appeared to be a Sri Lankan court document (Annexure B) ; and (7) a copy of a Sri Lankan Death Certificate said to relate to an associate of the applicant (F2).
26. In relation to these documents, I note that the covering letter is brief, and is administrative in nature. It contains a brief summary of the documents provided but is otherwise not relevant. The appointment form is merely an administrative document and in my opinion is also not of any relevance to the review of the applicant's case. I have not considered these documents further. The IAA Invitation is a duplicate of a document drafted by the IAA and is already before me.
27. The document titled Annexure B is a duplicate copy of a document already provided to the Department. It is already before me and is not new information under s.473DD of the Act. I have considered it.
28. The document titled Annexure A is 36 pages long and as I have noted above, it consists of several documents which have been compiled into a single PDF. Several of these constituent documents were, like Annexure B, earlier provided to the Department and were considered by the delegate. As these documents had been considered by the Department they are before me. However, some of the constituent documents in Annexure A had not been provided to the Department. These are new information.
29. As the remaining documents⁹ were not before the delegate, they are new information under the Act. I have reviewed the contents of the remaining documents. In my view, these documents contain information and claims that significantly revises the basis of the applicant's claims for protection. These new claims are put forward in the applicant's 2023 Statutory Declaration. The other documents are said to support the applicant's revised claims.

⁹ The 2023 Statutory Declaration, the Death Certificate & those parts of Annexure A which were not provided to the delegate.

30. In summary, the applicant's 2023 Statutory Declaration contains a range of new information and claims about the applicant, his life in Sri Lanka, and his claims for protection. This includes that:
- He is a former member of the Sri Lankan Special Forces who had enlisted in 1999 fought in the Civil War. During his period of service, he had been disciplined and demoted, and later deserted. He had not mentioned his military service because he feared it would mean that he would not be found to be a refugee.
 - That [in] August 2007 he and a friend (F1) were arrested and charged with Armed Robbery relating to theft from a [shop]. Another friend (F2) had already been arrested. That the applicant and F1 were able to escape, while F2 remained in Custody. That F1 was later captured and killed by the Sri Lankan authorities. F2 was also killed.
 - The applicant lived in hiding in Trincomalee where he used his brother's identity in order to avoid detection. He was arrested in 2009 on an unrelated matter in Trincomalee and later released on bail. He used his brother's name with the Police. After his release, the applicant returned to Colombo to reside with his wife. His brother had been arrested in 2016, due to the events in Trincomalee. He had spent [number] days in Goal.
31. The Death Certificate, Annexure A and Annexure B and were provided by the applicant in order to support the revised claims he had made in his 2023 Statutory Declaration. The Death Certificate is said to be for F2, who he claims the authorities killed. Annexure A and Annexure B are said to be court documents relating to the applicant from Sri Lanka.
32. The applicant's revised claims and the remaining documents are all new information. As the claims, and the new documents are all linked to the applicant's revised claims, I have considered whether all of these materials meet s.473DD together.
33. The applicant's new documents and claims were provided to the IAA in 2023, after the IAA invited him to review the material and comment on its relevance. The invitation by the IAA explicitly asked him to provide further information about these issues. In the circumstances, I am satisfied that s.473DD(b)(i) is met for all of this material. The new claims and documents relate directly to the applicant's circumstances and claims. I am satisfied that they are credible personal information in the relevant sense, which may have affected the consideration of his claims for protection and s.473DD(b)(ii) is also met. Given the significant revisions that these documents and claims represent, I am satisfied that there are exceptional circumstances to justify considering the new documents and claims provided to the IAA in February 2023. As both limbs of s.473DD are met, I have considered the new claims and documents.

Applicant's claims for protection

34. The applicant's claims can be summarised as follows:
- He is a Sri Lankan citizen of Sinhala ethnicity and an adherent of the Buddhist faith. He was born in the in Hambantota District of Southern Province of Sri Lanka in [specified year]. He grew up in the Southern Province with his parent and siblings. They lived in the family home in the town of [Town 1]. The applicant completed secondary schooling up to [grade].
 - In 2006, the applicant married. He and his wife lived in his family home in [Town 1].

- [In] August 2007, the applicant loaned his motorcycle to a friend (F1). F1 and another friend (F2) returned the motorcycle and told him that they had a minor accident, skidding into a streetlamp post. The motorcycle only had minor damage and the applicant was not concerned.
- At 4am the next morning, the Sri Lankan Police raided the applicant's home. They accused him of possessing illegal firearms and searched the house. They found no weapons, but still the applicant was arrested. He and his motorcycle were taken to the Police Station. While he was detained, the police mistreated and beat him. The Police informed him that F1 and another person had also been arrested and that they had been in possession of firearms. The applicant asserts that the police were trying to implicate him for the same crime.
- [Later in] Aug 2007, the Police took the applicant to Prison. After two weeks, he was taken before a magistrate who remanded him to prison. [In] September 2007, the applicant was taken back to the Court, but was able to escape his guards. F1 escaped at the same time.
- Thereafter, the applicant lived in hiding. He spent a few days at hiding at the homes of various friends and family. Then, around September 2007, he and his wife moved from [Town 1] to [Town 2] around 250 kilometres away. They lived there until around May 2008. [Detail deleted].
- F1 was captured by the Sri Lankan Police in 2008. In June 2008, he was killed by Police. F2 has also been captured and killed by the Police.
- In May 2008 the family departed [Town 2] and moved to [Town 3]. They lived there till May 2009 when they moved to [Town 4] in Colombo. He was able to hide during this period by renting these houses in the name of his wife.
- They lived in [Town 4] until March 2013, when the applicant departed Sri Lanka for Australia. After his departure, his wife and daughter returned to [Town 1] where they continue to reside with his family.
- While travelling to Australia by boat, the applicant provided assistance to the boat Captain by steering the ship. The captain, and other passengers on the ship subsequently advised Australian authorities that the applicant was a member of the boat crew. After a short period in Australia, around half the passengers on the boat were returned to Sri Lanka. Those returning passengers subsequently advised Sri Lankan authorities that the applicant was a member of the boat crew. As a consequence, this applicant believes that he would be identified as a people smuggler by the Sri Lankan authorities if he was returned to that country.
- The applicant fears to return to Sri Lanka. He fears that if he returns, he will face further harassment and persecution from the Sri Lankan Police for crimes he did not commit. He believes he would face arrest, imprisonment, torture and possibly death.
- The applicant fears to return to Sri Lanka, because he has been falsely accused to be a member of the boat crew. He believes that in Sri Lanka, he would face arrest and be charged with immigration offences in Sri Lanka. He says that another Passenger who had assisted to steer the boat, and who returned to Sri Lanka in 2014 has already been charged with such crimes. He fears the same would happen to him. He believes his previous interactions with the Sri Lankan Police would exacerbate this problem.
- He was affected by a 2014 data breach by the Department. He fears the Sri Lankan Police would know about his attempt to seek asylum in Australia. He fears that these factors would lead him to face harm in Sri Lanka.

Factual findings

35. As part of his SHEV Application, the applicant has provided copies of several identity documents in order to establish his identity. This includes a copy of his Sri Lankan Drivers Licence, Sri Lankan Birth Certificate, his Sri Lankan Marriage Certificate and the Birth Certificates of his wife and daughter. He has provided accredited translation for these documents.
36. I have reviewed all of this material. These documents provide consistent identity information, which is also consistent with the applicant's verbal claims. The applicant has established his identity to my satisfaction. I accept that he is a Sri Lankan citizen, of Sinhala ethnicity as he claims. I accept that he was born in [year] in Hambantota District of the Southern Province of Sri Lanka. For the purposes of this decision, I find that Sri Lanka is his receiving country.

Third-Party Information

37. In July 2016, shortly after the applicant submitted his protection visa application, the Department received a copy of handwritten note from an anonymous third party (the third-party note). The author of the document is not identified, though the note asserts the author is an "*elderly*" Australian citizen. The note implies the author has personal knowledge of the applicant.
38. The third-party note purported to contain information about this applicant and his life in Sri Lanka. The note asserted the following about the applicant:
 - He is dangerous and is wanted by the Sri Lankan Police. He used weapons in a hold up and is wanted for robberies and murder.
 - That he was arrested [in] August 2007 and that his case number was [number]. He escaped prison in Sri Lanka.
 - He escaped the special forces in the Army.
 - That a Court hearing for his case occurred in [2015] but he was not available as he was in Australia.
 - His presence in Australia is unknown to the Sri Lankan Police and that they had arrested the applicant's brother (B1) in his absence.
 - He should be investigated closely, and he is ready to disappear in Australia.
39. The document also asserted that further information about the applicant could be obtained from the Police Stations in Sri Lanka ([in Town 1] & Trincomalee), and identified a person said to be the applicant's attorney in Sri Lanka.
40. On its face, the information contained in the third-party note is unfavourable to the applicant. It suggests that he is a robber and a murderer who escaped prison, and whose case is ongoing in Sri Lanka. Implicitly, the note suggests that much of the information and claims the applicant has provided to Australian authorities about his problems in Sri Lanka is false or, at the very least, is substantially misleading and that he is neither a reliable witness, nor a person who faced harassment or persecution from the authorities in Sri Lanka. Instead, the third-party note implies the Sri Lankan authorities were interested in him for quite legitimate reasons, because he had committed serious criminal offences. The applicant denies that this is the case and has asserted that the charges laid against him are false.

41. Some of the information contained in the third-party note is similar to information that the applicant himself provided to the Department. This includes that the applicant is wanted by the Police in Sri Lanka; that he had been arrested in August 2007; that he escaped from custody. The case number mentioned in the third-party note is the same as the case number the applicant mentioned in his 2016 protection visa interview.
42. However, some of the information in the third-party note is completely at odds with the applicant's own account of his life in Sri Lanka. Relevantly, the note mentioned the applicant's brother B1, but though similar, the name provided for B1 in the third-party note is not the same as the name the applicant has provided for his brother. Moreover, the applicant has not claimed that he has been suspected or charged with robbery or murder in Sri Lanka, nor has he claimed that he has knowledge of an ongoing case against him for these crimes. Rather, on his account, he has only ever claimed that he was charged with possession of illegal weapons, and he has continually asserted that this charge was false. Furthermore, the applicant has not mentioned any interactions between himself and the Sri Lankan Army Special Forces at any time in Australia, nor has he ever indicated that his brother had been arrested in 2015. In fact, during his 2016 protection visa interview, the applicant explicitly denied that B1 had ever been detained by the Sri Lankan authorities. These factors suggest that the contents of the third-party note are not reliable.
43. As noted above, the applicant's responses to the IAA Invitation (issued on 2 February 2023) corroborates much of the third-party information. The applicant's 2023 Statutory Declaration confirms that:
 - He is a former member of the Sri Lankan Special Forces who had enlisted in 1999 fought in the Civil War. During his period of service, he had been disciplined and demoted, and later deserted. He had not mentioned his military service because he feared it would mean that he would not be found to be a refugee.
 - That [in] August 2007 he and a friend (F1) were arrested and charged with Armed Robbery relating to theft from a [shop]. Another friend (F2) had already been arrested. That the applicant and F1 were able to escape, while F2 remained in Custody. That F1 was later captured and killed by the Sri Lankan authorities. F2 was also killed.
 - The applicant lived in hiding in Trincomalee where he used his brother's identity in order to avoid detection. He was arrested in 2009 on an unrelated matter in Trincomalee and later released on bail. He used his brother's name with the Police. After his release, the applicant returned to Colombo to reside with his wife. His brother had been arrested in 2016, due to the events in Trincomalee. He had spent [number] days in Goal.
44. These are significant revisions to the applicant's original claims. On their face, the new documents the applicant provided in Annexure A confirm that the applicant was wanted in Sri Lanka for robbery offences.

Applicant's reliability

45. As I have summarised above, this applicant arrived in Australia in March 2013 and submitted his protection visa application in 2016. During this period, the applicant submitted a range of claims about his life in Sri Lanka, and the reasons he sought protection in Australia. He provided this information in various interviews, in his protection visa application forms, in Statutory Declarations and in submissions. However, his 2023 Statutory Declaration, and the other documents he provided to the IAA in February 2023 indicate much of the information

the applicant has provided to Australian authorities about his life in Sri Lanka was false, or at least was substantially misleading. The material before me indicates that the applicant provided this false or misleading evidence from the time he arrived in Australia until February 2023, a period of almost a decade. During this period, he omitted key facts about his life including details about his employment, where he lived, being arrested in 2009, his links to the security forces, criminal charges he had faced, and court proceedings he had knowledge of. Instead, he provided false or misleading information about all of these issues. In his 2023 Statutory Declaration, the applicant said he was afraid to tell the truth, because he feared the Australian authorities would not believe his account, and because it would mean he would not be granted a protection visa. Despite knowing he was not telling the truth about his life in Sri Lanka, throughout the first decade he was in Australia, he consistently asserted that he was telling the truth. He has only made his recent disclosures about these matters after the IAA indicated it already had knowledge of these issues which had been provided by a third party.

46. For reasons which I have elaborated throughout this decision, I am not satisfied that this applicant is a reliable witness. On his own admission, he provided false or misleading evidence about his life in Sri Lanka for almost a decade. During that period, he consistently asserted his claims were true, and only decided to come clean about these issues after the IAA informed him it had other evidence which indicated his claims about his life in Sri Lanka were inaccurate. It is clear from the 2023 Statutory Declaration that the applicant knew his original claims were false or misleading at the time he made them, and he continued to repeat his false and misleading claims for years. He admits he did so because he thought a true account would prevent him from obtaining a protection visa. To my mind, the applicant has demonstrated his clear willingness provide false or misleading information where he deems that doing so will improve his chances of obtaining a protection visa. He is not a reliable witness.

Applicant's life in Sri Lanka

47. According to the applicant's 2016 protection visa application he lived in the Southern or Western Provinces of Sri Lanka. He married in 2006. In Sri Lanka he worked as a farmer on leased property, [and in two other occupations]. In his application, and later in his protection visa interview and submissions to the Department, the applicant had claimed that [in] August 2007 he had been detained for around a month by the Sri Lankan authorities. The reason for his detention was that he had loaned his motorcycle to a friend (F1) who, along with another friend (F2) had been involved in an accident on the motorcycle. The applicant says that F1 returned to motorcycle to him and informed him that he had been in a minor accident. Since the vehicle was undamaged, the applicant thought little of this event. However, the applicant says that due to the motorcycle accident, the Sri Lankan Police became aware that F1 & F2 were carrying illegal weapons. The applicant asserts that though he was not present at this incident, because the applicant had allowed F1 & F2 to borrow his motorcycle, he also came under suspicion. The day after the accident the Sri Lankan Police came to his house. They questioned him, and searched the family home, where he lived, though no weapons were found. He was arrested, and later taken before a magistrate. The magistrate remanded him to prison. According to his protection visa application, he was charged with possession of firearms. Several weeks later, while he and F1 were taken to court, the applicant and F1 were able to escape from his guards, by feigning a need to urinate. They escaped [in] September 2007. He says that after his escape, he lived in hiding. He says that in 2008, F1 and F2 had been detained and killed by the Sri Lankan authorities due to their involvement in these events.

48. However, as I have noted, the documents the applicant has provided in 2023 include substantial revisions to the applicant's original claims. Originally, the applicant characterised his period of arrest and detention in 2007 as a false accusation related to the possession of illegal weapons. He asserted that he committed no crimes in Sri Lanka, and that he had undergone significant harassment by the Sri Lankan Police. He now says that he was arrested for robbery offences. He continues to assert that he escaped from detention and that the charges against him were unjust.
49. He has claimed he has no confidence in the Sri Lankan legal system, and fears to return to Sri Lanka because he would face further harassment and false charges. He says the Sri Lankan Police would torture and kill him. The applicant has described his case as a '*famous*' case in Sri Lanka. While his revised claims contain significant new elements, the applicant has not resiled from any of his earlier claims.
50. Because the applicant has put forward new claims, but has not resiled from his original claims, his evidence and claims are complex. Due to complexity of the applicant's new and revised claims, when considering them below, I have broken down the applicant's claims into more manageable parts.
51. **Arrest in 2007 and the subsequent court proceedings:** The applicant says he was arrested [in] August 2007. He now says that he was arrested and charged with a robbery that had occurred earlier on the same day. However, he had previously asserted that he was arrested because he had lent his motorcycle to F1 and F2, who had been involved in an accident and who had been found with illegal weapons.
52. The court documents provided by the applicant in Annexure A relate to a court case (Case# [Number]) in [Court 1]. These documents indicate that proceedings occurred in [Court 1] between [February] 2011, and [November] 2013. These proceedings related to the applicant and at that time, there was an active arrest warrant against the applicant for robbery; that he had escaped from custody; that the applicant's mother, a village head man and a Police Officer from [Town 1] had been questioned by a Magistrate in Sri Lanka and all had given evidence that attempts to find the applicant had failed; and that Sri Lankan officials had pushed for an *ex parte* trial to proceed against the applicant.
53. The applicant has also provided a document relating to the death of F1¹⁰. He says that this is a copy of a document which had been provided to [Court 2]. According to this document (the Police/Court document), F1 had been arrested and held in custody at [Prison 1] for robberies committed in [Town 1]. before he escaped at the same time as the applicant.
54. Taken together, these documents give weight to the applicant's revised claims. I accept that he had been arrested in 2007 as he asserts. I accept that he was charged with offences relating to robbery, as he now admits. I accept that for around a month, he and F1 were held in [Prison 1] and that they escaped together while being transported to a Court hearing. I accept that at the time of his escape, and afterwards, this applicant was facing charges related robbery.
55. However, I note that none of the documents provided by the applicant, including the Police/Court documents provides any evidence for the applicant's claims about lending his motorcycle to F1 and F2, or about illegal weapons charges. Given the substantial revisions to the applicant's claims, I am not satisfied that applicant's account about these aspects of his

¹⁰ He also provided Annexure B, which is a duplicate copy of this document

claim can be relied upon. I do not accept that the applicant lent his motorcycle to F1, or that a motorcycle accident led to Police interest in him. I am not satisfied those these aspects of the applicant's account are true and I conclude that these claims were invented by the applicant in order to provide Australian authorities with a reason for his arrest.

56. I also observe that none of the court documents provided by the applicant mention the applicant facing illegal weapons charges. However, documents before me do mention that he was charged with armed robbery. I am not satisfied tha the applicant was charged with any weapons offences.
57. It seems from a document titled 'Indictment' provided as part of Annexure A, that criminal charges against the applicant in 2008; that court proceedings commenced in February 2011, these proceeded for several years in the applicant's absence; that the authorities had sought, and failed, to find him; and, that an application to continue proceedings *ex parte* had been made. These events occurred around a decade ago, at the time the applicant arrived in Australia. None of the documents provided by the applicant are dated after November 2013, and it is not clear what happened in relation to these issues or what the outcome of these proceedings were.
58. The applicant says he is still wanted in relation to this issue in Sri Lanka. However, in my view, his failure to provide any further evidence in relation to this issue is a concern. I note that in his October 2016 protection visa interview, when questioned about these issues, and about his claim that the Sri Lankan authorities were still interested in him, the applicant indicated he "*had proof he could provide*" that there was an ongoing case against him, and that he could and would obtain further documents about his case and provide them to the Department. Despite his claim that he could and would provide further documentary evidence in relation to his case in Sri Lanka, the applicant never provided any such documents to the Department. Following the applicant's protection visa interview his representative sent an email to the Department stating that "*at the moment he has no new documents to provide. He is not sure whether the case exists or not. He thought he had a lawyer, but in actual fact he doesn't*". On its face, this email, provided by the applicant's migration agent under instruction from the applicant, casts doubt on the applicant's claim that he was still of interest to the Sri Lankan Government in late 2016 (when the email was sent).
59. While the applicant has provided additional documents to the IAA in 2023, (Annexure A and the Death Certificate for F2), these documents are all from 2013 or before. They do not prove that there was a case ongoing against the applicant in 2016 (at the time of his protection visa interview), nor do they offer proof he is still wanted in relation to these issues now, almost a decade later. The 2016 email (discussed in the preceding paragraph) also cast doubt on whether his is still of interest now.
60. While I have accepted that the applicant had been arrested in 2007, charged with robbery, escaped from custody and was still of interest in the years between 2011 and 2013, I have doubts about whether he is still of interest now. The applicant had not faced trial for any of these crimes at the time of his departure, but documents indicate that further court proceedings were planned. The applicant's departure from Sri Lanka coincides with the period when his case was being considered, and in my opinion, it appears likely that he departed Sri Lanka in order to avoid arrest and trial.
61. Almost a decade has passed since that time. The documents provided indicate his trial was to proceed in his absence and given the passage of time, it would seem an outcome was likely by now. The applicant's failure to provide up to date information about these court

proceedings, plus the other factors I have identified lead me to have some doubt the scope of his claims.

62. Nevertheless, given all the documentary evidence before me, I conclude that the applicant continues to be of interest in Sri Lanka for criminal offences arising from events in 2007.
63. **Murder of F1 & F2:** The applicant has claimed that after he had escaped from custody, he learned that F1 had been recaptured, and that he and F2 (who remained in custody) were subsequently murdered by the Sri Lankan authorities.
64. In support of his claims about these issues, the applicant has provided an untranslated Death Certificate in February 2023. He says that this is a death certificate for F2. However, apart from the title, and some of the headings in this document, the document appears to be written in Sinhalese. As the applicant has not provided a translation, I am unable to read the content of this document. The applicant has not explained when obtained this document, or how he obtained a copy of a death certificate from Sri Lanka, or why he did not provide it earlier to the Department or the IAA. In the circumstances, I am not satisfied that this Death Certificate does relate to F2 or that it supports his claims about F2. I give it no weight to this document as evidence of his claims.
65. The applicant has also provided a document he says is the Death Certificate for F1. He characterises this document as strong evidence in support of his claims. The applicant has not explained how or when he obtained this document. I have reviewed the document said to be F1's Death Certificate, and I observe that it indicates that F1 was killed [in] June 2008 by gunshot. On its face, this document does offer support for the applicant's claims. However, I note that F1's Death Certificate does not outline the circumstances or reasons for F1's death, other than saying he died due to gunshot wounds. +
66. The applicant has also provided a second document relating to the death of F1¹¹. He says that this is a copy of a document which had been provided to [Court 2]. This document purports to be an investigation report, which had been prepared by a Sri Lankan Police Officer in response to a complaint which had been lodged about the death of F1. The document purports to summarise the Police investigation of the circumstances of F1's death in response to the complaint. According to this document (the Police/Court document), this investigation had been conducted [in] June 2008, the day after F1's death.
67. The Police/Court document indicates that F1 had been arrested by the Sri Lankan Police on suspicion that he had been involved in committing robberies. The Police/Court document also indicates that the applicant had been arrested in connection with the robberies. However, both the applicant and F1 were said to have escaped from Police custody at an unspecified date. The Police/Court document goes on to indicate that later, F1 had been found and arrested by Police and that [in] June 2008, that he had been shot by officers of the Sri Lankan Police. In my view, the Police/Court document supports several aspects of the applicant's claims. Firstly, that he had been in Police custody at some time (date not specified); secondly, that he and F1 had escaped from police while being transported; thirdly, that F1 had later been recaptured and subsequently shot by the Sri Lankan Police force.
68. However, the Police/Court document provided by the applicant contains other information which differs from the account the applicant has provided. This includes that though the Police/Court document provided by the applicant indicated that F1 died by gunshot and had

¹¹ He also provided Annexure B, which is a duplicate copy of this document

been shot by police, the circumstances described in the document do not amount to an extra-judicial murder as asserted by the applicant. Rather, they indicate that F1 had been killed while he was participating in a police search for another person, apparently while he was attempting to pick up an explosive device. F1 was taken to hospital but pronounced dead on arrival. On its face this suggest that the Sri Lankan Police had sought to ensure that F1 obtained medical assistance. However, the applicant has asserted that F1 and F2 had been executed by the authorities in an extra-judicial murder and in such circumstances, it seems that F1 would not be provided with such care.

69. In my opinion, these differences cast some doubt on the applicant's account about what had happened in to F1 and F2. In a Statutory Declaration of 18 October 2016, the applicant says that the account of F1's death contained in the Police/Court document is not accurate. Rather, he asserts his belief that F1 was killed "*intentionally*" by the Sri Lankan Police and that he would also be killed by the authorities if returned to Sri Lanka.
70. I accept that F1 was shot by the Sri Lankan Police. However, having reviewed the Death Certificate for F1, and the Police/Court Document, I am not satisfied that the applicant's interpretation of these events is reliable. The Police/Court document is an investigation report about the death of F1. It does not indicate he was murdered in the way the applicant claims. Rather, he appears to have been killed, while he was participating in a police search for another person, apparently while he was attempting to assist the Sri Lankan Police. F1 was taken to hospital but pronounced dead on arrival. While I accept F1 was shot by police, I conclude that F1 died during a police search operation and that the Sri Lankan police attempted to take F1 to a hospital in order to obtain medical attention. I am not satisfied F1 was murdered. In the absence of clear supporting evidence, I am also not satisfied that F2 was murdered.
71. **Living in northern Sri Lanka after his escape:** The applicant now asserts he lived Trincomalee between the middle of 2008 and the end of 2009. He says he lived in Trincomalee using his brother's name and Driver's licence. He says he was arrested in late 2009. I observe that the applicant's 2023 Statutory Declaration indicates that he is not aware of why he was arrested in 2009. In that Statutory Declaration, he indicates his suspicion that his arrest was something to do with an acquaintance who tried to sell [an item 1] in a bank, apparently to raise money so they could rent accommodation together in Trincomalee. However, the applicant has not explained why they would be arrested for this reason, or why selling [an item 1] would lead to arrest or why the authorities arrested him, instead of merely arresting his acquaintance who tried to sell the [item 1]. It seems doubtful that the applicant could be held for two weeks without being identified, or without knowing why he had been detained. It also seems doubtful that the applicant's brother could be arrested seven years later in relation to the same incident, without getting an explanation for why he was detained. Given my concerns about these issues and noting my finding that this applicant is not a reliable witness, I am not satisfied that the applicant has been entirely forthcoming about what, if anything, happened to him in 2009.
72. The applicant has not provided any supporting evidence for his claim to have lived in Trincomalee between mid-2008 and late 2009. He did not mention living there when he first arrived in Australia¹². He has not described where in Trincomalee he lived, or what he did for employment or any other day to day issues related to his time in that city. By the time the applicant says he moved to Trincomalee it was securely under the control of the Sri Lankan Government.

¹² 2013 interview materials

73. During his protection visa interview the applicant said his brother had never been detained in Sri Lanka, but he now says his brother was arrested in 2016 and held for [number] days. He says his brother's arrest was a direct consequence his own arrest in Trincomalee in 2009 and his practice of using his brother's identity while living in Trincomalee. He has not provided any independent supporting evidence that his brother was arrested in 2016, or that the arrest, if it did happen, was the result of the applicant being arrested in 2009.
74. I note that the third-party information does suggest that the [Police] station had records relating to the applicant, and I acknowledge that, for the most part, the applicant has confirmed the information provided by the third party, but in the absence of independent supporting evidence about these 'Trincomalee' issues, I have doubts. The applicant says that he hired a lawyer in 2009 which would suggest that there was a paper trail associated with this event. This would be normal for any period of arrest and remand such as the applicant claims to have experienced. The applicant now says he forgets the name of the lawyer and cannot remember what happened to the papers from this episode.
75. It is also unclear why he failed to mention any of these 'Trincomalee' claims earlier since, if true, they would have provided support for the applicant's claims that he lived in hiding. In my view, the applicant's failure to mention living in Trincomalee, or being arrested there in 2009 is astonishing. His failure to mention any of these events for more than a decade, and the other issues I have mentioned, cause me to doubt his reliability about these events. I am not satisfied he is telling the truth.
76. Overall, I have doubts about the applicant's claims in relation to these issues. In the absence of supporting evidence, and noting again my findings about the applicant's reliability, I am not satisfied that the applicant's claims about Trincomalee are true. I am not satisfied the applicant lived in Trincomalee, or that he was ever arrested there. I am not satisfied that the applicant's brother was arrested in 2016 for reasons linked to the applicant.
77. **Living in southern Sri Lanka after his escape:** Central to the applicant's account is his assertion that after his escape from the Police in August 2007 he was a wanted man in Sri Lanka, and thereafter had to live in hiding.
78. Turning first to the issue of where the applicant resided during this period. According to his 2016 protection visa application between August 2007, and early 2013, when he departed Sri Lanka for Australia, he lived in the following locations: Colombo for two days immediately following his escape; [Town 2] town between September 2007 and May 2008; [Town 3] between May 2008 and May 2009; and [Town 4] between May 2009 and February 2013. During this period, his protection visa application indicates he worked as a farmer, [and in two other occupations]. The Statement of Claims which accompanied his Protection Visa Application indicates that he maintained a low profile during this period, and that after work, he would go "*straight home every evening*". His protection visa application states he did not live a "*normal life*" or socialise and that he lived in fear. His protection visa application states that the Sri Lankan Police would be able to find him anywhere in Sri Lanka.
79. While the applicant now says that he lived in Trincomalee in Sri Lanka's Eastern Province from around 2008, until around late 2009, I have not accepted these claims.
80. The applicant's 2016 submission portrays the Sri Lankan security services as effective and efficient. They are said to have "*highly sophisticated intelligent and advanced*" investigative skills and furthermore, they are said to be ruthless in the execution of their role, commonly resorting to "*intimidation, threatening and violence in order to extract the information*" and

using “*brutal interrogation techniques*”. If this picture of the security forces is correct though, it raises the obvious question of how this applicant was able to live in Sri Lanka between 2007, when he says he escaped from detention, and 2013 when he departed for Australia. In his protection visa application and at interview, the applicant claimed he was in hiding during these years. However, as I have summarised above, on his own evidence, and event taking into account his revised claims, during this period he largely lived in southern Sri Lanka in various localities located in the Southern and Western Provinces. These areas were not affected by fighting associated with the civil war and were under the control of the Government during this entire period. He resided in these southern locations with his wife and child and while living there he used his own name. He was employed in a variety of roles including as a farmer, [and in two other occupations]. In my view, this hardly describes a person who was living in hiding.

81. At interview, the applicant asserted that during this period he lived in rented accommodation, and that the houses he lived in were rented in the name of his wife. He said that for this reason, the authorities in Sri Lanka did not know where he lived. This explanation is, in my view, very unpersuasive since the applicant lived with his wife and daughter throughout this period. In this context, I note that he has provided a copy of his daughter’s Birth Certificate. This Birth Certificate indicates that his daughter was born in a government hospital in [Town 2] in [year]. The Birth Certificate identifies the applicant as the father using his full name, and notes that his daughter’s birth was registered with the Sri Lankan authorities. Furthermore, given that the applicant says he was residing with his family during this period, it would seem that the Sri Lankan authorities would have known he was living and working in [Town 2] at this time. On its face, this document would seem to suggest that this applicant was able and willing to use his own name in interactions with elements of the Sri Lankan State and that he was living openly in [Town 2] [around this time], rather than being in hiding.
82. This applicant asserts he was wanted for serious crimes for the six years between August 2007 and his departure in early 2013. However, it seems doubtful that if a person was being sought by the authorities during this period, that he could have lived in Sri Lanka for six years without the awareness of the Sri Lankan Police, or other authorities, especially given the “*highly sophisticated intelligent and advanced*” investigative skills reported in the applicant’s submission. In this context, I note that he says his friend (F1) who he says was also wanted by the Government in connection with this issue, had been identified and detained by 2008, within 12 months of their escape.
83. In my view, all of these factors cast real doubt on the applicant’s claims about living in hiding. Nevertheless, I have accepted that the applicant was arrested and charged with serious crimes, and that he escaped from custody. The new Court documents provided in Annexure A describe the applicant as having escaped custody and having been “*absconding since then*” and I have already noted that attempts were made to find him by village officials and the Sri Lankan Police. In the circumstances, even taking into account the concerns I have discussed above, I am satisfied that the applicant was in hiding during this period.
84. **Summary:** Overall, I have accepted many of the applicant’s revised claims about this period of his life including that he was arrested in 2007, charged with robbery, and escaped from custody. I accept he was subject of charges in the 2010 – 2013 and that there was a warrant for his arrest at this time.
85. Nevertheless, there are aspects of the applicant’s claims about which I am not satisfied. I do not accept the central premise of the applicant’s claims about these issues: that the charges

faced by this applicant were the result of harassment or persecution by police. On the evidence before me, I am not satisfied that the charges faced by this applicant were improper or were the result of harassment or persecution. Instead, it appears that this applicant was arrested and charged by the Sri Lankan Police due to a genuine suspicion that he committed serious criminal offences.

86. I have also not accepted that F1 and F2, who were suspected of being his accomplices, were murdered in the way he claims. Instead, I conclude that F1 was accidentally killed while assisting police in a search, as indicated in the Police/Court document and I am not satisfied that F2 was murdered.

Crew Member, People Smuggler charges

87. The applicant travelled from Sri Lanka to Australia by boat. In a Statutory Declaration dated 18 October 2016 which was provided to the Department, he claims that while he was travelling to Australia, he, and another passenger (P1), assisted the captain (C1) of the boat to steer it. The applicant asserts that his assistance in steering the boat was incidental, and only occurred because he feared it was unsafe to proceed when C1, who was the sole crew member of the boat, was tired. He says concern for the safety of himself and the other passengers motivated his decision to assist. Despite steering the boat while it was travelling to Australia, the applicant asserts that he was not a member of the boat's crew, nor did he receive any payment for steering the ship. After the applicant's boat arrived in Australian waters, the applicant, the other passengers and C1 were detained by Australian authorities.
88. In April 2013, the applicant says that C1, and another [number] passengers from the boat were returned to Sri Lanka. P1 was returned to Sri Lanka in March 2014. The applicant asserts that another passenger from the boat has informed him that prior to C1's departure from Australia, he (C1) informed Australian authorities that the applicant and P1 were actually crew members of the boat. The applicant denies this that this is the case.
89. The applicant also asserts that after they returned to Sri Lanka, both C1, and P1 were charged with breaches of the Sri Lankan *Immigrants and Emigrants Act*, which is legislation which regulates arrival and departure from Sri Lanka. The applicant claims that in Sri Lanka, he too is wanted in connection with breaches of the *Immigrants and Emigrants Act*, and that if he is returned to that country, he would face charges in relation to this issue.
90. As evidence for these claims the applicant has provided copies of three documents. These were:
- First document: from [Court 2] in Negombo related to Case [Number] which identified that the [number] passengers who were returned to Sri Lanka would be charged for offences relating to the *Immigrants and Emigrants Act*.
 - Second document: Report about P1's involvement as a crew member, and the charges he subsequently faced in Sri Lanka.
 - Third document: 2014 petition, filed by P1's wife to the [Town 5] Court, requesting for P1 to be released on bail.
91. In 2023, the applicant provided further documents about this issue as part of Annexure A.
92. I have reviewed the Sri Lankan documents provided about this issue. The first document indicates that:

- P1, and another person named '[Name A]' were crew members of a boat that took [number] persons from Sri Lanka to Australia in 2013 in breach of the *Immigrants and Emigrants Act*.
 - That upon return to Sri Lanka, [smaller number] passengers of the boat were identified by the Sri Lankan authorities. These persons are to be charged with breaches of the *Immigrants and Emigrants Act*. A
93. The second document indicates that:
- P1 was identified as a crew member of the boat and has been charged with offences related to aiding and abetting the other passengers to travel to Australia. A person named '[Name A]' was also a crew member.
94. The third document indicates that:
- P1 had been arrested [in] 2014 after his return to Sri Lanka. After he had been imprisoned on remand for six months, his wife submitted a petition that he be released on bail pending finalisation of his court matter.
 - The Sri Lankan court had granted bail to P1 due to his lack of previous convictions
95. The applicant says that the person identified as '[Name A]' on the boat is actually him, and that '[Name A]' is simply a misspelling of his name, '[similar name]'. As evidence for this claim, he asserts that he was one of only [few] Sinhalese persons on the boat, and none was named '[Name A]'. He says the remaining passengers were all Tamils. He says Tamil speakers could not pronounce his name correctly. He says that he has consistently informed Australian authorities of his assistance driving the boat on the way to Australia, an assertion I accept. He says that if returned to Sri Lanka, he, like P1, would face charges for aiding and abetting passengers travelling to Australia in breach of the *Immigrants and Emigrants Act*. In his Statutory Declaration, the applicant asserts that he is not a people smuggler, was not a crew member, and that this is a false charge. He says that because of this false charge, he would be at risk of torture and mistreatment if he returned to Sri Lanka. He says that he would not be granted bail due to his earlier difficulties with police in 2007.
96. Country information does indicate that persons associated with people smuggling ventures face charges under the *Immigrants and Emigrants Act* in Sri Lanka¹³. The documents provided do indicate that P1 faced charges associated with aiding and abetting breaches of the *Immigrants and Emigrants Act* when he was returned from Australia.
97. The applicant has not provided any supporting evidence for his claim that there was no other person named '[Name A]' on the boat. However, I note that other court documents provided in 2023, refer to the applicant by this name and link him to offences under the *Immigrants and Emigrants Act*.
98. Overall, I have doubts about the applicant's claims. I accept that he drove the boat that came to Australia. I am satisfied that the Sri Lankan authorities are aware that this applicant was on the boat and that he drove the boat. I accept the Sri Lankan authorities suspect he was

¹³ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Report - Sri Lanka", 16 February 2015, CISEC96CF1164; & Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report - Sri Lanka", 18 December 2015. CISEC96CF14143; Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – 24 January 2017" CISED50AD105; Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – 23 May 2018" CIS7B839411064; Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244; Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report - Sri Lanka', 23 December 2021, 20211223094818

part of the boats crew. I have considered his explanations for why he drove the boat, but I found them to be unpersuasive. He has not satisfied me he was not a member of the boats crew. I am not satisfied by the applicant's assertions that these were false charges and I conclude that the Sri Lankan authorities' interest in him for these matters is genuine.

Special Forces

99. The applicant now asserts that in 1999 he enlisted in the Sri Lankan Army Special Forces and, after completing a year of training, that he participated in the civil war from 2000, serving in the military for the next three years. He says that during his period of service with the army, he was demoted and disciplined due to giving his subordinates excessive punishment. He says that after a period of leave, he decided not to return to the Army. He feared returning to Sri Lanka where he would be identified as a deserter.
100. The applicant has not provided any independent supporting evidence for his claim to have been a former special force soldier, or that he deserted. When he arrived in this country, he did not disclose any military service¹⁴, and denied that he had receiving training in preparation for conflict, or that he had participated in armed conflict or fighting. In his SHEV Application he denied serving in a military force or undergoing military training¹⁵.
101. Nevertheless, I note that the third-party information refers to the applicant as having 'escaped' from the special forces and the applicant now asserts that he did serve.
102. I have considered this issue carefully. I accept the applicant served in the Sri Lankan Army Special Forces between 1999 and 2003. However, I note that the applicant has not provided any supporting evidence for his claim to have deserted from the Army. None of the Court documents he has provided describe him in these terms or indicate that he was wanted by the Sri Lankan authorities for this reason. Furthermore, even though I have accepted he went into hiding after 2007, on his own evidence, the applicant lived Sri Lanka, in his hometown of [Town 1] from the time he left the Army (around 2003) until 2007 without problems. It would seem that that the applicant was not facing any difficulties during this time. In the circumstances, I am not satisfied that the applicant deserted from the Sri Lankan Army or that he was ever of interest for this reason. I am not satisfied he would be considered a deserter upon return to Sri Lanka. I will not consider this issue further.

Refugee assessment

103. 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

104. Under s.5J of the Act 'well-founded fear of persecution' involves a number of components which include that:

¹⁴ 2013 interview material.

¹⁵ SHEV Application – Part B, Question 4, & Part C, Question 27

- 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.

105. I have found that this applicant is a Sri Lankan citizen, and that Sri Lanka is his receiving country. I have accepted his claim that in Sri Lanka lived in the south, throughout most of his life. I accept his claim that his wife and children reside in Colombo. I conclude that if returned to Sri Lanka, he would seek to return and reside with his family in Colombo, as he did previously.

Illegal departure, Failed Asylum seeker, Data Breach

106. The applicant has claimed that he fears harm because of his illegal departure from Sri Lanka and his attempt to claim asylum in Australia. The applicants argued that if returned to Sri Lanka he would face a real chance of being detained due to his cumulative profile. However, above, I have found that he is not of any ongoing interest to anybody in Sri Lanka and so I conclude that if returned to that country he would return without a profile of interest

107. Sri Lanka has a population of 21 million and ethnicity is a source of tension in Sri Lanka and the Government of Sri Lanka¹⁶. This is unsurprising given the long running civil war in Sri Lanka was fought along ethnic lines with the minority Tamil community seeking to establish a separate state. According to a recent census in Sri Lanka, ethnic Sinhalese comprise 74.9 per cent of Sri Lanka's total population while Tamils are the second largest ethnic group in Sri Lanka constituting approximately 15% of the population¹⁷. The Sri Lankan Constitution provides that 'no citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any such grounds'¹⁸.

¹⁶ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Report - Sri Lanka", 16 February 2015, CISEC96CF1164; & Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report - Sri Lanka", 18 December 2015. CISEC96CF14143; Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – 24 January 2017" CISEDB50AD105; Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – 23 May 2018" CIS7B839411064; Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244; Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report - Sri Lanka', 23 December 2021, 20211223094818

¹⁷ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Report - Sri Lanka", 16 February 2015, CISEC96CF1164; & Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report - Sri Lanka", 18 December 2015. CISEC96CF14143; Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – 24 January 2017" CISEDB50AD105; Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – 23 May 2018" CIS7B839411064; Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244; Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report - Sri Lanka', 23 December 2021, 20211223094818

¹⁸ Document: (h); Department of Foreign Affairs and Trade (DFAT), "DFAT Country Report Sri Lanka - 3 October 2014", DFAT, 03 October 2014, CIS2F827D91259; Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information

108. I accept that the applicant departed Sri Lanka by boat without passing through normal Sri Lankan immigration and customs checks. I note that such a departure in Sri Lanka is a breach of ss.34 and 45(1)(b) the Immigrants and Emigrants Act (1949) which governs exit and entry from Sri Lanka¹⁹. I have also accepted that the applicant is of interest to the Sri Lankan authorities for other breaches of the Immigrants and Emigrants Act (1949).
109. Country information indicates that upon return to Sri Lanka, the applicant will likely be identified at the airport. He will likely undergo an investigative process in order to establish his identity. This will likely involve a range of Sri Lankan agencies including Department of Immigration and Emigration, the State Intelligence Service and the Criminal Investigation Department and, at times, the Terrorism Investigation Department who will interview the applicants in order to determine identity and whether they are subject to any outstanding criminal matters²⁰. This processing occurs in arrival groups at the airport and can take several hours. During this time, the applicants can expect to be held at the airport while the entire cohort of returnees is interviewed²¹. These processes are standardised and are applied to all returnees regardless of ethnicity or religion²².
110. DFAT reporting indicates the Sri Lankan government has directed that all passengers of people smuggling ventures be charged and appear in a court closest to where the offence occurred. The frequency of court appearances depends on the magistrate and vary widely, but those charged are required to return to court when their case is being heard, or if summonsed as a witness in a case against the facilitator or organiser of a people smuggling venture. There can be lengthy delays in court processes²³.

Report - Sri Lanka", 18 December 2015 CISEC96CF14143; Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – 24 January 2017", 24 January 2017, CISED50AD105

¹⁹ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Report - Sri Lanka", 16 February 2015, CISEC96CF1164; & Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report - Sri Lanka", 18 December 2015. CISEC96CF14143; Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – 24 January 2017" CISED50AD105; Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – 23 May 2018" CIS7B839411064; Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244; Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report - Sri Lanka', 23 December 2021, 20211223094818

²⁰ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Report - Sri Lanka", 16 February 2015, CISEC96CF1164; & Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report - Sri Lanka", 18 December 2015. CISEC96CF14143; Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – 24 January 2017" CISED50AD105; Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – 23 May 2018" CIS7B839411064; Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244; Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report - Sri Lanka', 23 December 2021, 20211223094818

²¹ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Report - Sri Lanka", 16 February 2015, CISEC96CF1164; & Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report - Sri Lanka", 18 December 2015. CISEC96CF14143; Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – 24 January 2017" CISED50AD105; Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – 23 May 2018" CIS7B839411064; Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244; Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report - Sri Lanka', 23 December 2021, 20211223094818

²² Department of Foreign Affairs and Trade (DFAT), "DFAT Country Report - Sri Lanka", 16 February 2015, CISEC96CF1164; & Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report - Sri Lanka", 18 December 2015. CISEC96CF14143; Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – 24 January 2017" CISED50AD105; Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – 23 May 2018" CIS7B839411064; Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244; Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report - Sri Lanka', 23 December 2021, 20211223094818

²³ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Report - Sri Lanka", 16 February 2015, CISEC96CF1164; & Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report - Sri Lanka", 18 December 2015. CISEC96CF14143; Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – 24 January 2017"

111. Penalties for leaving Sri Lanka illegally in most cases result in a fine. DFAT reports that the Attorney-General's Department claims no mere passenger on a people smuggling venture has been given a custodial sentence for departing Sri Lanka illegally. However, fines are issued to deter people from departing illegally in the future. Fine amounts vary from approximately 25 AUD for a first offence to approximately 1,670 AUD. A guilty plea will attract a fine, which can be paid by instalment, and the defendant is free to go. Where a passenger returnee pleads not guilty, the magistrate will usually grant bail on the basis of personal surety or guarantee by a family member. Where a guarantor is required, returnees may need to wait for the guarantor to come to court. Anecdotal evidence suggests that most passengers of people smuggling ventures spend many years on bail, and that most are free to go after paying a fine²⁴. Bail is usually granted to voluntary returnees. Bail conditions are discretionary and can involve monthly reporting to police²⁵. Some returnees from Australia have been charged with immigration offences and with criminal offences allegedly committed before departure²⁶.
112. DFAT assesses that refugees and failed asylum seekers face practical challenges to a successful return to Sri Lanka due to the expenses incurred to undertake their outward journey, difficulty finding suitable employment and reliable housing and delays in obtaining official documentation²⁷. Refugees and failed asylum seekers have also reported social stigma from their communities upon returning to some communities as people resent the financial support provided to refugee returnees²⁸. DFAT assesses that returnee may also face some societal discrimination upon return to their communities, which could affect their ability to

CISED50AD105; Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – 23 May 2018" CIS7B839411064; Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244; Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report - Sri Lanka', 23 December 2021, 20211223094818

²⁴ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Report - Sri Lanka", 16 February 2015, CISEC96CF1164; & Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report - Sri Lanka", 18 December 2015. CISEC96CF14143; Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – 24 January 2017" CISED50AD105; Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – 23 May 2018" CIS7B839411064; Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244; Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report - Sri Lanka', 23 December 2021, 20211223094818

²⁵ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Report - Sri Lanka", 16 February 2015, CISEC96CF1164; & Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report - Sri Lanka", 18 December 2015. CISEC96CF14143; Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – 24 January 2017" CISED50AD105; Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – 23 May 2018" CIS7B839411064; Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244; Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report - Sri Lanka', 23 December 2021, 20211223094818

²⁶ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Report - Sri Lanka", 16 February 2015, CISEC96CF1164; & Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report - Sri Lanka", 18 December 2015. CISEC96CF14143; Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – 24 January 2017" CISED50AD105; Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – 23 May 2018" CIS7B839411064; Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244; Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report - Sri Lanka', 23 December 2021, 20211223094818

²⁷ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Report - Sri Lanka", 16 February 2015, CISEC96CF1164; & Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report - Sri Lanka", 18 December 2015. CISEC96CF14143; Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – 24 January 2017" CISED50AD105; Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – 23 May 2018" CIS7B839411064; Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244; Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report - Sri Lanka', 23 December 2021, 20211223094818

secure housing and employment. DFAT further assesses that continued surveillance of returnees contributes to a sense of mistrust of returnees within communities²⁸.

113. The applicant has a copy of his Sri Lankan Birth Certificates and an expired Sri Lankan Drivers Licence. I am not satisfied the applicant would be unable to establish his identity if returned to Sri Lanka.
114. The problems faced by returning asylum seekers to Sri Lanka are the kind of everyday problems faced by all persons who have spent lengthy periods overseas and thousands of asylum seekers have returned to Sri Lanka in the last decade²⁹. In the circumstances, I am not satisfied that the applicant would face real chance of harm due to his attempt to claim asylum in Australia.
115. In any case, I conclude that upon return to Sri Lanka this applicant would be identified at the airport. As he departed Sri Lanka illegally, I accept that after he was identified he would very likely face charges arising from his breach of the Immigrants and Emigrants Act. Taking into account my other findings about his past in Sri Lanka and suspicions about his involvement in people smuggling, I conclude that upon return, he is also likely to face charges linked to people smuggling offences, and further charges associated with his escape from custody, and robbery. Most likely, this would result in the applicant being arrested immediately upon his arrival in Sri Lanka. He would probably be held on remand, likely in a prison, and he could expect a lengthy period of pre-trial detention. Due to his escape from custody in 2007 and illegal departure in 2013, he is unlikely to be granted bail. Depending on the outcome of any trial, he may also face a prison sentence.
116. I have found that the applicant is of genuine interest to the Sri Lankan authorities for breaches of Sri Lankan immigration law. The evidence before me indicates that the provisions of Sri Lankan immigration law are laws of general application that apply to all Sri Lankans equally. The law is not discriminatory on its terms, nor is there country information before me that indicates that the law is applied in a discriminatory manner or that it is selectively enforced³⁰. Accordingly, I am not satisfied that any process the applicant may face on return to Sri Lanka because of his illegal departure would constitute persecution for the purpose of the Act.

²⁸ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Report - Sri Lanka", 16 February 2015, CISEC96CF1164; & Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report - Sri Lanka", 18 December 2015. CISEC96CF14143; Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – 24 January 2017" CISED850AD105; Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – 23 May 2018" CIS7B839411064; Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244; Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report - Sri Lanka', 23 December 2021, 20211223094818

²⁹ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Report - Sri Lanka", 16 February 2015, CISEC96CF1164; & Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report - Sri Lanka", 18 December 2015. CISEC96CF14143; Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – 24 January 2017" CISED850AD105; Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – 23 May 2018" CIS7B839411064; Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244; Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report - Sri Lanka', 23 December 2021, 20211223094818

³⁰ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Report - Sri Lanka", 16 February 2015, CISEC96CF1164; & Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report - Sri Lanka", 18 December 2015. CISEC96CF14143; Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – 24 January 2017" CISED850AD105; Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – 23 May 2018" CIS7B839411064; Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244; Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report - Sri Lanka', 23 December 2021, 20211223094818

117. The applicant also of interest to the Sri Lankan authorities for other serious offences including robbery and more serious breaches of Sri Lankan immigration law. I have not accepted the applicant's claims that these charges are the result of police harassment or persecution. Rather, I have concluded that the Sri Lankan authorities have a genuine reason for suspecting him of serious criminal and immigration offences.
118. This applicant is a Sinhala, and there is no evidence that Sri Lankan criminal law is applied against Sinhala in a discriminatory manner or selectively enforced. The applicant has not claimed reasons of race, religion, nationality, membership of a particular social group or political opinion as a reason to fear harm in Sri Lanka. He does not claim that the charges against him are for any of these reasons. I am not satisfied that any arrest, detention, court proceedings or imprisonment he faced in Sri Lanka would be for one of these reasons. I am not satisfied that any detention, or court proceedings or imprisonment arising from his breaches of Sri Lankan immigration or criminal law would constitute persecution for the purpose of the Act. The applicant does not have a well-founded fear of persecution for these reasons.
119. This applicant has claimed that he would face harm in Sri Lanka due to a 2014 Data breach by the Department. During his protection visa interview, when asked how the disclosure of this information could affect him if returned to Sri Lanka, the applicant indicated his belief that the Sri Lankan Government already knew about his claim for asylum and would take him into custody because there was an outstanding warrant for his arrest, and he would be detained.
120. I have already accepted that the applicant will face arrest upon arrival in Sri Lanka. Furthermore, the information released during the 2014 data breach was not easily accessible, was only available for a short time and included the applicant's name, date of birth, gender, nationality and some details about their period of immigration detention in Australia. No information about any specific protection claims made by him was available during the breach.
121. In my view, the data released during the breach is information that would be immediately apparent to Sri Lankan authorities should the applicant be returned to Sri Lanka (that is, information about his identity and that he had sought asylum in Australia) and does not contain any information from which the scope of the applicant's claims could be inferred. In the circumstances, I am not satisfied that the 2014 Departmental data breach would lead to this applicant facing a real chance of any harm in Sri Lanka. The applicant does not have a well-founded fear of persecution for this reason.

Refugee: conclusion

122. 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

123. 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

124. 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.

125. 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.

126. I have found that upon return to Sri Lanka the applicant will likely be detained, remanded to prison and charged with criminal offences and breaches of the *Immigrants and Emigrants Act*. Given his earlier escape from custody and subsequent flight overseas, he is unlikely to be granted bail. The justice system in Sri Lanka works slowly and he will likely face a lengthy period of pretrial detention. He may face a further period of imprisonment after trial.

127. Sri Lankan law does allow a death penalty to be imposed for convictions for murder, and drug trafficking, though no execution has occurred since 1976³¹. This applicant has not claimed he is wanted for either offence. During and immediately after the civil war in Sri Lanka, enforced disappearances and extrajudicial killings were common in Sri Lanka and were perpetrated by both sides. Numerous historical cases of extrajudicial killings remain unsolved. However, the war in Sri Lanka ended over 13 years ago and conditions have improved. DFAT does report such killing do continue to occur, but they are infrequent, and the principal victims of state violence at present are underworld figures rather than politically targeted victims³². Abductions and disappearances have also reduced substantially in Sri Lanka³³. This applicant is not involved in politics, or other controversial issues in Sri Lanka. Despite suspicions of his criminal past, he cannot be characterised as an underworld figure, and I am not satisfied that he would face a real risk of the death penalty or being arbitrarily deprived of his life.

128. In submissions the applicant argues that if detained he would face intimidation, threats and violence during questioning and that he may even face torture, if detained under the auspices of the Sri Lankan Prevention of Terrorism Act (PTA). Country information from 2017 which was provided by the applicant³⁴ indicates that in Sri Lanka during and after the civil war the justice sector was plagued by a culture of impunity for crimes committed by public

³¹ Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244; Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report - Sri Lanka', 23 December 2021, 20211223094818

³² Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244; Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report - Sri Lanka', 23 December 2021, 20211223094818

³³ Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244; Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report - Sri Lanka', 23 December 2021, 20211223094818

³⁴ The Grounds View Article

officials (security forces) and that reform efforts had stalled. This was particularly true for cases conducted under PTA which allowed those suspected of breaches to be detained indefinitely. This article also criticised the practice of using torture to obtain confessions in Sri Lanka which is said to be common. DFAT reports indicate that police in Sri Lanka routinely mistreat suspects during criminal investigations, including using torture as a way of extracting confessions. Mistreatment could range from a slap to the face to severe beatings, and, in some cases, may amount to torture³⁵. DFAT also says that torture was common in prisons³⁶.

129. Torture, where it occurs, was not confined to a particular geographic region or ethnic group, but was a problem countrywide that affected all communities, though more likely to affect the poor and marginalised, including members of criminal groups and LGBTI individuals, among others³⁷. Other country information supports the view that the Sri Lankan security forces are credibly reported to mistreat persons in custody in order to obtain confessions³⁸. The International Truth and Justice Project indicates that those suspected of terrorism offences or are linked to the Liberation Tigers of Tamil Eelam (LTTE), or who are of Tamil ethnicity are most likely to face torture³⁹. DFAT reports those arrested under the PTA, suspected terrorists, and drug dealers are particularly vulnerable to this type of mistreatment⁴⁰.
130. However, I also note that the article provided by the applicant reports that since the end of the war there has been a steep decline in the use of the PTA in Sri Lanka and that the Sri Lankan Government has declared its intent to transition away from the PTA and return to using a more traditional criminal law framework in Sri Lanka. This transition is said to reduce the likelihood that a person would face torture, since confessions given to police officers are inadmissible under Sri Lankan criminal law⁴¹. Ultimately, DFAT concludes that Sri Lankans face a low risk of torture overall and that that Sri Lankans detained by the authorities face a moderate risk of torture. This is especially the case for the poor and criminal elements, and for those who challenge or are perceived to challenge the Government.
131. There is no suggestion that this applicant would be arrested and detained under the provisions of the PTA in Sri Lanka or that he would face any charge associated with breaches of the PTA. Rather, as I have noted above, the applicant is facing charges for breaches of criminal and immigration law. According to the country information provided by the applicant this would reduce the risk of him facing torture⁴². This applicant is also not suspected of terrorism offences, or a drug dealer. He is not a Tamil and has no connection to the LTTE. He is not an opponent of the Government or a political activist. Furthermore, while

³⁵ Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244; Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report - Sri Lanka', 23 December 2021, 20211223094818

³⁶ Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244; Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report - Sri Lanka', 23 December 2021, 20211223094818

³⁷ Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244; Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report - Sri Lanka', 23 December 2021, 20211223094818

³⁸ International Truth & Justice Project Sri Lanka (ITJP), "Silenced: survivors of torture and sexual violence in 2015", 7 January 2016, CIS38A801275

³⁹ International Truth & Justice Project Sri Lanka (ITJP), "Silenced: survivors of torture and sexual violence in 2015", 7 January 2016, CIS38A801275

⁴⁰ Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244; Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report - Sri Lanka', 23 December 2021, 20211223094818

⁴¹ The Grounds View Article

⁴² The Grounds View Article

the applicant does assert, he suffered some mistreatment while detained in the past, he does not claim he was tortured.

132. I have considered this issue carefully. The applicant's profile is not amongst those who are most likely to face torture in Sri Lanka. However, I have found that he will be detained in Prison for an extended period while awaiting trial and that he may face a period of imprisonment after trial. The country information indicates that a person who are in prison, and criminals face a higher risk of torture in Sri Lanka. In the circumstances, I am satisfied that this applicant would face a real risk of torture amounting to significant harm in Sri Lanka. Furthermore, I find that there are substantial grounds for believing that this risk is a necessary and foreseeable consequence of the person being removed from Australia.

133. Section 36(2B) provides that there is taken not to be a real risk that a person will suffer significant harm in a country if:

- it would be reasonable for the person to relocate to an area of the country where there would not be a real risk that the person will suffer significant harm
- the person could obtain, from an authority of the country, protection such that there would not be a real risk that the person will suffer significant harm, or
- the real risk is one faced by the population of the country generally and is not faced by the person personally.

134. In this case, this applicant would be unable to relocate to another area of the country or obtain protection from an authority in Sri Lanka to avoid a real risk of significant harm since I have found he would be detained upon arrival and because he fears harm from agents of the state. The risk of torture is not one faced by the population of the country generally, but rather would be faced by him personally. None of the real risk qualifications listed in s.36(2B) apply in this case

Complementary protection: conclusion

135. There are 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.

Decision

The IAA remits the decision for reconsideration with the direction that:

- there are substantial grounds for believing that, as a necessary and foreseeable consequence of the referred applicant being removed from Australia to a receiving country, there is a real risk that the referred applicant will suffer significant harm.

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.