

1318846 (Refugee) [2016] AATA 4038 (28 June 2016)

DECISION RECORD

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| DIVISION: | Migration & Refugee Division |
| CASE NUMBER: | 1318846 |
| COUNTRY OF REFERENCE: | Sri Lanka |
| MEMBER: | Fraser Syme |
| DATE: | 28 June 2016 |
| PLACE OF DECISION: | Brisbane |
| DECISION: | The Tribunal affirms the decision not to grant the applicant a Protection visa. |

Statement made on 28 June 2016 at 1:31pm

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 431 of the Migration Act 1958 and replaced with generic information which does not allow the identification of an applicant, or their relative or other dependant.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. The applicant is a [age] Tamil man from Eastern province, Sri Lanka. According to the applicant, [number] of his brothers were killed during the early 1990s and armed men continue looking for the applicant. He is a businessman from a wealthy family who was extorted in the past by the Karuna group and the Eelam People's Democratic Party ("EPDP") in the 1990s. So in 1998 he went overseas. In 2009 he returned to Sri Lanka. Then in 2012 he was threatened by a Sinhalese man, Mr K, due to a business dispute. Mr K has a relative in the army. The applicant departed Sri Lanka when he received threats and a break-in of the applicant's home. The applicant fears if he returns to Sri Lanka he will be harmed by the Sri Lankan authorities because: of his dispute with Mr K; he is a businessman and from a wealthy family; his brothers were killed; he is Tamil; he applied for asylum in Australia, and he departed Sri Lanka illegally.
2. The applicant applied to this Tribunal on 12 December 2013 for review of a decision made by a delegate of the Minister for Immigration [in] December 2013 to refuse to grant the applicant a Protection visa under s.65 of the *Migration Act (1958)*. The applicant included the delegate's decision record with the review application.
3. This review application raises the following issues for the Tribunal to determine:
 - a. Does the applicant have a well-founded fear of persecution in the reasonably foreseeable future if he returns to Sri Lanka.
 - b. Are there substantial grounds for believing there is a real risk the applicant will suffer significant harm if he is removed to Sri Lanka

HISTORY OF APPLICATION FOR REVIEW

4. The applicant who claims to be a citizen of Sri Lanka arrived in Australia as an unauthorised maritime arrival in June 2012. He applied to the Department of Immigration for a protection visa in November 2012. The delegate conducted an interview with the applicant in October 2013 with the assistance of an interpreter in the Tamil and English languages. The Tribunal has listened to a recording of that interview. The applicant provided to the department his former and current Sri Lankan passports, birth certificate, marriage certificate and ID card.
5. In the decision under review, the delegate accepted the applicant was from a wealthy family and a businessman and for that reason, had been extorted by the EPDP and Karuna group in the past, but the extortion ceased in 2005. The delegate accepted too that the applicant had an altercation with Mr K, but did not accept that the applicant had received any death threats or would be targeted for harm by the army because of that. On the basis of country information, the delegate found the applicant did not have real chance of serious or significant harm because he is a Tamil, a businessman, had an imputed pro-LTTE political opinion, nor as a failed asylum seeker, or due to his illegal departure if he returned to Sri Lanka. The applicant did not raise his claims regarding the deaths of his brothers and armed men looking for him before the delegate.
6. The applicant appeared in person before the Tribunal to give evidence and present arguments at a hearing on 21 April 2015. The Tribunal hearing was conducted with the assistance of an onsite interpreter in the Tamil and English languages. The Tribunal acknowledges there has been a passage of time since it conducted the hearing, however the Tribunal has listened to the electronic recording of the hearing prior to finalising this decision.

7. During the hearing the applicant offered to provide the telephone number of a potential witness in Sri Lanka and invited the Tribunal to receive evidence from that person to corroborate his evidence. The Tribunal declined to do so. The Tribunal considered it reasonable not to telephone that person. The Tribunal could not be certain of the identity of whom it spoke with on the telephone. The Tribunal too could not be certain whether doing so would put the applicant or the witness at the risk of future harm.
8. The applicant was represented in relation to the review by his registered migration agent. The migration agent attended the hearing and provided written submissions to the Tribunal prior to the hearing. The Tribunal has had regard to those submissions, which are set out relevantly in more detail below.
9. The applicant provided to the Tribunal at the hearing untranslated death certificates of his [siblings]. He claims [number] [siblings] were killed by the Sri Lankan army in 1991. [Another sibling] was killed in 1992 by the LTTE. He claimed the [other sibling]'s death certificate was issued by the LTTE but incorrectly states [sibling] died fighting for the LTTE. Due to poor eyesight, he was unable to read to the Tribunal the cause of death on the death certificates and the Tribunal considered it appropriate to require the interpreter who was engaged as an interpreter to render a translation of the documents.

RELEVANT LAW

10. The criteria for a protection visa are set out in s.36 of the Act and Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom Australia has protection obligations under the 'refugee' criterion, or on other 'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa of the same class.
11. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
12. Australia is a party to the Refugees Convention and generally speaking, has protection obligations in respect of people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.
13. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia 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 applicant being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').
14. In accordance with Ministerial Direction No.56, made under s.499 of the Act, the Tribunal is required to take account of policy guidelines prepared by the Department of Immigration –

PAM3 Refugee and humanitarian - Complementary Protection Guidelines and PAM3 Refugee and humanitarian - Refugee Law Guidelines – and any country information assessment prepared by the Department of Foreign Affairs and Trade (“DFAT”) expressly for protection status determination purposes, to the extent that they are relevant to the decision under consideration. There are two DFAT country information assessments regarding Sri Lanka, to which the Tribunal has had regard: DFAT Country Report – Sri Lanka (“DFAT Country Report”) and DFAT Thematic Report – People with links to the Liberation Tigers of Tamil Eelam (“DFAT Thematic Report”). Since the date of the hearing, a new Country Report on Sri Lanka was issued by DFAT on 18 December 2015. That report replaces the earlier Country Report and the Thematic Report. The Tribunal has had regard to all three reports. It has compared the information in the earlier reports and the new report. The Tribunal considers the relevant information in the new Country Report is materially the same as in the prior reports that it discussed with the applicant during the hearing.

CONSIDERATION OF CLAIMS AND EVIDENCE

15. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.
16. In making its findings, the Tribunal is mindful the applicant has an incomplete high school level of education and was [age] at the time of the hearing. The Tribunal is mindful too that whenever evidence is received in a language other than the applicant’s first language or through an interpreter there is always room for differences in meaning and nuance. The Tribunal is satisfied the standard of interpreting at the hearing was reasonable. The Tribunal considers the applicant was able to communicate effectively, understood the Tribunal proceedings and participated in a meaningful way.
17. The Tribunal finds the applicant is a national of Sri Lanka. He provided a copy of his Sri Lankan identity documents to the department. He made no claim to be a national of any other country. The Tribunal accepts the applicant’s claims should be assessed against Sri Lanka for the purposes of the Convention in s.36(2)(a) and as the receiving country for the purposes of the complementary protection obligations in s.36(2)(aa). In making the below findings, the Tribunal has considered the village where he resided before departing Sri Lanka and where his [relative] continues to reside to be his home region in Sri Lanka.
18. The Tribunal accepts that ‘applicants for refugee status face particular problems of proof as an applicant may not be able to support his or her statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule.’ The Tribunal also accepts that ‘if the applicant’s account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt. (The United Nations High Commissioner for Refugees’ *Handbook on Procedures and Criteria for Determining Refugee Status*). The Handbook further states:

The benefit of the doubt should, however, only be given when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant’s general credibility. The applicant’s statements must be coherent and plausible, and must not run counter to generally known facts.
19. The Tribunal acknowledges, while it may have regard to the Handbook, the Handbook is not binding. The Tribunal must bear in mind that if it makes an adverse finding in relation to a material claim made by the applicant but is unable to make that finding with confidence it must proceed to assess the claim on the basis that it might possibly be true (see *MIMA v Rajalingam* (1999) 93 FCR 220). However, the Tribunal is not required to accept uncritically any or all of the allegations made by an applicant. Further, the Tribunal is not required to have rebutting evidence available to it before it can find that a particular factual assertion by an applicant has not been made out, see *Randhawa v MILGEA* (1994) 52 FCR 437.

20. The Tribunal told the applicant during the hearing his credibility was in issue. As set out in detail below, the applicant on multiple occasions sought to explain difficulties in his evidence arose from problems with his memory. He told the Tribunal he had no consulted any doctor about memory problems. On a number of occasions, the applicant referred to not remembering what had been written before. The Tribunal considers this greatly undermines that he was attempting to recall from his memory events which genuinely occurred as he was referring to things he had written rather than incidences which happened. The Tribunal is not persuaded the difficulties in the applicant's evidence set out below are satisfactorily explained by the applicant's claims of having a bad memory.

Well-founded fear of persecution

21. The Tribunal is mindful it must consider the applicant's chance of harm not only currently but into the reasonably foreseeable future. In making its findings, the Tribunal has considered PAM3 Refugee and humanitarian - Refugee Law Guidelines as required by Ministerial Direction No.56, made under s.499 of the Act.
22. In summary, the applicant's claims are he is from a wealthy family and he is a businessman. In the 1990s he had a [certain] business. In 1994, he was extorted by the Karuna group. He had to comply or the Karuna group would have harmed him. In 2007, the EPDP granted him a licence to [move] [item]. The EPDP then extorted money from him. He feared the extortion would escalate so he went to [Country 1]. In 2005, he returned to Sri Lanka thinking he was safe, but Karuna group and EPDP recommenced extorting him, so he went to [Country 2]. In 2009 he returned to Sri Lanka. He resumed business [moving] [item]. He was threatened by Mr K, who has a relative in the army. He received threatening calls and an unknown man broke into the applicant's home. He believes Mr K arranged that. So he departed Sri Lanka. He fears Mr K will use his army contacts to harm the applicant. The applicant further fears he will be harmed by the Sri Lankan authorities because he is Tamil, he is a businessman from, a wealthy family, he applied for asylum in Australia and he departed Sri Lanka illegally.
23. At the hearing, the Tribunal discussed with the applicant in detail all of his claims.

Death of [siblings]

24. At the hearing, the applicant made a new claim the Sri Lankan government were searching for him because of his [siblings]. He said he had a problem with the village protection force who suspected his family were connected to the LTTE due to the deaths of his [siblings]. As noted above, he claims [number] of his [siblings] were killed during the Sri Lankan civil war. He explained the village protection force was appointed by the army. He further explained these were events between 1986-92, but it was only in 2012 that the army ceased searching for him. He claimed the village protection force or militia or army would come to his mother's home and ask his whereabouts. This happened once a month or once a week. His mother told him she did not know who they are. Sometimes the men were in uniform and sometimes in plain clothes, but they were always armed. The Tribunal expressed difficulty accepting the army had looked for the applicant for that number of years but never found him. He explained he was sometimes overseas. Sometimes he lived in North Western province and for a time he lived at a refugee camp in Colombo. The Tribunal noted the applicant had never raised these claims before the hearing. He agreed he had not raised it before. He was worried there would be repercussions for his family. He later told the Tribunal his [number] [siblings] killed in 1991 were not combatants killed by the army, but were civilians killed in a farm field. His [siblings] had no connections to the LTTE.
25. The Tribunal discussed with the applicant if the army were going to his mother's home weekly or monthly, why did he return to Sri Lanka from [Country 1]. He said it was because he did not return to his mother's village. He went to a different village 40kms away in Eastern

province. He told the Tribunal he used a genuine passport issued in his own name when he travelled to and from [Country 1] and too and from [Country 2]. He told the Tribunal he was never questioned at the airport. He said the army were only looking for him in his mother's village area. The Tribunal noted the army and airport security are all part of the Sri Lankan government. If he was so important that the army look for him weekly or monthly, then it is reasonable to expect he would be questioned at the airport. He replied the person looking for him has a personal grudge, nothing is registered with the government. When asked who the person was, he said people from the same neighbouring Sinhalese family he had problems with in the village protection force because he did not give them money from farming. The Tribunal noted he therefore knew who was looking for him, which is inconsistent with his earlier evidence his mother did not know who the men looking for him were and also inconsistent with his earlier evidence the men were looking for him because they were suspicious of his family's links to the LTTE after the taking of the applicant's [siblings]. The Tribunal put to the applicant it was concerned regarding the credibility of the applicant's evidence. He replied he knew who they are, but his mother did not know who they are or why they were looking for the applicant. The Tribunal noted his evidence he claimed they are a Sinhalese who live close to his village and that did not explain why the applicant gave inconsistent reasons as to why the army were searching for him every week or month from the 1990s to 2012, compared with his new claim it was a Sinhalese family with a grudge because he did not pay them money from a harvest. He then said the personal grudge was due to [moving] [item]. He had not made any claims regarding his [siblings] prior to the hearing. The Tribunal commented that did not explain the inconsistency in his evidence as to who was looking for him at his mother's house. The Tribunal was not persuaded it was his mother's lack of knowledge. Neither was the Tribunal persuaded it was due to the applicant's lack of memory. The people searching for him are either army suspecting him of connection to the LTTE due to his [siblings], or were a Sinhalese family with a private grudge, not both.

26. The Tribunal is willing to accept [number] of the applicant's [siblings] were killed during the early 1990s, which was at the time of the Sri Lankan civil war. The Tribunal however does not accept the [siblings] were killed when fighting for the LTTE and it does not accept anyone was looking for the applicant between the 1990s and 2012. The Tribunal considers it implausible the Sri Lankan army or village protection force would search for the applicant every week or month from the 1990s to 2012. It does not accept the applicant would be a person of such interest to the Sri Lankan authorities, yet, be issued a passport and permitted to travel to and from [Country 1] and too and from [Country 2] without being questioned at the airport. It is not persuaded by his explanation he was not questioned at the airport because the person looking for him was a neighbouring Sinhalese family with a personal grudge. The applicant provided inconsistent evidence as to who it was that was looking for him the army/village protection force or the Sinhalese neighbour with a grudge. The applicant provided inconsistent evidence too regarding whether he knew who was looking for him, variously saying his mother did not know who it was, it was the army/village protection force and it was the neighbouring Sinhalese. The Tribunal is concerned too that the applicant did not raise any claims regarding being searched for until the Tribunal hearing. It is not persuaded he did that because he feared repercussions for his family. The Tribunal considers the applicant not making these claims until the hearing, his implausible claims, his inconsistent evidence and non-persuasive explanations all weigh in favour of finding the applicant was not a credible witness.
27. The Tribunal has rejected any groups have been searching for the applicant due to the deaths of his [siblings]. It accepts his evidence his [siblings] had no connection to the LTTE. The Tribunal considers further below the chance of serious harm to the applicant arising from his having [siblings] who were killed during the Sri Lankan civil war in more detail below.

Karuna group and EPDP

28. The Tribunal discussed with the applicant that in his written statement accompanying his protection visa application, the applicant did not mention any date, but stated he was extorted by the Karuna group. He said that happened after he returned to Sri Lanka from [Country 2]. Before that, he had no problems. Upon returning from [Country 2], they questioned him about where he had gone and what was his problem. The Tribunal noted that was inconsistent with his written statement, that he left Sri Lanka to go to [Country 1] in 1998 due to having problems with the Karuna group. He replied he went overseas after his [siblings] were taken. He then said he had problems with a breakaway group from Karuna group. He said it was a gang without a proper name and they carried out atrocities in the villages while Karuna was helping the government. The Tribunal noted in 1998, General Karuna was still on the side of the LTTE and was not helping the government. The applicant agreed that when he went to [Country 1] in 1998, General Karuna had not yet changed sides from the LTTE to the government. The Tribunal commented his evidence at the hearing that an unnamed group extorted him prior to 1998, was inconsistent with his statement identifying Karuna group and EPDP as the groups who extorted him. He replied he has problems with his memory, but had not consulted any doctor about that. The Tribunal noted the change of government in January 2015 meant that Karuna was no longer a part of the ruling coalition, which would diminish his group's ability to harm anyone. The applicant replied he did not know what would happen.
29. He explained prior to 1998, he and his first wife moved residence to avoid clashes between the army and LTTE. He could not recall what else happened to him. He had written the details before. The Tribunal commented if the events genuinely occurred it was reasonable to expect him to recall those events which he claimed as his basis for protection. He then recalled events related to his dispute with Mr K. When asked again what happened before he went to [Country 1], he replied he could not remember. The Tribunal told him his statement claims he was extorted by EPDP. He explained he was asked for money when he was farming, but he could not remember what was written about that. The Tribunal noted it was concerned he referred to remembering what was written, rather than trying to recall what happened.
30. He then explained the EPDP enforced a harvest tax. He had a big harvest, so he had to pay a big amount of money. When asked did he have any problems with EPDP about his [business], he said yes. There was a farm boundary dispute. He could not recall anything else. He was stressed due to his parents recently having problems. The Tribunal put to him in his statement he was granted a licence by EPDP to [transport] [item] and EPDP demanded money from him. He replied that he remembered he had the licence, and that is when he had a problem with Mr K. The Tribunal reminded him it was discussing his claims from before going to [Country 1] 1998 and related to EPDP. The Tribunal expressed it was concerned the applicant was not recalling from his memory events which genuinely occurred.
31. The applicant told the Tribunal after he returned to Sri Lanka from [Country 1], he paid money to Karuna group. He explained Karuna group collected tax from all the farmers. He then went to [Country 2]. The Tribunal noted his written statement claimed after he was extorted by the EPDP too and threats were made against his first wife after he returned from [Country 1]. He replied he did not remember that. He then said he remembered his first wife being threatened by someone on a motorbike and he met demands to pay money. He did not remember how many times that happened or who carried out the extortion. His first wife may have once paid SLR[amount] or SLR[amount]. The Tribunal noted in his statement the applicant claimed he was extorted [number] other times. He replied he could remember after he was reminded by the Tribunal telling him about these events. His memory is bad and he has a lot of worries.

32. He told the Tribunal he left [Country 2] because his visa expired. The Tribunal noted his statement claimed he returned to Sri Lanka due to his first wife's illness. He confirmed his first wife was ill and she died about 6 months after his return, but he left [Country 2] because his visa expired. The Tribunal noted the applicant claimed he had been extorted for a lot of money by Karuna group and EPDP and he claimed the army or the village security force a Sinhalese family had been searching for him weekly or monthly. Yet, that he was willing to come back to Sri Lanka not due to his wife's illness, suggests he had not faced the troubles he had claimed to face in the past. He had no comment about that. When he wrote his statement his mind was clearer. He now has too many worries and a bad memory.
33. The Tribunal does not accept the applicant was extorted by the Karuna group or EPDP at any time. It makes that finding for a number of reasons. Firstly, the Karuna group did not exist until after General Karuna split from the LTTE to join the government in 2004.¹ The Tribunal is not persuaded by the applicant's explanation it was not the Karuna group but an unnamed splinter group from the Karuna group who extorted him prior to 1998. Again, as the Karuna group did not exist, it follows too there could be not be any splint group from a group which was yet to exist. Secondly, the applicant gave vague and inconsistent evidence regarding the claims of extortion by Karuna group, EPDP or any other group. The Tribunal prefers the applicant's evidence these groups exacted tax on businesses and farmers and the claims of extortion are actually taxes being levied by the groups vying to govern Eastern province of Sri Lanka. The applicant may have been opposed to payment of those taxes, but it is an exaggeration to claim payment of a harvest tax is extortion. The Tribunal rejects the applicant's first wife was extorted by men on motorbikes. It rejects the EPDP extorted money from the applicant after granting him a licence to [move] [item]. The Tribunal considers the applicant exaggerated these claims so as to create a profile upon which to apply for protection.
34. The Tribunal rejected above the applicant's claim a neighbouring Sinhalese family were searching for the applicant due to a personal grudge after he refused to pay them. The Tribunal rejects too that a neighbouring Sinhalese family sought to extort the applicant. Both EPDP² and Karuna group³ are Tamil based organisations and the Tribunal considers it implausible a Sinhalese would seek to obtain tax payments from the applicant on behalf of the EPDP or Karuna group. The Tribunal rejects too that the neighbouring Sinhalese family have otherwise extorted the applicant in the past. The applicant made no claim of being extorted by a neighbouring Sinhalese family prior to the hearing. The Tribunal considers the applicant fabricated that claim during the hearing when the Tribunal was pressing him for information regarding his claimed extortion by the Karuna group or EPDP.
35. The Tribunal has gone on to consider whether the applicant's opposition to pay taxes to Karuna group or the EPDP gives him a political opinion which would give rise to a well-founded fear of persecution. The applicant having to pay taxes occurred prior to 1998 and in 2005, more than 10 years ago. Further, following the change of government in Sri Lanka in January 2015 the EPDP or Karuna are no longer part of the ruling coalition.⁴ The Tribunal considers there to be only a remote or speculative chance and therefore not a real chance the applicant will face serious harm for having a political opinion opposed to paying taxes to the Karuna group or EPDP, now or in the reasonably foreseeable future if the applicant returns to Sri Lanka.

¹ Human Rights Watch 2007, *Complicit in Crime: State Collusion in Abductions and Child Recruitment by the Karuna Group*, January, Vol. 19, No. 1

² UK Home Office 2007, *Country of Origin Information Report: Sri Lanka*, 8 February

³ Gopalakrishnan, Ramesh 2004, 'Profile: Colonel Karuna', *BBC News*, 5 March
http://news.bbc.co.uk/2/hi/south_asia/3537025.stm

⁴ Sajin, Karuna And Flood Of 'Undesirables' Flock To Maithripala' 2015, *Colombo Telegraph*, 12 January
<https://www.colombotelegraph.com/index.php/sajin-karuna-and-flood-of-undesirables-flock-to-maithripala/>

Mr K

36. The applicant told the Tribunal after he returned from [Country 2] he had the problem with [moving] [item] and the village security force. The Tribunal noted his earlier evidence was he had problems with Mr K after he returned to Sri Lanka. He said he could not remember and maybe he should go to the hospital about his memory problem. He remarried because he has a [age] [child], but his relationship with his new wife is not good. His father is ill, but his new wife refused to see the applicant's father and his new wife had requested she and the applicant separate. This gives the applicant a lot of problems. He could not recall if anything happened to him between 2009 and 2012.
37. He then explained how he had an argument with a Sinhalese man (Mr K) who accused the applicant of [moving] [item] from outside the applicant's area. The applicant advertised his phone number on his tractor. He then got threatening calls from an unknown person. He described how one night when the applicant was away from home, someone cut his fence using wire cutters and entered his home. But no one saw the person and the person harmed no one. The applicant found boot prints in the dirt, so he presumes the man is in the army. In his written statement, the applicant describes the person's clothing, which is inconsistent with his evidence at the hearing no one saw the man. In his written statement the applicant claims other people in his village had been killed due to dispute over [moving] [item]. He did not raise that with the Tribunal during the hearing. The Tribunal asked if the applicant returned to Sri Lanka, why would anyone want to harm him now as three years had passed and the applicant was no longer [moving] [item]. He replied he did not know what would happen. The Tribunal put to the applicant it may not be satisfied there is nothing more than a remote chance.
38. The Tribunal is willing to accept the applicant had a business [moving] [item] after he returned to Sri Lanka from [Country 2]. It is willing to accept too that he had an argument with Mr K and that Mr K has a relative in the army. However, that dispute with Mr K occurred in 2012 and the evidence of the applicant is if he returns to Sri Lanka, he will stay at home. Therefore, he will not resume doing any business [moving] [item]. Due to his vague evidence, the Tribunal does not accept the applicant received any threatening phone calls, nor does the Tribunal accept an unknown person broke into the applicant's home. The Tribunal considers these to be further examples of the applicant fabricating evidence upon which to create a profile to apply for protection. The Tribunal is not satisfied the applicant faces a real chance of serious harm from Mr K if the applicant returns to Sri Lanka, now or in the reasonably foreseeable future.

Businessman – wealthy family

39. The applicant told the Tribunal his family owed a lot of land and businesses. He said his father ran those businesses and land while the applicant was in [Country 1] and [Country 2]. He did not know if his father was extorted, His father did not tell him anything. His mother also did not tell him. The Tribunal noted that was inconsistent with his mother telling him every week or month people were looking for the applicant. The Tribunal had doubts his father had ever been extorted while the applicant was overseas and the target of the extortion is the wealth of the applicant's family. It appeared implausible the extortion would only happen when the applicant was in Sri Lanka. The applicant replied his father could have been extorted without the applicant's knowledge.
40. The applicant said he did not know why anyone would harm him because he was from a wealthy family. The applicant said if he returned to Sri Lanka, he would not do anything, he would stay at home. The migration agent's pre-hearing submissions included the applicant

had been deprived his land and livelihood. Those submissions do not accord with the applicant's evidence at the hearing his family are wealthy with several businesses and lots of land.

41. The Tribunal is willing to accept his family is wealthy. It has found above the applicant had to pay taxes to EPDP and Karuna group and that he had a dispute with Mr K. It rejected that he was extorted or threatened in the past. The evidence before the Tribunal does not suggest the applicant's family have been extorted in the past and he will not conduct any business in the future if he returns to Sri Lanka. The Tribunal considers there to be only a remote and therefore not a real chance the applicant will face serious harm due to his being from a wealthy family, now or in the reasonably foreseeable future if he returns to Sri Lanka.

Tamil – from Eastern province

42. The applicant has claimed he will be harmed by the Sri Lankan authorities because he is a Tamil and he was from an LTTE controlled area of Eastern province and his [number] [siblings] were killed during the Sri Lankan civil war.
43. The Tribunal discussed with the applicant country information regarding the situation for Tamils in Sri Lanka. It noted the UNHCR 2012 eligibility guidelines for assessing the protection needs of asylum seekers from Sri Lanka⁵ and the UK Upper Tribunal guidance decision of 2013⁶ indicate Tamils are not in need of protection unless they have other characteristics, such as ties to the LTTE. According to the UNHCR a risk factor exists for a Tamil with certain actual or imputed links to the LTTE. The decision of the UK Upper Tribunal, indicates that although the Sri Lankan authorities are described as 'paranoid' about an LTTE resurgence, simply because a Tamil has had LTTE connections or sympathies in the past will not now of itself cause the Sri-Lankan government to consider that that person is a destabilising threat. The risk is limited to those who are or are perceived to have a significant role in relation to post-conflict separatism. The Upper Tribunal decision too indicates that the Sri Lankan authorities are aware persons who lived or worked in areas of Sri Lanka previously controlled by the LTTE had some level of involvement with the LTTE during the civil war, but that would not cause the Sri Lankan authorities to consider such a person to be a risk. The Sri Lankan authorities collect and maintain sophisticated intelligence gathering techniques to identify persons with substantial links to the LTTE. The Tribunal therefore having regard to that information does not consider all Tamils would be imputed with a pro-LTTE political opinion just because they are Tamil.
44. The applicant had no comments about that information. The applicant claimed too that Tamils are discriminated against and suffer harassment everywhere in Sri Lanka.
45. The Tribunal accepts that the independent evidence indicates, at least until the end of the civil war in 2009, that Sri Lankan citizens of Tamil ethnicity suffered disproportionately at the hands of the Sri Lankan authorities. The Tribunal also accepts that the information indicates that the risk was more prevalent in LTTE dominated Northern and Eastern areas. This is consistent with the applicant's claims of general discrimination and persecution of Tamils. The independent evidence supports the applicant's claims that during the civil war many thousands of Tamils disappeared, presumed dead, and thousands of others were killed or injured. The DFAT country report states the situation for Tamils in Sri Lanka has changed significantly since the cessation of the civil war between the Sri Lankan government and LTTE in 2009. However the Tribunal accepts on basis of the country information provided by

⁵ UN High Commissioner for Refugees 2012, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka*, 21 December, pp.26-37
<<http://www.unhcr.org/refworld/docid/50dla08e2.html>>

⁶ Upper Tribunal (Immigration and Asylum Chamber) United Kingdom Country Guidance Decision in *GJ v Secretary of State for the Home Department (post-civil war: returnees) Sri Lanka* CG [2013] UKUT 319 (IAC).

the migration agent that Tamils in Sri Lanka have historically faced a degree of harassment and discrimination on account of their ethnicity and may continue to do so, such as difficulties in accessing employment and disproportionate monitoring by security forces. Human Rights Watch has reported that there is evidence of continuing atrocities against some Tamils who were members or supporters of the LTTE.⁷ The Bar Human Rights Committee of England and Wales⁸ and Amnesty International report on surveillance, intimidation and monitoring of former LTTE members by the security forces.⁹ The DFAT thematic report refers to there a high risk of harm to high profile former members of the LTTE. However, while the Tribunal accepts the harassment and discrimination that Tamils may face in Sri Lanka does give rise to some harm as indicated in the country information, the Tribunal is not satisfied when having regard to s.91R(1)(b) and to the non-exhaustive instances of serious harm set out in s.91R(2) that harm amounts to serious harm.. The Tribunal accepts based on the country information that most Tamils experience some degree of harassment and discrimination. Having considered the applicant's individual circumstances, the Tribunal is satisfied the applicant faces a remote chance and therefore not a real chance of serious harm from the Sri Lankan authorities because he is a Tamil.

46. On the basis of the country information discussed above, it does not accept the applicant has any profile which would warrant the Sri Lankan authorities to target him for harm. The Tribunal does not accept he will be imputed with any anti-government or pro-LTTE opinion because of any of the other reasons he has claimed he will be imputed with such a political opinion, including: his [siblings] were killed during the Sri Lankan civil war, he is a Tamil or because he is from Eastern province, or because he had a dispute with Mr K or because departed Sri Lanka illegally and applied for asylum. The Tribunal considers there is only a speculative and therefore not a real chance he will suffer serious harm by the Sri Lankan authorities, because of his race, any particular social group or political opinion or any other Convention reason, now or in the reasonably foreseeable future if he returns to Sri Lanka.

Failed asylum seeker

47. The applicant has claimed he will be harmed because he applied for asylum in Australia. There are two aspects to the applicant's claim. That the Sri Lankan authorities will impute him with a pro-LTTE/anti-government political opinion because he applied for asylum and that the Sri Lankan authorities will seek to punish him because they will assume the applicant was critical of them in his claims for asylum.
48. The Tribunal considers the Convention ground relevant to this claim is an implied political opinion of being against the Sri Lankan authorities due to the applicant's applying for asylum overseas or his membership of the particular social group of returned failed asylum seekers. Interrelated to this is his race as a Tamil and an implied political opinion of being pro-LTTE because he is a Tamil and/or applied for asylum overseas. Regardless of which Convention reason, the Tribunal considers the issues under consideration are substantially the same.
49. The Tribunal discussed with the applicant country information that there are reports¹⁰ of some Tamils being questioned, detained and tortured by the Sri Lankan authorities upon

⁷ See Human Rights Watch 2014, World Report 2014 – Sri Lanka, 21 January 2013. (Harrison F.2013, 'Tamils still being raped and tortured in Sri Lanka, British Broadcasting Corporation, 9 November

⁸ Y Sooka, March 2014, 'An Unfinished War: Torture and Sexual Violence in Sri Lanka 2009-2014' http://www.barhumanrights.org.uk/sites/default/files/documents/news/an_unfinihsed_war._torture_and_sexual_violence_in_sri_lanka_2009-2014_0.pdf

⁹ Amnesty International 2014, *Ensuring Justice: Protecting Human Rights for Sri Lanka's future*, ASA 37/011/2014, September, p. 11

¹⁰ See: Freedom From Torture 2014, *Freedom from Torture up-dated submission to the Human Rights Committee for the 5th periodic review of Sri Lanka in October 2014*, 1 October http://www.freedomfromtorture.org/sites/default/files/documents/freedom_from_torture_submission_to_the_human_rights_committee_september_2014_0.pdf

return to Sri Lanka as failed asylum seekers, particularly from the UK. Freedom from Torture and Tamils Against Genocide report on returnees with links to the LTTE or the Tamil diaspora being harmed on return by the Sri Lankan authorities. The Tribunal is mindful too of reports such as that of HRW¹¹ as to the prevalence of the use of torture by the Sri Lankan authorities when questioning or detaining persons. The UK Home Office¹² noted six and the Canadian Immigration Refugee Board¹³ four cases of failed asylum seekers being detained upon return, all of whom had criminal charges outstanding in Sri Lanka. The DFAT Country Information Report indicates all Sri Lankan nationals are treated in the same manner with regard to entry procedures into Sri Lanka, the same information is reported by the British¹⁴ Canadians.¹⁵ Thousands of asylum seekers have returned to Sri Lanka since 2009 from Australia, US, Canada, UK and European countries but there are relatively few allegations of mistreatment and the DFAT country information report states many allegations of mistreatment of returnees have not been substantiated. The Tribunal put to the applicant that it did not consider he had a profile as someone with links to the LTTE or the diaspora and that he would not be imputed targeted for harm because he applied for asylum in Australia.

50. The applicant had no comments about that information.
51. On the basis of the country information set out above, the Tribunal does not accept that *all* failed asylum seekers are imputed with anti-government or pro LTTE political opinion by the Sri Lankan authorities, regardless whether the returnee is Tamil or not. In making that assessment the Tribunal has had placed weight on the UNHCR guidelines and the Upper Tribunal guidance decision noted above which indicate that while persons with links to the LTTE may be in need of protection, the Sri Lankan authorities rely on sophisticated intelligence gathering in identifying persons with such links. The Tribunal has had regard too to the applicant's low level connections to the LTTE through his [sibling]'s being killed during the Sri Lankan civil war and his having previously lived in an LTTE controlled area of Sri Lanka.
52. After assessing all the evidence and the applicant's circumstances as a whole, the Tribunal finds that the applicant will not be imputed with an anti-government or pro LTTE political opinion because he will return to Sri Lanka as a person who applied for asylum overseas. In reaching that finding, the Tribunal has given regard to the country information on the return of failed asylum seekers to Sri Lanka and has been mindful of the questioning process and not just the outcome of any questioning the applicant may face from the Sri Lankan authorities as a returnee and is not satisfied that questioning when having regard to s.91R(1)(b) and to the non-exhaustive instances of serious harm set out in s.91R(2) that harm amounts to serious harm. The Tribunal is not satisfied the applicant has a real chance

Freedom from Torture 2012, 'Sri Lankan Tamils tortured on return from UK', 13 September <http://www.tamilnet.com/img/publish/2012/09/Freedom_from_Torture_briefing92012.pdf>; Freedom from Torture 2011, *Out of the Silence: New Evidence of Ongoing Torture in Sri Lanka 2009-2011*, p.23; Tamils against Genocide, "Returnees at Risk: Detention And Torture in Sri Lanka", <http://www.tamilsagainstgenocide.org/data/docs/tag-report-16-sep-2012-returnees-at-risk.pdf> (16 September 2012);

¹¹ *We will teach you a lesson Sexual Violence by Sri Lankan Security Forces*, 26 February 2013, http://www.hrw.org/sites/default/files/reports/srilanka0213webwcover_0.pdf

¹² UK Home Office 2012, *Sri Lanka: Country of Origin Information Report*, 7 March

¹³ Immigration and Refugee Board of Canada 2011, *Sri Lanka: Information on the treatment of Tamil returnees to Sri Lanka, including failed refugee applicants; repercussions, upon return, for not having proper government authorization to leave the country, such as a passport*, LKA103815.E, 22 August <http://www.irb-cisr.gc.ca:8080/RIR_RDI/RIR_RDI.aspx?id=453562&l=e>

¹⁴ UK Home Office 2012, *Sri Lanka: Country of Origin Information Report*, 7 March, pp.202-203

¹⁵ Immigration and Refugee Board of Canada 2011, *Sri Lanka: Information on the treatment of Tamil returnees to Sri Lanka, including failed refugee applicants; repercussions, upon return, for not having proper government authorization to leave the country, such as a passport*, LKA103815.E, 22 August <http://www.irb-cisr.gc.ca:8080/RIR_RDI/RIR_RDI.aspx?id=453562&l=e>

of serious harm because of an implied political opinion or membership of any particular social group however described arising from the applicant returning to Sri Lanka as a person who applied for asylum in Australia if the applicant returns to Sri Lanka, now or in the reasonably foreseeable future.

Illegal departure from Sri Lanka

53. The applicant claimed he would be harmed because he departed Sri Lanka illegally. The Tribunal accepts that the applicant departed Sri Lanka without possession of his Sri Lankan passport and not from an approved port. The Tribunal discussed with him his doing so was an offence under the Immigration and Emigration Act of 2006 ("IEA") for illegal departure from Sri Lanka.¹⁶ It discussed too that according to information from DFAT¹⁷ returnees are generally met either by DFAT or IOM staff at the airport. Since November 2012, all failed asylum seekers returned to Sri Lanka from Australia who had departed Sri Lanka illegally had been arrested upon return to the airport in Colombo. The returnees were then charged with offences relating to illegal departure under the IEA and held on remand until brought before a Magistrate. After a bail hearing, the returnees are granted bail with a personal surety and able to return to their home area. The period on remand varies between a couple of hours to a couple of days, depending on how soon a bail hearing can be held, but there are reports of it taking up to two weeks.¹⁸ The Sri Lankan authorities will investigate the background and identity of each returnee, which can involve contacting the person's family and the police in their home area. Eventually the returnee will need to return to Court to face the charges. Although the IEA states the penalty for illegal departure is a prison sentence from 1 to 5 years and a fine of 50,000 LKR to 200,000 LKR, the Magistrates are able to use their own discretion in determining the amount of the fine. In practice, Magistrates have been handing out fines between 5,000 LKR and 50,000 LKR. Only returnees suspected of people smuggling offences have been denied bail or given a prison sentence. The most recently available information is the above process is continuing under the new government.¹⁹
54. Again, the Tribunal is mindful it must give regard not only to the outcome of any interrogation or questioning, but also whether there is a chance of harm during the process involved in attaining that outcome.²⁰ The Tribunal considers the offences under the IEA are laws of general application. On the face of the wording of the IEA legislation and the information regarding the implementation of the IEA before the Tribunal, the Tribunal is not satisfied the IEA laws are discriminatory in their terms or enforced in a selective or discriminatory way. The laws apply to all Sri Lankan citizens who depart Sri Lanka in breach of the IEA laws. Any harm the applicant may suffer arising from punishment for an offence under the IEA has no element of persecution for the purpose of s.91R(1)(c) and therefore is not persecution.²¹ The Tribunal does not accept that his prosecution for breach of Sri Lankan migration laws amounts to persecution.
55. The applicant had no comment about that information.
56. The Tribunal notes the country information that bail is routinely given on the accused's own recognisance although a family member is also required to provide surety. If the arrival

¹⁶ Sections 34, 35 and 45 IEA [http://www.lawnet.lk/process.php?st=1981Y10V245C&hword=""&path=5](http://www.lawnet.lk/process.php?st=1981Y10V245C&hword=)

¹⁷ DFAT Country Information Report: Sri Lanka, 31 July 2013; (CX234989 of 14 October 2009; CX234202 of 29 September 2009; CX 249694, CX297471 of 19 October 2012, CX304258 of 27 February 2013 and DFAT report 1479 of 4 March 2013)

¹⁸ 'Sri Lanka: Asylum denied, a penalty waits at home', *Sydney Morning Herald*, 8 December 2012, CX300741.

¹⁹ A. Perera, B. Doherty, S. Medhora, 'Asylum seekers transferred at sea by Australia to face court in Sri Lanka' (20 Feb 2015) <http://www.theguardian.com/australia-news/2015/feb/20/asylum-seekers-transferred-at-sea-by-australia-to-face-court-in-sri-lanka>

²⁰ *SZQPA v MIMA* [2012] FMCA 123

²¹ *SZQPA v MIMA* [2012] FMCA 123

occurs over a weekend or on a public holiday the returnee is placed in the remand section of Negombo prison and may remain there for some days until a bail hearing is available. The Tribunal has regard to the decision of the High Court in *WZARV*²² that not all detention amount to a threat to a person's liberty and is an instance of serious harm. The Tribunal accepts that conditions in Sri Lanka's prisons are poor, they are described so in the DFAT country report. Conditions on remand have been described in media reports²³ as being overcrowded. The Tribunal has considered the available country information in relation to the circumstances of individuals who are held in prison in Sri Lanka and notes the reports of torture and assault.²⁴ The DFAT country report refers to there being unsubstantiated allegations but is unaware of reports of mistreatment of returnees while on remand. However it considers it is prisoners who otherwise have a profile of being opposed to the current Sri Lankan government profile (such as persons affiliated to the LTTE) who are targeted in this way. There have not been reports that returnees held awaiting bail hearings have been subjected to torture or other forms of deliberate mistreatment. The Tribunal considers any period the applicant spends on remand is as result of the application of the IEA laws, which the Tribunal found above are laws of general application and any period on remand would be a consequence of those laws of general application and therefore not persecution.²⁵ Furthermore the Tribunal is not satisfied that due to the short-term nature of the imprisonment on remand that the applicant would face a real chance of serious harm while held on remand.

57. The Tribunal considers it not because the applicant is a Tamil or a failed asylum seeker, but rather because the applicant departed Sri Lanka illegally that he will be charged or held or remand or questioned at the airport or further questioned upon return to his home village. The Tribunal is not satisfied that any difficulties the applicant may face as a result of questioning, being charged, encountering cramped and uncomfortable and unsanitary conditions on remand are aimed at the applicant for any Convention reason. The Tribunal considers that these are factors which apply generally and not specifically to Tamils or failed asylum seekers or persons with imputed political opinions. The Tribunal is not satisfied, that questioning, arrest, and the poor conditions in remand, and the application of a penalty for illegal departure amount to systematic and discriminatory conduct as required by s.91R(1)(c).
58. There is also the consideration of the applicant facing a jail term for his illegal departure. On the face of the wording of s.45(1)(o) of the IEA states both a fine **and** a prison sentence are enforced upon conviction for illegal departure. The information from DFAT and the Attorney General Department of Sri Lanka is the Magistrates have discretion to suspend a sentence and that is what is routinely done. This power is found in s.303 of the Code of Criminal Procedure.²⁶ The Tribunal considers based on the available country information there is only a remote and therefore not a real chance the applicant will be sentenced to a term of imprisonment for his offences under the IEA. The Tribunal considers it high likely the applicant will be fined not more than LKR200,000 (AUD1,850) and more likely to be

²² *MIBP v WZAPN, WZARV v MIBP* [2015] HCA 22, see also, *SZTEQ v MIBP* [2015] FCAFC 39

²³ 'Asylum denied, a penalty waits at home,' Ben Doherty, *Sydney Morning Herald*, 8 December 2012, <http://www.smh.com.au/world/asylum-denied-a-penalty-waits-at-home-20121207-2b0qi.html>

²⁴ ACAT-France, "When arbitrariness prevails: A study of the phenomenon of torture in Sri Lanka", http://www.acatfrance.fr/public/sri_lanka_en-web-acat_report_june_2012_when_arbitrariness_prevails_a_study_of_the_phenomenon_of_torture_in_sri_lanka.pdf (June 2012) see also DFAT country report, HRW op cit, Amnesty International op cit, UKBA op cit, Freedom from Torture. op cit, Canadian IRB op cit.

²⁵ *MZAPO v MIBP* [2015] FCCA 96, *SZSPT v MIBP* [2014] FCA 1245 and *SZSRU v MIBP* [2014] FCA 1252
²⁶ [http://www.lawnet.lk/sec_process.php?chapterid=1981Y2V26C§ionno=303&title= CODE OF CRIMINAL PROCEDURE &path=5](http://www.lawnet.lk/sec_process.php?chapterid=1981Y2V26C§ionno=303&title=CODE%20OF%20CRIMINAL%20PROCEDURE&path=5)

The IEA was amended in 2006 to repeal s.45(6), which previously excluded operation of s.303 of the Code of Criminal Procedure. <http://www.refworld.org/type,LEGISLATION,,LKA,46a6015327,0.html>

LKR50,000 (AUD460).²⁷ The Code of Criminal Procedure provides for allowing time for payment and for the payment of fines by instalments.²⁸ The evidence before the Tribunal does not suggest the applicant will be unable to pay or that fine or that payment of the fine will cause him hardship. The evidence before the Tribunal too does not suggest he is without any relative able to provide surety. Therefore, the applicant will be able to receive a suspended sentence. As such, the Tribunal considers there is no real chance the applicant will face an extended period of imprisonment arising from his illegal departure from Sri Lanka.

59. In summary, the Tribunal finds the applicant does not face a well-founded fear of persecution due to his illegal departure from Sri Lanka because: the laws were not persecution due to a lack of discriminatory intent or application and there is no real chance he would face a term of imprisonment for the offence of illegal departure.
60. After assessing all the evidence and the applicant's circumstances and being mindful of both the process and the outcome of the prosecution the applicant will face from the Sri Lankan authorities arising from his illegal departure, the Tribunal is satisfied that the applicant does not face a real chance of serious harm due to his illegal departure, now or in the reasonably foreseeable future if he returns to Sri Lanka.
61. The Tribunal has considered the claims of the applicant individually and cumulatively. The Tribunal is not satisfied the applicant faces a real chance of serious harm by the Sri Lankan authorities due to any of his claimed reasons. The Tribunal is not satisfied the applicant has a well-founded fear of persecution for any Convention reason or combination of reasons, now, or in the reasonably foreseeable future if he returns to Sri Lanka. Therefore he does not satisfy the requirements of s.36(2)(a).
62. The Tribunal considers his claims further below in relation to complimentary protection.

Real risk of significant harm

63. The Tribunal has also considered the application of s.36(2)(aa) to the applicant's circumstances. In making its findings, the Tribunal has considered the Complementary Protection Guidelines as required by Ministerial Direction No.56, made under s.499 of the Act.

Discrimination

64. The Tribunal accepted above on basis of the country information that Tamils in Sri Lanka have historically faced a degree of harassment and discrimination on account of their ethnicity and that Tamils may continue to do so, such as difficulties in accessing employment and disproportionate monitoring by security forces. The Tribunal has had regard to whether that harassment and discrimination amounts to significant harm. The Tribunal considers the only relevant forms of significant harm are torture, cruel or inhuman treatment or punishment, or degrading treatment or punishment. On the evidence before it, the Tribunal is not satisfied the harassment or discrimination towards Tamils involves severe physical or mental pain or suffering, therefore it does not meet the definition of torture in s.5(1). Similarly, the harassment and discrimination cannot meet limb (a) in the definition in s.5(1) of cruel or inhuman treatment or punishment, nor could the harassment or discrimination be reasonably regarded in all the circumstances as cruel or inhuman in nature for the purpose

²⁷ www.oanda.com (accessed 22 January 2015)

²⁸ Parliament of the *Democratic Socialist Republic of Sri Lanka* n.d. [current], 'Code of Criminal Procedure. An Act to Regulate the Procedure of the Criminal Courts', (2 July 1979) [No.26 of 1981] (amended to Act No.7 of 2006), *LawNet. Government of Sri Lanka [Ministry of Justice]*, Section 291 'Provisions as to sentences of fine' <[http://www.lawnet.lk/process.php?st=1981Y2V26C&hword="&path=5](http://www.lawnet.lk/process.php?st=1981Y2V26C&hword=)>

of limb (b) of that definition. The Tribunal accepts the harassment and discrimination may cause some humiliation to the applicant, but is not satisfied that the harassment and discrimination would cause extreme humiliation which is unreasonable. Therefore, the Tribunal is not satisfied any harm arising to the applicant from the harassment or discrimination will amount to significant harm.

Illegal departure

65. The Tribunal has had regard to whether the harm the applicant may suffer arising from his committing offences under the IEA amounts to significant harm, in particular, being questioned, his bail conditions, being detained for a short period while on remand and imposition of a fine. The Tribunal has had regard to whether that amounts to significant harm. The Tribunal considers the only relevant forms of significant harm are torture, cruel or inhuman treatment or punishment, or degrading treatment or punishment. On the evidence before it, the Tribunal is not satisfied the applicant's being questioned, bail conditions, detention on remand or fine will involve severe physical or mental pain or suffering, therefore it does not meet the definition of torture in s.5(1). Similarly, his being questioned, the bail conditions, detention while on remand and fine cannot meet limb (a) in the definition in s.5(1) of cruel or inhuman treatment or punishment, nor could his bail conditions, detention while on remand or fine be reasonably regarded in all the circumstances as cruel or inhuman in nature for the purpose of limb (b) of that definition. The Tribunal is not satisfied too that his being questioned, the bail conditions, detention while on remand and fine would cause extreme humiliation which is unreasonable. Moreover, the definitions of 'cruel or inhuman treatment or punishment' in s.5(1) requires that pain or suffering be 'intentionally inflicted' on a person and the definition of 'degrading treatment or punishment' requires that the relevant act or omission be 'intended to cause' extreme humiliation. Mere negligence or indifference is not sufficient; what is required is an intention to inflict pain or suffering or to cause extreme humiliation.²⁹ The Tribunal does not accept on the evidence before it that the pain or suffering caused by the overcrowding and other problems in prisons in Sri Lanka is 'intentionally inflicted' on prisoners as required by the definition of 'cruel or inhuman treatment or punishment' in subsection 5(1) of the Migration Act. Neither does the Tribunal accept that the overcrowding and other problems are 'intended to cause' extreme humiliation as required by the definition of 'degrading treatment or punishment'. Therefore, the Tribunal is not satisfied any harm arising from his being questioned, the bail conditions, being detained while on remand or fined will amount to significant harm.
66. In relation to the balance of the applicant's claims, the Tribunal found above the applicant did not have a well-founded fear of persecution on any ground as he does not face a real chance of serious harm. Section 36(2)(aa) refers to a 'real risk' of an applicant suffering significant harm. The 'real risk' test imposes the same standard as the 'real chance' test applicable to the assessment of 'well-founded fear' in the Refugee Convention definition: *MIAC v SZQRB*.³⁰ Given the test is the same, for the same reasons set out above in relation to real chance, the Tribunal is not satisfied the applicant has a real risk of significant harm.
67. The Tribunal therefore considers there are no substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Sri Lanka there is a real risk the applicant will suffer significant harm, in the form of: arbitrary deprivation of life; the death penalty being carried out; torture; cruel or inhuman treatment or

²⁹ Compare *SZSPE v Minister for Immigration & Border Protection & Anor* [2013] FCCA 1989, upheld on appeal, *SZSPE v Minister for Immigration and Border Protection* [2014] FCA 267

³⁰ [2013] FCAFC 33

punishment, or degrading treatment or punishment. Therefore the named applicant does not meet the requirements of s.36(2)(aa).

CONCLUSIONS

68. For the reasons given above, the Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a).
69. Having concluded that the applicant does not meet the refugee criterion in s.36(2)(a), the Tribunal has considered the alternative criterion in s.36(2)(aa). The Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under s.36(2)(aa).
70. There is no suggestion that the applicant satisfies s.36(2) on the basis of being a member of the same family unit as a person who satisfies s.36(2)(a) or (aa) and who holds a protection visa. Accordingly, the applicant does not satisfy the criterion in s.36(2).

DECISION

71. The Tribunal affirms the decision not to grant the applicant a Protection visa.

Fraser Syme
Member