



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA19/07331

Date and time of decision: 13 November 2019 15:25:00
L Hill, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a citizen of Sri Lanka. He arrived in Australia in November 2012 and applied for a Safe Haven Enterprise Visa (protection visa) on 23 March 2017. A delegate of the Minister for Immigration (the delegate) refused to grant the visa on 11 October 2019.

Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
3. The IAA received an email from the applicant on 4 November 2019. Attached was an IAA statement. It contains a discussion on why the applicant does not agree with the delegate's decision. It reiterates and addresses the claims made by the applicant to the delegate. It is not new information and I have considered it in this review.

Applicant's claims for protection

4. The applicant's claims can be summarised as follows:
 - He is a Tamil born in Batticaloa District in the Eastern Province of Sri Lanka.
 - Arising from the civil conflict he and his family were displaced.
 - In 2005, the Sri Lankan Army (SLA) set up an army camp on land [near] his family's land. The SLA would sometimes restrict their movements, question them and check their identification.
 - a jail in [City 1] before being released with reporting requirements.
 - In 2009, he was arrested by SLA. He was held for two days before being released.
 - In 2011, on a visit to his home village, he was detained for a short period during a round up conducted by the SLA.
 - In 2012, a Tamil National Alliance (TNA) candidate approached him and others and asked if they wanted to join and help lobby for the TNA. During the 2012 election he did volunteer work for the TNA. He would lobby, put up posters, provide information, talk to people about what was needed and what the TNA intended to do. He also helped on Election Day.
 - In September 2012, he and some other boys were pulled into a white van by unknown people. He didn't know who the people were but believed because of his involvement with the TNA they were from the Sri Lankan government. He was held for approximately two to three hours before he was pushed out of the white van.
 - After this event he started to look for ways to leave the country. In October 2012, he departed Sri Lanka by boat and travelled to Australia.
 - Recently, his brother, "S" has gone missing while working in [Country].
5. The applicant fears he will be harmed including being physically assaulted, abducted, arrested or murdered on return because of his ethnicity, actual and/or imputed political opinion as a

Tamil male who resided in a majority Tamil area in Eastern Province, his past experiences with the Sri Lankan authorities and his support to the TNA. He fears this harm will be inflicted on him by the Sri Lankan authorities including the CID, police, SLA and people who travel in white vans. He also fears he will be perceived to have lots of money because he will be returning from Australia.

Refugee assessment

6. 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

7. Under s.5J of the Act 'well-founded fear of persecution' involves a number of components which include that:
 - the person fears persecution and there is a real chance that the person would be persecuted
 - the real chance of persecution relates to all areas of the receiving country
 - the persecution involves serious harm and systematic and discriminatory conduct
 - the essential and significant reason (or reasons) for the persecution is race, religion, nationality, membership of a particular social group or political opinion
 - the person does not have a well-founded fear of persecution if effective protection measures are available to the person, and
 - the person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour, other than certain types of modification.
8. I accept, on the evidence the applicant has provided that his identity is as claimed. I accept the applicant is a Tamil male from the Eastern Province of Sri Lanka, and a Sri Lankan national. Sri Lanka is the receiving country for the purpose of this assessment.
9. The applicant claimed, and I accept, that arising from the civil conflict he and his family were displaced from their family home a number of times. In 2005, the SLA set up an army camp near the family's home. The SLA sometimes placed restrictions on his and his family's movements. They were sometimes questioned and their identification checked. These aspects of the applicant's claims have been generally consistent between his protection visa application, interview and the [Organisation 1] report.
10. The applicant claimed, and I accept, that in 2005 he left his home village and travelled to [City 1] where he resided and worked in a [Workplace] as [an Occupation]. The area he resided and worked in was a predominately Sinhalese area. He registered his address with the local authorities. I accept that on a number of unspecified occasions when travelling between areas he was stopped and his identification checked by the Sri Lankan authorities. I accept in August 2008 he was detained by the Sri Lankan authorities. He was travelling on a bus when

it was stopped by the police and SLA. There was heightened security in [City 1] at that time because there had been a bomb blast in Colombo. The police and SLA came on the bus and checked his identification. He and another Tamil and Muslim were taken off the bus and detained. He believes he was detained because he was a Tamil and they suspected he was a LTTE member and had something to do with the bomb blast. This aspect of the applicant's evidence has also been credibly presented throughout his interactions with the Department.

11. The applicant claimed, and I accept, that after he was detained he was taken to jail in [City 1]. He was placed into a room. He was held for around eight days during which he was regularly questioned, forced to do push ups and physically and sexually assaulted by police, CID and plain clothes officers. He was released after a letter was provided confirming that he was of a good character and his reasons for residing and working in [City 1]. The applicant's description of the event in 2008, including the harm he was subjected to while detained, has been generally consistent between his protection visa application and [Organisation 1] report. He also provided a convincing and plausible account of this event at the protection visa interview. A copy of the hand written letter, which he stated was provided to the Sri Lankan authorities in order for him to be released, has also been provided. The verbal translation of this letter at the interview further corroborates this aspect of his evidence.
12. In contrast, the applicant's evidence regarding his conditions on release has oscillated. In the [Organisation 1] report, which was prepared in 2015, he stated that on release he was required to sign a piece of paper written in Sinhalese and he was asked to report to the jail for the next three months. In the protection visa statement, which was prepared in 2016, he stated that on release his uncle signed and he agreed to attend the police station and sign in once a month for the next six months. He returned to his home village in the Eastern Province in October 2008 where he continued to report. At the protection visa interview, the applicant indicated that he had to sign in every month and he did not return to his home village for at least a year and a half after the event in 2008.
13. I am prepared to accept that the applicant was released after he and his uncle signed a piece of paper and that a condition of his release was that he had to report each month at the police station. Furthermore, as claimed by the applicant in his protection visa statement, I am prepared to accept that these reporting requirements extended beyond six months after this event. As discussed above, his evidence has varied however he has consistently asserted that on release in 2008 a piece of paper was signed and he had reporting requirements. Furthermore, there is country information before me such as the 2009 UK Home Office report to suggest that at that time it was not uncommon for reporting requirements to be a condition of release.
14. I am not satisfied that he was required to report after he returned to his home village in Eastern Province. In the [Organisation 1] report he stated that between 2008 and 2011, he continued to work in [City 1] and returned to his home village at the end 2011. Similarly, at the protection visa interview, the applicant initially indicated that after the 2008 event he stayed in [City 1] and didn't return to his home village for two years. Later in the interview he stated that it had been one and a half years before he returned to his home village. The applicant's evidence that he returned to his home village and reported does not correlate with the timeframes in his [Organisation 1] report or his protection visa interview, and I do not accept he was required to report on return to his home village.
15. The applicant has not claimed that when he attended the police station to report or during his period of reporting he was ever detained, arrested or harmed and I am not satisfied that he was. Nor has he claimed that his reporting requirements were extended. Rather, I am

satisfied that he reported to the police station in [City 1], once a month as required and that by January 2009, six months after the event in 2008, his reporting requirements ceased.

16. In the [Organisation 1] report, the applicant claimed that in 2009 he was arrested by SLA. The SLA had been collecting statistics of how many people were in the area. When they were doing this enquiry he gave the wrong answer. While detained he was questioned and physically and sexually assaulted. He was released after a letter was provided.
17. The applicant's evidence regarding his description of the event has varied. While he made mention of this event in [Organisation 1] report, he made no mention of it in his protection visa statement. He was assisted by and interpreter and a volunteer from a specialist refugee legal clinic to prepare his statement. Nonetheless, he did confirm the substantive details of this event when they were put to him by the delegate at the protection visa interview. However, he stated that the event in 2009 had occurred in his home village in Eastern Province. The delegate put to him that this aspect of his evidence was inconsistent with his evidence in his [Organisation 1] report; that being that between 2008 and 2011 he continued to work in [City 1]. It was also different to his evidence earlier in the protection visa interview in which he had stated that after the event in 2008 he had not returned to his home village for two to three years (2010/2011). He responded that that it was not two to three years; it was one and a half years before he returned, it was something like that. He stated after the event in 2009 he returned to [City 1].
18. I am prepared to accept the substantive details of this claim, that an unspecified time 2009 he was arrested by the SLA. He was held for two days. While detained he was questioned and physically and sexually assaulted. He was released after a letter was provided. Having considered all the evidence before me, including the absence of any specific mention of where this event took place in the [Organisation 1] report and his evidence at the protection visa interview, I am prepared to accept that it took place in his home village in the Eastern Province.
19. At the protection visa interview, the applicant claimed and I accept that after the event in 2009 he returned to [City 1]. He continued working in the [Workplace] as [an Occupation]. He would sporadically return to his home village to visit his family. In 2011, on a visit to his home village, he was detained for a short period during a round up conducted by the SLA. He was released after enquiries showed he was "ok".
20. The applicant's evidence was that on each occasion in 2009 and 2011 he was detained for no more than two days by the Sri Lankan authorities before being released. He has not claimed that on either occasion he was charged with an offence, he had to sign any documents or that he had reporting requirements or bail as a condition of his release, and I am not satisfied that he did. While I accept these events were difficult for the applicant his release on each occasion suggests to me that the Sri Lankan authorities did not hold any serious suspicions about him. If they did, the country information in the referred materials such as DFAT and UK Home Office indicates he would have been at a real and serious risk of being subjected to arrest, period of rehabilitation or indefinite detention, as was the case for many Tamils who were suspected of assisting, supporting or being a member of the LTTE at that time. Beyond these initial suspicions for being Tamil, I am not satisfied that the applicant were otherwise of any interest to the Sri Lankan authorities at that time.
21. In relation to the two occasions that the applicant was detained and sexually assaulted, the applicant has not claimed to have known the perpetrators (other than them being from the

Sri Lankan authorities) or that he feared any reprisals. I am satisfied that these were opportunistic attacks by unidentified individuals.

22. The applicant claimed that prior to his departure he was a supporter of the Tamil political party, the Tamil National Alliance (TNA). When he returned to his home village he would attend TNA meetings. He became increasingly interested in equal rights for Tamil people, particularly following his detention in 2008.
23. The applicant claimed that during one of his home visits sometime between 2008 and 2010, "M" who was the leader of the neighbouring village and a member of the Provincial Council of Eastern Province asked for his help. He asked him to go to the villagers and ask them what they needed. He volunteered to do this as he wanted to help other people. He has provided a letter from M confirming that he is "an active supporter of the TNA".
24. The applicant claimed that in 2012, "P" who was a TNA candidate approached him and others who had been scouts and asked if they wanted to "join and help them lobby for the TNA". He felt strongly for the Tamil rights movement. Being involved in this group enabled him to know what was happening with Tamil people. During the 2012 election he did volunteer work for the TNA in his home village. He would lobby, put up posters, provide information, talk to people about what was needed and what the TNA intended to do. He also helped on Election Day. He stated that the Sri Lankan government views the TNA as a political threat and did not want him working for them. TNA fights for equal rights for young people and the Sri Lankan government dislikes them.
25. The applicant claimed that in September 2012 while undertaking work for the TNA with some other boys in a neighbouring village they were pulled into a white van by unknown people. In the van they were physically assaulted. He didn't know who the people were but believed because of his involvement with the TNA they were from the Sri Lankan government. They asked them why they helped the TNA. They were told this was not their country. He believes they were held in the white van for approximately two to three hours. Eventually he was pushed out of the white van and was taken to hospital. He has not seen the other boys who were taken with him again. He was afraid to report this event. M came and visited him in hospital and suggested it was not a good time to make a complaint as anything to do with the white van was CID or Sri Lanka government. It would be too risky.
26. The applicant claimed after he was released from hospital he continued to work with the TNA until the election was over. He was scared and started to look for ways to leave the country. He asked an agent to assist him to organise a visa to another country. He gave his passport and money to this agent but the agent ran away. His brother in law informed him that people were going by boats to other countries. His brother in law provided him with money to leave. In October 2012, he departed Sri Lanka by boat.
27. The applicant's claims regarding his involvement in political activities and the subsequent harm he faced on account of his activities has evolved over time.
28. Approximately seven weeks after his arrival in Australia, the applicant participated in an entry interview. There is a recording of this interview before me. The applicant was asked to briefly provide the reasons for leaving Sri Lanka. He referred to having worked for a political Tamil movement group and arising from this people in a white van had gone looking for them. He was specifically asked what the name of the political group was. He appears to pause before stating that it was the Tamil United Group. This inconsistency was put to the applicant at the protection visa interview. He responded that he had mentioned the TNA. I have listened to

the recording and the Tamil United Group was provided as part of the translation for the applicant's evidence. Aside from the applicant's assertions, there is no evidence before me to suggest that this aspect of the applicant's evidence was interpreted incorrectly, and I do not accept it was. I find it difficult to accept that had he provided support to the TNA for a period of at least four years as claimed he would not provide the correct name of this group when he an opportunity to do so. Furthermore, he made no mention of the more significant aspect of his claims of abduction and detention by unknown people in a white van for approximately two to three hours in the month prior to his departure at the entry interview. I have considered the applicant's explanation in the protection visa statement that he "did not tell the immigration officer everything about [his] experiences in Sri Lanka when he arrived in Australia as [he] only had a quick 35-40 minute interview" however I am unpersuaded by it. The entry interview recording is approximately one hour in length and I am satisfied that within this time the applicant was given an opportunity to provide this information. Had his claims regarding his abduction had any credible basis he would have provided it, even if only to briefly mention it when he had an opportunity to do so, he did not.

29. The applicant's evidence regarding when the election occurred was also problematic. In the protection visa interview, he stated that he was abducted in September 2012, and that after this event he continued "working with the TNA until the election was over". However, when he was asked at the protection visa interview when the election took place, he stated "2012 August". He was then asked whether he had any further involvement with the TNA after this. He stated "no after that came here". He was asked whether he had been involved in any further activities since that time, he stated he had not. I find it difficult to accept that he would not be clearer about when the election was held given the significance of the events which he claimed to have taken place around this time.
30. I have considered the three letters which have been provided to corroborate these aspects of his claims and I make the following observations. None of the letters refer to his substantive claim that he was abducted by unknown people in a white van, rather all the letter similarly state that armed/unknown groups have "searched for him". While two of the letters appear to confirm his claim that he was supporter of the TNA they make no mention of what his support to the TNA involved or why in their view he is considered a strong and/or active supporter of the TNA. More specifically, in the letter dated [December] 2012, the writer states that "[he is aware [that the applicant] lives in hideout since [date]-2012]" which appears contrary to the applicant's evidence at the protection visa interview that he continued to reside and worked in his home village up until the time of his departure. He also made no mention of being in hiding in his protection visa application and statement or [Organisation 1] report. The letter dated [September] 2012, apart from not mentioning the applicant's abduction, more significantly it makes no mention of this writer's visit to the applicant when he was in hospital recovering from the injuries sustained during the abduction, claims made by the applicant in his protection visa statement. The letter dated [February] 2015 states that the applicant "worked hard for the victory of the TNA during the election that was held on April 2010" and appears to be at odds with the applicant's evidence at the protection visa interview that he had not assisted TNA at elections until in 2012 . The applicant also makes no specific mention of his support to the TNA in any election in 2010 in his protection visa statement or [Organisation 1] report. Finally, when these concerns are cumulatively considered against my other concerns, I give them no weight.
31. Finally, apart from the concerns above, I found that applicant's evidence at the protection visa interview about his past support to the TNA and his subsequent abduction on this basis to be unconvincing and not indicative of a lived experience. Furthermore, I find it to be more

than a mere coincidence that such events happened in the month preceding his travel by boat to Australia.

32. In light of the foregoing, I am not satisfied that the applicant has been a truthful witness regarding his past support to the TNA in Sri Lanka. I am not satisfied that the applicant supported and/or had any involvement with the TNA. Nor am I satisfied that the claims that he was abducted by unknown persons in a white van and that he has been threatened and his whereabouts sought by any groups or individuals are true.
33. I accept however that prior to his departure he did try and seek the assistance of an agent to travel overseas. This agent did not assist him and instead kept his passport and money. Unlike the applicant's claims discussed above, this aspect of his claims has been consistent throughout the applicant's interactions with the Department including at his entry interview. The applicant has not claimed that he fears harm on this basis and nor am I satisfied that he will suffer any repercussions or harm on return.
34. At the protection visa interview, the applicant claimed that his brother, S is missing. He was asked when his brother went missing. He stated recently. Around six month ago. He didn't know the exact time. He was asked what his brother was doing at the time he went missing. He stated that he had been working in [Country]. He was unable to provide any more discernible details regarding this claim, and I am not satisfied on the nebulous details he has provided that it is true.
35. The applicant has claimed he fears being physically assaulted, abducted, arrested or murdered on return because of his ethnicity, actual and/or imputed political opinion as a Tamil male who resided in a majority Tamil area in Eastern Province, his past experiences with the Sri Lankan authorities, the perception he has lots of money because he has resided in Australia and other matters which I have found not to be credible. The delegate also considered whether the applicant may face harm on return as a failed asylum seeker who departed illegally.
36. The applicant claimed, and I accept, that since his arrival in Australia, the Sri Lankan government has been made aware that he is in Australia by his family. His family provided this information when the GS (Grama Sevaka/Niladhari) and police in his home village were recently preparing voting lists. The applicant claimed that he is afraid that on return the Sri Lankan authorities will wrongly think he has lots of money. There is no independent information before me to suggest that individuals who have spent an extended period outside of Sri Lanka on return are perceived to have lots of money or to be wealthy and harmed including being extorted by anyone including the Sri Lankan government. I do not accept these claims.
37. I accept the applicant is a [age] year old Tamil male, who has resided in a majority Tamil area in the Eastern Province. Country information published by the UK Home Office supports that a person being of Tamil ethnicity from the North or the East would not in itself warrant international protection. There is no independent information before me, absent any other concerns to suggest that a person's age or gender or residence in a majority Tamil area in the Eastern Province they would any longer be would imputed with an adverse profile or perceived to be pro-LTTE or pro-Tamil or anti-Sri Lankan government and harmed on return on this basis.
38. DFAT and the UK Home Office reports indicate it is individuals who have or are perceived to have had a significant role in relation to post-conflict Tamil separatism or a renewal of

hostilities within Sri Lanka who are at a real risk of serious or significant harm on return. DFAT has assessed that those at highest risk of monitoring, arrest, detention or prosecution are 'high profile' former LTTE members, including the former leadership, and former members suspected of terrorist or serious criminal offences during the conflict or of providing weapons or explosives to the LTTE, and that close relatives of such people who remain wanted by the authorities may be monitored. People on a 'stop list', those with extant court orders or arrest warrants or orders to impound their passport, may be at risk of being detained; and people on a security services' 'watch list' for separatist or criminal activities, may be monitored. The US State Department has reported that although the use of force against civilians by government officials remained a problem it was increasingly rare, and that arbitrary arrest by police had decreased.

39. I accept that there is credible evidence of serious harm being perpetrated against certain Tamils associated with, or perceived to be associated with, the LTTE by the Sri Lankan authorities in pre and post-war Sri Lanka; however, I am not satisfied the applicant's past or present circumstances would lead to a real chance of any adverse interest or consequences for him on return.
40. The country information in the referred materials indicates that prior to the end of the civil war, particularly in the north and east, many Tamils reported being monitored, harassed, arrested and/or detained by security forces, and I am not satisfied that the events which I have accepted that the applicant was subjected to at least eight years ago is indicative of the treatment he would receive now, particularly having regard to changed country conditions. His evidence is that he has not supported and/or been in any way involved with the LTTE. Nor have any of his family members. He has not committed any terrorist or criminal acts or been involved in any LTTE or Tamil separatist activities since the civil conflict ended. Furthermore, his own evidence at the protection visa interview was that during his most recent detention in 2011, he was released after enquiries showed he was ok. There is no information to suggest that the applicant is on either the stop or watch lists. He did not have, and nor do I accept that there is a real chance he would be perceived to have had any role in the LTTE or Tamil separatist activities on return.
41. I have rejected the applicant's claims regarding his past support and/or involvement with the TNA and his subsequent abduction on this basis. The applicant has not claimed to have been involved in any other type of political activities or organisations. Nor is there evidence before me to suggest that his family members are of interest to the Sri Lankan authorities or have any association or involvement with the LTTE, political activities or organisations.
42. In the protection visa statement, the applicant claimed and I accept that his family home is located very close to and SLA camp. The photographs provided corroborate this. In the [Organisation 1] report, the applicant claimed that after he had departed a bomb blast happened near his family home. His parents told him not to return. He has claimed that on the basis of the close proximity of his family home to the SLA camp that on return he will come to the attention of the SLA and be at risk. I am not satisfied that the applicant will be perceived to have any type of adverse profile, and I am not satisfied that the proximity of his family home to an SLA camp will give rise to a real chance of harm.
43. In the IAA submission, he claims that the delegate failed to consider the claim that his life would be in danger on return because "he was supposed to report to the police station". I have found that he reported to the police station in [City 1], once a month as required and that by January 2009, six months after the event in 2008, his reporting requirements ceased. There is no credible evidence before me to that after January 2009, he had any further

reporting requirements and I am not satisfied that he did. Nor am I satisfied that he faces a real chance of harm on this basis.

44. The applicant departed Sri Lanka in October 2012, and I am not satisfied that given the passage of time and the nature of his and his family's past interactions with the Sri Lankan authorities that the applicant would be perceived as being associated or involved with the LTTE or anti-Sri Lankan government on return. I am not satisfied that the applicant will be imputed with any type of adverse profile arising from his or his family's past circumstances on return to Sri Lanka. I am not satisfied the applicant faces a real chance of harm as a Tamil, or because of any actual or imputed pro-LTTE, pro-Tamil, pro-Tamil separatism or anti-Sri Lankan government political opinion, on his return to Sri Lanka now or in the reasonably foreseeable future.
45. I accept the applicant left Sri Lanka illegally and he would very likely return to Sri Lanka on a temporary travel document. I accept he has applied for asylum and would be returning to Sri Lanka after a prolonged period of time living in Australia and having made an asylum application and that the Sri Lankan authorities may know or infer that he has made claims for protection in Australia.
46. DFAT reports that most Sri Lankan returnees, including those from Australia are questioned at the airport upon their return. DFAT has reported that for returnees travelling on temporary travel documents, police undertake an investigative process to confirm identity, which would identify someone trying to conceal a criminal or terrorist background, or trying to avoid court orders or arrest warrants. This often involves interviewing the returning passenger, contacting the person's claimed hometown police, contacting the person's claimed neighbours and family, and checking criminal and court records.
47. I accept, as a person returning on a temporary travel document, the applicant may be detained at the airport with other returnees for processing by the Sri Lankan authorities. I accept that during this process the authorities will very likely become aware of the applicant's past circumstances. However, as discussed above, I am not satisfied that the applicant will be perceived to be a person of concern. There is no credible evidence before me that he has outstanding court orders or arrest warrants or criminal background. There is also no independent information before me to suggest that absent any other concerns, individuals who return to Sri Lanka after having spent period of time living in Australia are imputed with an adverse profile and I do not accept that he will be. I am satisfied that it would be quickly determined that the applicant has no adverse profile or other profile of interest.
48. DFAT and Immigration Board of Canada advises that returnees are treated according to standard airport procedures, regardless of their ethnicity and religion and that they are not subject to mistreatment during processing at the airport. The process can take several hours, due to the administrative processes, interview lengths and staffing constraints at the airport. Returnees are processed in groups, and individuals cannot exit the airport until all returnees have been processed. The information before me is that the processing of returnees at the airport is not applied in a discriminatory manner or selectively enforced and nor are returnees mistreated.
49. Overall, I am satisfied that any period of detention that would occur while these investigations are ongoing will be brief and would not exceed the several hours that group processing generally takes.

50. I accept that on return the applicant may be charged under the Immigrants and Emigrants Act (I&E Act) for departing Sri Lanka other than via an approved port of departure. At the earliest available opportunity returnees are transferred to the closest Magistrates Court. Should a magistrate not be available before this time – for example, because of a weekend or public holiday – those charged may be detained in an airport holding cell for up to two days. Information before me is that detention is not selectively applied to returnees, or that returnees are processed in any discriminatory manner.
51. DFAT reports that penalties under the relevant legislation for returnees who depart illegally can include imprisonment and a fine. According to the Sri Lankan Attorney-General's Department, 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. There is no credible evidence before me to indicate that the applicant would be perceived or treated as anything other than a passenger on the people smuggling vessel. I am not satisfied that there is a real chance the applicant will be given a custodial sentence.
52. If the returnee pleads guilty to departing illegally, he will be required to pay a fine (which he can be done by instalment) and will subsequently be 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. DFAT has indicated that 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 fine. It further noted that the fines issued were low. The applicant has not claimed, and there is no evidence before me to suggest that he would plead not guilty. Nor is there anything to indicate that if he did plead not guilty that he would not grant bail on the basis of personal surety or guarantee by a family member. DFAT reports that those who plead not guilty will only need to return to court when their case is being heard, or if summonsed as a witness in a case against the organiser/facilitator of a people smuggling venture. There is no general requirement to report to police or police stations between hearings. DFAT noted that the fines issued for passengers of people smuggling ventures was often low, but that the cumulative costs associated with regular court appearance over a protracted length of time can be high.
53. In the case of this applicant, I am not satisfied that the conditions of detention for a brief period at the airport, a fine and if he plead not guilty the costs associated with bail and regular court appearances, if required, amounts to serious harm. In addition, the information before me does not indicate that I&E Act is discriminatory on its terms, that it is applied in a discriminatory manner or that it is selectively enforced.
54. Accordingly, I am satisfied that any investigation, prosecution and punishment would not amount to persecution for the purpose of ss.5H(1) and 5J(1) of the Act.
55. DFAT reported that between 2008 and 2017, over 2,400 Sri Lankan nationals departed Australia for Sri Lanka. This includes nationals who were returned from the Australian community, and those removed from Australian onshore immigration detention centres. Many others returned from the US, Canada, the UK and other European countries, and most returnees are Tamil. In 2017, the Sri Lankan Prime Minister publicly stated that failed asylum seekers from Australia would be welcome back to Sri Lanka. However, DFAT has also reported that notwithstanding this positive government sentiment, failed asylum seekers may face practical difficulties on return. Failed asylum seekers receive limited reintegration assistance and many returnees have difficulty finding suitable employment and reliable

housing on return. However, DFAT assesses that reintegration issues are not due to failure to obtain asylum, but rather due to the employment and accommodation difficulties they may face. DFAT also notes that some failed asylum seekers reported social stigma from their communities upon return. It also reported that it was aware of anecdotal evidence of regular visits and phone calls by the CID to failed asylum seekers, although the information related to those in the North and not the East where the applicant's family, whom he continues to be in regular contact with, remain residing. I am satisfied that the applicant would return to the East after having sought asylum. I accept on return he may face some reintegration issues that being difficulties finding employment, accommodation and some social stigma from his community; however I am not satisfied that such matters amounts to serious harm.

56. I am not satisfied that, as a Tamil asylum seeker with his background including the periods of time he spent living in Australia, the applicant faces a real chance of persecution on his return to Sri Lanka or in the reasonably foreseeable future.

Refugee: conclusion

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

Complementary protection assessment

58. A criterion for a protection visa is that the applicant is a non-citizen in Australia (other than a person who is a refugee) in respect of whom the Minister (or Reviewer) is satisfied Australia has protection obligations because there are substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm.

Real risk of significant harm

59. Under s.36(2A), a person will suffer 'significant harm' if:
- the person will be arbitrarily deprived of his or her life
 - the death penalty will be carried out on the person
 - the person will be subjected to torture
 - the person will be subjected to cruel or inhuman treatment or punishment, or
 - the person will be subjected to degrading treatment or punishment.
60. I accept the applicant would very likely be travelling to Sri Lanka (whether involuntarily or otherwise) on temporary travel document, I accept he may be detained at the airport for processing on return and questioned. I also accept he may be charged with departing Sri Lanka illegally and be detained briefly at the airport if a magistrate is unavailable, fined and if he pled not guilty possibly incur costs associated with bail and regular court appearances. I am not satisfied these measures constitute significant harm as defined. I do not accept they would amount to the death penalty, constitute or result in an arbitrary deprivation of life, or torture. Nor does the evidence before me indicate that these processes, or the penalties implemented as a result involve any intention to inflict pain or suffering that could reasonably be considered cruel or inhuman in nature, severe pain or suffering or an intention

to cause extreme humiliation. I am not satisfied that it amounts to cruel or inhuman treatment or punishment or degrading treatment or punishment as defined. I am not satisfied there is a real risk of significant harm on this basis. I am not satisfied there is a real risk of significant harm on this basis.

61. I accept that as a returning failed asylum seeker the applicant may face some reintegration issues in finding employment and accommodation and some social stigma. I am not satisfied these measures constitute significant harm as defined. The evidence does not suggest that there is a real risk the applicant will suffer the death penalty, arbitrary deprivation of life, or torture as a consequence of being a returnee. I am not satisfied that any reintegration challenges and social stigma the applicant may face amounts to pain or suffering that is cruel or inhuman in nature, severe pain or suffering, whether physical or mental, or extreme humiliation, as required in the definitions of cruel or inhuman treatment or punishment or degrading treatment or punishment. I am not satisfied there is a real risk of significant harm on this basis. I am not satisfied there is a real risk of significant harm on this basis.
62. Furthermore, I am also not satisfied that the treatment he faces on return collectively amounts to significant harm.
63. I have otherwise found the applicant does not face a real chance of harm on any or the bases claimed. As 'real risk' involves the same standard as 'real chance', I am also not satisfied that the applicant faces a real risk of significant harm on these bases.

Complementary protection: conclusion

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

Decision

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

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

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

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

...

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

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

but does not include an act or omission:

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

...

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

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

...

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

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

...

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

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

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

...

5H Meaning of refugee

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

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

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

...

5J Meaning of well-founded fear of persecution

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

5K Membership of a particular social group consisting of family

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

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

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

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

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

5L Membership of a particular social group other than family

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

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

5LA Effective protection measures

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

...

36 Protection visas – criteria provided for by this Act

...

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

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

...

Protection obligations

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

Determining nationality

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