

1319856 (Refugee) [2016] AATA 3830 (5 May 2016)

### DECISION RECORD

<b>DIVISION:</b>	Migration & Refugee Division
<b>CASE NUMBER:</b>	1319856
<b>COUNTRY OF REFERENCE:</b>	Sri Lanka
<b>MEMBER:</b>	Sydelle Muling
<b>DATE:</b>	5 May 2016
<b>PLACE OF DECISION:</b>	Melbourne
<b>DECISION:</b>	The Tribunal affirms the decision not to grant the applicant a Protection visa.

Statement made on 05 May 2016 at 5:22pm

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. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the applicant a Protection visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant who claims to be a citizen of Sri Lanka, applied for the visa [in] December 2012 and the delegate refused to grant the visa [in] December 2013.
3. The applicant appeared before the Tribunal on 11 February 2016 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Tamil (Sri Lankan) and English languages.
4. The applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing.

### CONSIDERATION OF CLAIMS AND EVIDENCE

5. 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.
6. 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).
7. 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.
8. 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').
9. 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 expressly for protection status determination purposes, to the extent that they are relevant to the decision under consideration.

10. The applicant claims to be a citizen of Sri Lanka who was born in [his home town], in Puttalam on [date], however the identification documents he submitted, including his birth certificate has his date of birth recorded as [later that year]. According to his protection visa application, the applicant lived in [his home town], in Puttalam district from [specified year] to 2000. From 2000 to 2003 he lived in [another town], in Puttalam district and from 2003 to June 2012 he was living in [his home town], in Puttalam district. He completed [number] years education and is fluent in Tamil and can speak Sinhalese. He described his occupation before coming to Australia as student. The applicant departed Sri Lanka illegally [in] June 2012. His father, mother, [and siblings] are residing in Sri Lanka.
11. The applicant presented his claims in his protection visa application [in] December 2012 (folios 31 to 68 of the Department file [number]), a Departmental interview he attended [in] August 2013 ( between folio 119 and 120 of Department file [number]), in submissions received by the Tribunal from his previous and current advisers and at his Tribunal hearing on 11 February 2016. The following is the statement made by the applicant attached to his protection visa application:

**Background:**

My name is [name] and I am [an age] year old male born in [home town], Puttalam District, Sri Lanka. The following is only a summary of my claims for protection. It is not an exhaustive statement of the reason or reasons why I cannot return to my country of origin. I will provide further information in relation to my present claims during my interview with the POE officer. An Entry interview was conducted with me [in] August 2012 with a DIAC officer. During that interview I was asked to provide my claims in a brief form which is why not all my claims were given at that stage. Also I have not been explained what is relevant and what I am required to disclose to the Department for the purpose of assessment of my claims.

My citizenship is Sri Lankan. My ethnicity is Tamil and my religion is Hindu. I have never been married and I have no children. My father, mother, [and siblings] remain in Sri Lanka.

I have resided in Sri Lanka since my birth, in both [home town] and [another town], both within Puttalam District.

I fear returning to Sri Lanka.

**Why I left my country:**

I left Sri Lanka in June of this year as I was fearful for my life. I had been threatened by the Sri Lankan Army; I had also been threatened by the CID through the capture of my father.

My father is [an Occupation 1]. When he went to [District 1] for employment, he was captured by the CID on suspicion of involvement with the LTTE in smuggling arms. My father had an injury on the side of his body where he was hit with a shell during bombings during the war. The CID saw this injury and suspected that my father got this because of his involvement with LTTE. It does not matter that my father is an elderly man. The CID only see that because my father is still working as [an Occupation 1], he has the ability to smuggle arms and help the LTTE. My father was captured in around 2008. He was held for [number] years. I was [age] years old when

my father was detained. For [number] years, I was without my father and was unsure whether he was alive or not. We honestly thought he was no more.

My father returned home to our family for around three weeks this year before he was captured again by a different branch of the CID. My father didn't say too much to me about his detention, only that he was tortured during the time that he was detained; and that he was detained on the above suspicion of assisting the LTTE with the smuggling of arms. My father was taken by the CID to a hospital in [District 1], possibly [a specific] hospital and I understand there are records to show that he was the victim of torture.

This second time that the CID came, I was at home with my father when he was detained by the CID. The CID again accused him of smuggling arms. The CID found arms in our house with a detector. The CID had planted these. My father has not in any way been involved with the LTTE, neither have myself or my [sibling]. My father was detained by the CID for a few weeks but has since been let go. He is now in hiding. My mother tells me that the CID have come to our home regularly to look for my father.

In an interview on Christmas Island, I did not mention that my father had been detained by the CID as I was so fearful that my father would again be detained by the CID if I said anything about his plight. My father is in hiding in Sri Lanka and I did not want for him to be found by the CID. I was fearful that if I said anything about the CID, this could happen.

In around [month] this year, I was taken by the Sri Lankan Army into their camp and interrogated and tortured for about 2 or 3 hours. I was beaten. I was taken because the Army wanted me to join them. They wanted me as a young Tamil man to join them to act similar to a spy for them for other Tamils. I refused to join the Sri Lankan Army. I did not mention this on Christmas Island as again I was scared that my comments would get back to the Sri Lankan Army and I would be harmed for fleeing Sri Lanka.

I was very scared and confused when I arrived on Christmas Island.

I am also fearful of returning to Sri Lanka because of the Grease Men. These are men who cover themselves in grease and kill innocent Tamils. The Grease Men once came into our compound. I fainted from fear. They were horrifying to see.

**What I fear might happen if I go back to my country:**

I fear that I will be harmed by the CID and Sri Lankan Army if I were to return to Sri Lanka. I have refused to fight with the Sri Lankan Army. My father has been captured by the CID. I am fearful that they will suspect me of being involved with my father's imputed political opinion of support for the LTTE.

I am fearful of returning to Sri Lanka as a failed asylum seeker. I will be captured by the authorities and will lose my life for fleeing from Sri Lanka to a Western country for safety.

**Who I think will harm or mistreat me if I go back:**

The Sri Lankan Army and CID will harm me if I were to return to Sri Lanka.

I am also fearful of harm from the Grease Men. Many Tamils are attacked and killed by these men. I am fearful that I will be a victim of the Grease Men.

**Why I believe they will harm or mistreat me if I go back:**



I will be harmed as I will be suspected of an imputed political opinion because I am my father's son. The CID may suspect that I have been involved with my father in supporting the LTTE. This suspicion will further be raised by my having fled from Sri Lanka. I fear that danger will come to me because of the imputed political opinion held against me.

I will be harmed because of my race as Tamil. Tamils are killed in Sri Lanka because of our ethnicity and religion.

I am fearful that I will be harmed for fleeing to Australia to seek asylum.

**Why I believe that the authorities in my country will not protect me if I go back:**

The authorities of Sri Lanka cannot protect me if I were to return to Sri Lanka as they hold suspicion that, as a Tamil, I have been involved with my father in the LTTE. The Sri Lankan Army will target me for having fled from their demands to join them. They will impute that I am against them.

I do not believe that the Sri Lankan government will protect me from harm as they will view that I have exposed the persecution of Tamils to the world by fleeing to Australia and seeking asylum.

The authorities do not protect Tamils from the Grease Men. All authorities are aware of the Grease Men but do nothing to stop them.

Tamils are not protected from attacks against their religion of Hindu from the Sinhalese Buddhists. The authorities in Sri Lanka are largely Sinhalese and Buddhist.

**Why I believe I will suffer significant harm:**

I will suffer significant harm as I am a Tamil. As a Tamil, I will suffer cruel and inhumane and degrading treatment and punishment because of my ethnicity, religion and the imputed political opinions that are held against me. Tamils are not respected in Sri Lanka.

**Why I cannot relocate:**

I cannot relocate to any other area of Sri Lanka as I will be easily identified as Tamil. I speak our distinctive language of Tamil and will be easily recognised as being Tamil. I will be harmed wherever I were to live in Sri Lanka. Nowhere is safe for me to live in Sri Lanka.

12. The primary issue in this review is whether there is a real chance that, if the applicant returns to Sri Lanka, he will be persecuted for one or more of the five reasons set out in the Refugees Convention for the purpose of s.36(2)(a) of the Migration Act and, if not, whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of him being removed from Australia to Sri Lanka, there is a real risk that he will suffer significant harm for the purpose of s.36(2)(aa) of the Migration Act.
13. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.
14. The Tribunal accepts the applicant travelled to Australia by boat without a travel document but provided several documents identifying his name and place of birth, including his national identity card and birth certificate. Despite the applicant providing a different date of birth to that recorded on his identity documents, the Tribunal finds the applicant has provided consistent information regarding his identity and place of birth. In the absence of evidence to

the contrary, the Tribunal accepts that the applicant is a citizen of Sri Lanka and has assessed his claims against Sri Lanka as his country of nationality.

15. The Tribunal is aware of the importance of adopting a reasonable approach in the finding of credibility. In *Minister for Immigration and Ethnic Affairs and McIlhatton v Guo Wei Rong and Pan Run Juan* (1996) 40 ALD 445 the Full Federal Court made comments on determining credibility. The Tribunal notes in particular the cautionary note sounded by Foster J at 482:

....care must be taken that an over-stringent approach does not result in an unjust exclusion from consideration of the totality of some evidence where a portion of it could reasonably have been accepted.

16. In the decision of *Minister for Immigration and Ethnic Affairs v Wu Shan Liang & Ors* (1996) 185 CLR 259, the High Court also made comments on the correct approach to determining findings on credibility. Kirby J said at 39:

First, it is not erroneous for a decision-maker, presented with a large amount of material, to reach conclusions as to which of the facts (if any) had been established and which had not. An over-nice approach to the standard of proof to be applied here is not desirable. It betrays a misunderstanding of the way administrative decisions are usually made. It is more apt to a court conducting a trial than to the proper performance of the functions of an administrator, even if the delegate of the Minister and even if conducting a secondary determination. It is not an error of law for a decision-maker to test the material provided by the criterion of what is considered to be objectively shown, as long as, in the end, he or she performs the function of speculation about the "real chance" of persecution required by *Chan*.

17. With these points in mind the Tribunal now turns to an assessment of the applicant's claims.
18. The applicant claimed in the hearing that he would have problems from the army if he returned to Sri Lanka because his father had problems with the army. He claimed that his father had been shot and had a scar and as a result, in 2009, his father was taken to an army camp because the army suspected him.
19. The Tribunal does not accept that the applicant's father was detained in the past by the army because he was suspected as a result of a scar that he had. The Tribunal found the applicant's evidence in the hearing regarding what had happened to his father to be vague and lacking in detail. The applicant was unable to tell the Tribunal when in 2009 his father was allegedly detained, where his father was detained other than in an army camp in Vavuniya or what his father was suspected of. The Tribunal notes that the applicant claimed in his statutory declaration attached to his protection visa application that the army had suspected his father got his scar because of his involvement with the LTTE and that as [an Occupation 1] he had the ability to smuggle arms and help the LTTE. However, in the hearing when questioned about these suspicions the army had of his father, the applicant claimed they thought his father supported the army and made no mention of anything about the LTTE, including having allegedly supported them by smuggling arms. While the Tribunal appreciates that the applicant was in his mid-teens at the time of his father's alleged detention, given the seriousness and significance of these events to his claims for protection, the Tribunal would expect him to have some knowledge regarding these fairly basic but important details about what happened to his father. At the very least, the Tribunal finds that the applicant should have been able to articulate that his father was suspected of being involved with the LTTE, if in fact his father had been detained for [number] years as he claimed. The Tribunal has considered the applicant's adviser's submission that it is not unusual for a father and mother to protect their youngest child from trauma suffered and events that might affect him. However, in light of the fact that the applicant's fears are directly related to his father's alleged experiences, and he had previously expressed in his statutory declaration attached to his protection visa application that his father was detained

on suspicion of involvement in smuggling arms for the LTTE, the Tribunal does not accept that this adequately explains the applicant's demonstrated lack of knowledge in the hearing regarding what allegedly happened to his father.

20. The Tribunal has also taken into consideration the inconsistencies in the applicant's evidence in the hearing, as compared with his claims in his statutory declaration attached to his protection visa application, regarding the alleged injury or scarring of his father which was the reason for the alleged suspicions that the army had and resulted in his father's alleged detention for a period of [number] years. The Tribunal notes according to the applicant's evidence in the hearing, the scar his father had was the result of him being shot. However, in the statutory declaration attached to his protection visa application, the applicant specifically claimed that the scar his father had was the result of being hit with a shell during bombings during the war. While the applicant responded suggesting that a gun or shell are the same, the Tribunal finds being shot and being injured by shelling as a result of a bombing are quite different and it does not accept that if the applicant's father was injured during the war, that the applicant would not be able to provide consistent evidence regarding how his father sustained the injury and subsequent scar. When this is taken together with the limited evidence the applicant provided in relation to the circumstances in which his father had allegedly been injured and scarred, the Tribunal does not accept that the applicant's claims are credible and does not accept that the applicant's father had any scar as a result of either being shot or shelled during the war or that he was detained by the army for three years as a result of suspicions based on this alleged injury.
21. Based on the above, the Tribunal does not accept that the applicant's father was detained by the army for three years in 2009, or in 2008 as he claimed in his statutory declaration attached to his protection visa application, during which time he was tortured. The Tribunal has had regard to the applicant's evidence in the hearing regarding the efforts that were made to locate his father when he allegedly did not return from [his work] in [District 1]. According to the applicant, his mother went once, soon after his father did not return to [his home town], and made enquiries from people who were working there. The Tribunal finds it implausible that if the applicant's father had gone to [District 1] and had not returned over a period of three years, that either his mother or his [siblings], would not have made any further enquiries about his whereabouts over that period of time.
22. The Tribunal also finds it implausible that the applicant would not be able to recall when in 2012 his father allegedly returned to [his home town]. As the Tribunal put to the applicant in the hearing, the alleged return of his father after he had been missing for three years, presumably dead, is a significant event and it has difficulty accepting that he would not be able to recall at least the month in which his father returned after such a long period of allegedly being away, particularly considering it would have occurred a few months prior to his departure from the country.
23. As the Tribunal does not accept that the applicant's father had been detained for three years in an army camp, as the applicant claimed, the Tribunal does not accept that when he allegedly returned to [his home town], the army and CID came and made enquiries from him or his father. The Tribunal notes the applicant provided inconsistent evidence regarding what allegedly happened after his father returned home to [his home town]. In the hearing he claimed that the CID and/or army came once, two weeks after his father had returned home, and just questioned his father and they returned a week later, at which time they found weapons on their property and they took his father to the [his home town] camp, where he was kept for a week. However, in his statutory declaration attached to his protection visa application, the applicant made no mention about any visit by the CID or army during which they just questioned his father. Instead he claimed that his father returned home to his family for around three weeks before he was captured again and he discussed the CID coming and finding arms with a detector. The applicant also claimed that his father was detained by the



CID for a few weeks, as opposed to a week, before being let go. Further, according to delegate's decision, copy of which was provided to the Tribunal, the applicant's evidence was that when his father returned home, for a period of approximately two weeks, the CID visited his home three times and harassed his father and had also asked him and his relatives questions about his father and when they attended his home and carried out a search and found the weapons, the CID did not arrest or detain anybody for the possession of weapons. The Tribunal finds this to be in stark contrast to the applicant's evidence in his statutory declaration and during the hearing and is therefore further satisfied that these events did not occur.

24. Similarly, in relation to the applicant's claims in regard to his contact with the authorities, the Tribunal notes the applicant claimed in the hearing that he was questioned at home at the time the weapons were allegedly found, about his father and the weapons. The applicant also claimed in the hearing that he was harmed at the time he was questioned, however when asked how he was harmed he stated that they threatened him. In response to the Tribunal's question as to how he was threatened, the applicant stated that they spoke to him in an aggressive way. In contrast to the applicant's evidence in the hearing, the Tribunal notes the applicant's claims in his statutory declaration attached to his protection visa application that he was taken by the Sri Lankan Army into their camp and interrogated and tortured for about 2 or 3 hours and beaten because the army wanted him to join them. Further, according to the delegate's decision, a copy of which was provided to the Tribunal, the applicant's evidence was that when the Sri Lankan Army came to see his father at home after his release from detention they attempted to recruit him and he told them he was not interested in their offer and they left. The Tribunal finds that the applicant has provided conflicting evidence regarding his contact with the army and/or CID and as such, it is further satisfied that the applicant had no contact with either the army or CID prior to his departure from Sri Lanka either because of any interest they allegedly had with his father or because they wanted to recruit him. The Tribunal notes the applicant's evidence that his statement was taken a long time ago so he could have missed a few things or forgotten certain things and the adviser's submission that the significant period of time between the applicant making his claims and the hearing could be the reason why the applicant could not remember some events. The Tribunal does not accept given the seriousness of the applicant's initial claim that he was taken to an army camp, interrogated and tortured and the significance of these alleged events to the applicant's claims for protection, that the applicant would have forgotten that this had occurred. The Tribunal therefore does not accept that the applicant was either questioned by the CID or army about his father or any weapons that were allegedly found at his home or that he was taken to the army camp, interrogated and tortured and asked to join the army or that he was asked to join the army when they came to his home.
25. As the Tribunal does not accept that the applicant's father was detained for three years in an army camp on suspicion of association with the LTTE because he had scars or because of his employment as [an Occupation 1] or for any other reason, or that the army or CID came to the applicant's home once his father allegedly returned home and found weapons on their property or that they questioned the applicant either about his father, the weapons or joining the army, the Tribunal does not accept that the applicant's father is in hiding in [District 1] or that the CID have come to the applicant's home regularly looking for his father, as he claimed in the statutory declaration attached to his protection visa application. The Tribunal notes in the hearing, the applicant's evidence was that the CID had come to his home twice to get the family members names and his mother told them he was in Colombo studying. There was nothing in the applicant's evidence in the hearing suggesting that there were any enquiries made about his father. As such, while the Tribunal accepts as plausible that routine checks may have been made to establish which members of the applicant's family were residing in the family home, it does not accept that there have been any specific enquiries made about the applicant from either the CID, the army or any other authorities



since his departure from the country. The Tribunal does not accept the applicant's adviser's contention that the applicant's absence from his home when these enquiries were made would impute him with suspicion based on the weapons found on his family's property, given the Tribunal does not accept this claim for the reasons discussed above.

26. Based on the above, the Tribunal does not accept that the applicant or any members of his family have been of interest to the authorities in the past. While the Tribunal accepts the applicant's adviser's submission at the conclusion of the hearing that the applicant has consistently claimed that his father had been detained for three years, that weapons were found in his house and that his father continues to be in hiding in Sri Lanka, the Tribunal finds the applicant's evidence in respect to these general claims to be inconsistent and/or lacking, as discussed above, and as such it does not find them credible. The Tribunal does not share the applicant's adviser's opinion, as expressed in his post hearing submission, that the inconsistencies identified and discussed with the applicant in the hearing are slight. Nor does the Tribunal accept the applicant's lack of familiarity with the immigration process or the use of an interpreter to forward his claims adequately explains the numerous deficiencies in the applicant's evidence regarding his alleged personal experiences.
27. The Tribunal therefore does not accept that the applicant's father was ever detained on suspicion of being involved with the LTTE because he has a scar or because his father works as [an Occupation 1] or for any other reason. Nor does the Tribunal accept that the applicant had any contact with the authorities in the past either because of his father or because the army wanted to recruit him. The Tribunal therefore does not accept that if the applicant returns to Sri Lanka, that the army or the CID would have any interest in him for these reasons or that he would face a real chance of serious harm from either the CID, the army or any other authorities now or in the reasonably foreseeable future for reasons of an imputed political opinion based on his father's imputed political opinion of support for the LTTE or because the applicant allegedly refused to work for the army. The Tribunal does not accept, based on its findings that the applicant's father has not been detained in the past or been suspected of involvement with the LTTE, that the applicant's father's employment as [an Occupation 1] would result in either the applicant's father or the applicant being imputed with supporting the LTTE or association with the LTTE and facing a real chance of persecution, now or in the reasonably foreseeable future, for this reason.
28. The Tribunal has considered whether the applicant faces a real chance of persecution on his return to Sri Lanka simply based on his Tamil ethnicity and/or his membership of the particular social group of "Young Tamil males" as submitted by the applicant's previous adviser. In relation to being Tamil or part of a group identified on the basis of Tamil ethnicity, the Tribunal has had regard to the country information it put to the applicant in the hearing from sources including DFAT Country Information Reports for Sri Lanka dated 18 December 2015 and 15 February 2015, UNHCR *Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka*, dated 5 July 2010 and 21 December 2012, UK Home Office Operation Guidance Note for Sri Lanka dated July 2013 and UK Home Office Operation Country Information and Guidance Report about Tamil Separatism in Sri Lanka dated 28 August 2014.
29. The Tribunal refers to the country information it put to the applicant in the hearing from the UNHCR *Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka*, which suggests that the situation has improved somewhat for Tamils since the end of the war and indicates that Tamil race alone is not necessarily a predictor of persecution. While the 2010 guidelines refers to some reports that young ethnic Tamil men from the north and east may be disproportionately affected by security measures on account of suspected affiliation with the LTTE, they also indicated that there is no longer a presumption of eligibility for Sri Lankans of Tamil ethnicity or a need for group-based protection mechanisms. In the 2012 guidelines, UNHCR provided that not all Tamils from

the northern and eastern Sri Lanka are vulnerable to harm due to imputed links with the LTTE and people with “more elaborate links to the LTTE” may require protection. The Tribunal does not accept that the applicant falls within any of the profiles identified by UNHCR as being at risk of serious harm. As the Tribunal put to the applicant in the hearing, he was from [his home town] which is in the north western province of Sri Lanka and not the north or east of the country and he had claimed that neither he or his family members had ever been involved with the LTTE. Further, as discussed above, the Tribunal finds that neither the applicant’s father or the applicant has ever been suspected of having links with the LTTE.

30. The Tribunal has also taken into consideration the guidance decision *GJ v. Secretary of State for the Home Department (post-civil war: returnees) Sri Lana CG* [2013] UKUT 319 (IAC) made by the Upper Tribunal (Immigration and Asylum Chamber) in the UK. As the Tribunal put to the applicant in the hearing, according to this decision the current categories of persons at risk of persecution or serious harm on return to Sri Lanka are individuals who are or are perceived to be a threat to the integrity of Sri Lanka as a single state because they are perceived to have a significant role in relation to post-conflict Tamil separatism within the diaspora and/or a renewal of hostilities within Sri Lanka. As the Tribunal put to the applicant in the hearing, looking at his profile and experiences, it does not accept he will be perceived as a present risk to the Sri Lankan state or government and as such this decision suggests he does not fall within the category of persons at risk of serious harm.
31. The Tribunal finds that the country information before it, including the information provided by the applicant’s previous adviser in a submission received on 31 March 2014 and his current adviser in post hearing submissions, does not suggest that all Tamils face a real chance of suffering serious harm solely on account of their Tamil ethnicity, nor would it be assumed that all Tamils were connected with the LTTE. The Tribunal also does not accept that the independent information suggests that all young Tamils are subject to additional suspicion because they of an age to bear arms and fight against the Sri Lankan army, as contended by the applicant’s adviser at the conclusion of the hearing. The Tribunal notes the applicant’s claim in his statutory declaration attached to his protection visa application that Tamils are not respected in Sri Lanka, however the Tribunal does not accept that this constitutes serious harm within the meaning of s.91R(1). Taking into account the applicant’s particular profile as a Tamil male from the north western province of Sri Lanka who has not been of any interest to the authorities in the past due to any suspected or perceived links with the LTTE, the Tribunal does not accept that the applicant faces a real chance of serious harm from the authorities or anyone else, for reason of his Tamil ethnicity or for his membership of a particular social group of “ young Tamil males”. The Tribunal also does not accept that the applicant faces a real chance of persecution based on an imputed political opinion arising from his Tamil ethnicity and/or his age.
32. The Tribunal notes the applicant also claimed in his protection visa application to fear returning to Sri Lanka because of grease men. He claimed that once grease men came into his family compound and he fainted from fear and they were horrifying to see. However, in the hearing, the applicant’s evidence was that these greasemen, whom he thought was from the army, threatened everyone and put weapons in their houses and came to his house and threatened him and he fainted. When asked what happened exactly, he claimed that one person got on top of his house and all the houses in the neighbourhood. In response to the Tribunal’s question as to how he was threatened, the applicant initially responded stated his case was about his and his father’s issue. When the Tribunal explained that it was asking him about the grease men and what happened during the incident he had claimed, the applicant stated nothing happened to him but it was scary. The applicant subsequently confirmed he had no contact with grease men.



33. Based on the applicant's evidence in the hearing, the Tribunal does not accept that a grease man or grease men came into the applicant's family's compound or that there was a grease man on the roof of his house or that he saw a grease man or was threatened by one and fainted. While the Tribunal accepts that there were reports of grease men or "grease devil" activity in Puttalam, as the Tribunal put to the applicant in the hearing, the independent information, as cited in the delegate's decision, a copy of which was provided to the Tribunal, describes the phenomenon of grease men as localised incidents where women were most often at risk and that such incidents had subsided if not entirely ceased before 2012, when the applicant claimed the incident at his house occurred. Given the Tribunal's findings regarding the applicant's alleged interaction with grease men, in addition to the independent information regarding the elimination of such activity prior to 2012, the Tribunal does not accept that the applicant had any sort of interaction with grease men in the past or that there is a real chance that the applicant would face serious harm from grease men on his return to Sri Lanka, now or in the reasonably foreseeable future.
34. The Tribunal has had regard to the applicant's claims that if he returns to Sri Lanka he will experience problems because he left the country illegally. When asked what problems he may experience, the applicant claimed the he would be checked at the airport and asked for his passport and he will also be asked how he left the country. He claimed he will be questioned again and will be jailed because he came by boat illegally.
35. The Tribunal accepts that there is a real chance that the applicant will be questioned at the airport on his arrival in Sri Lanka in relation to his illegal departure from the country. The Tribunal notes the information it put to the applicant in the hearing from the DFAT report on Sri Lanka, dated 18 December 2015, which provides that people who departed Sri Lanka irregularly are questioned by police at the airport and are photographed. They are transported by police to the closest Magistrates court at the first available opportunity after investigations are completed, after which custody and responsibility for the individual shifts to the courts or prison services. The Court then makes a determination as to the next steps for each individual. Those arrested can remain in police custody at the CID Airport Office for up to 24 hours. Should a magistrate not be available before this time – for example, because of a weekend or public holiday –those charged may be held at a nearby prison. DFAT was informed in July 2015 by Sri Lanka's Attorney General's Department, which is responsible for the conduct of prosecutions, that no returnee who was merely a passenger on a people smuggling venture had been given a custodial sentence for departing Sri Lanka illegally. However, fines had been issued to act as a deterrent towards joining boat ventures in the future. Fine amounts can vary on a case-by-case basis and can be paid by instalments. Previous information provided by DFAT in their report on February 2015 was that fines ranged between 5000 and 50,000 Sri Lankan rupees (\$40-\$400AUD). If a person pleads guilty, they will be fined and are then free to go. In most cases, when a returnee pleads not guilty, returnees are granted bail on personal surety immediately by the magistrate, or may be required to have a family member act as guarantor. Looking at the applicant's particular circumstances, if there was any such requirement, he has his mother, father, [and siblings] in Sri Lanka who can stand as guarantor for him and there is nothing to suggest that they would not do so. DFAT assesses that ordinary passengers are generally viewed as victims and penalties are more likely to be pursued against those suspected of being facilitators or organisers of people smuggling ventures.
36. Taking into consideration the information discussed above, in addition to the applicant's particular profile, the Tribunal accepts that the applicant may be questioned on his arrival in Sri Lanka however, the Tribunal does not accept that the process of questioning amounts to serious harm as required by s.91R(1) of the Act. The Tribunal also finds that the applicant may be held in remand for between a few hours and possibly a few days, depending on when he arrives in Sri Lanka. The Tribunal notes the applicant's evidence in the hearing that if he was arrested for up to an hour or two that would affect him mentally. The Tribunal does



not accept on the information before it that the applicant would face mistreatment from the authorities during initial airport checks or whilst he is held in remand given that he does not have an adverse profile. Nor does the Tribunal accept any short period of time the applicant may be held in remand in prison, where conditions may be poor, will result in serious harm to him for a Convention reason, based on the Tribunal's findings regarding the applicant's profile.

37. Further, the Tribunal does not accept that any possible short period of detention the applicant may face constitutes persecution as it is the operation of a law of general application. The Tribunal refers to the country information, including in the recent DFAT report, that under Sri Lankan law, people who depart from any place other than an approved port of departure and/or without valid travel documents can be charged with an offence under the Immigrants and Emigrants Act. The Tribunal finds that this law is a national law and there is nothing in the information before it to suggest that the law is applied selectively or discriminatively or that it is discriminatory in its terms. The Tribunal therefore finds that what the applicant will face (i.e questioning, charge, remand, conviction and punishment through the imposition of a fine) on return to Sri Lanka would be the result of the non-selective enforcement of a law of general application and therefore does not amount to persecution under s.91R(1)(c).
38. The Tribunal therefore does not accept that the treatment the applicant may face on his return to Sri Lanka as a result of his illegal departure from the country, either on arrival at the airport, whilst on remand awaiting a bail hearing or when he appears later before the court, constitutes serious harm amounting to persecution. Based on the above, the Tribunal does not accept that the applicant faces a real chance of serious harm, now or in the reasonably foreseeable future because he left Sri Lanka illegally.
39. The Tribunal notes that it was also claimed that the applicant faces harm on his return to Sri Lanka as a failed asylum seeker. When asked what he believes will happen to him for this reason if he returned to Sri Lanka, the applicant stated that he would have problems at the airport; even two days being kept in jail, no-one would like.
40. The Tribunal has considered the information from DFAT it put to the applicant in the hearing, which noted that significant numbers of Tamils have been returned involuntarily to Sri Lanka and from other countries and the independent sources do not indicate that a returnee identified as someone who sought asylum in Australia or another western country, would face a real chance of serious harm. As the Tribunal put to the applicant in the hearing, various sources including DFAT, other foreign governments and UNHCR regarding people returning to Sri Lanka as failed asylum seekers and the treatment that they may receive suggests that returned asylum seekers are usually kept at the airport for some hours while their identity is checked and they may be questioned during this period and there is no further interest of persons without any adverse profile such as a criminal record or known involvement with the LTTE. While the Tribunal accepts that the applicant as a failed asylum seeker/returnee or Tamil failed asylum seeker/returnee may be subjected to a process of questioning by the Sri Lankan authorities immediately on his return to Sri Lanka, taking into consideration his particular profile as someone who has no criminal record and claimed to have never been involved with the LTTE or assisted them in any way and the findings above that neither he or any members of his family had been suspected of having any involvement with the LTTE, the Tribunal finds on the country information before it, including the information referred to by the applicant's previous and current adviser in their submissions to the Tribunal, that the applicant would be released without further interest and he would not face a real chance of persecution as failed asylum seeker or Tamil failed asylum seeker or because he would be viewed as exposing the persecution of Tamils to the world by fleeing to Australia and seeking asylum.

41. While the Tribunal accepts that there are some reports by human rights organisations such as Amnesty and Human Rights Watch, suggesting some examples of serious harm to returnees, it finds that these appear to be isolated examples where individuals have had particular adverse profiles. The Tribunal also notes the information it put to the applicant in the hearing from the decision of the Upper Tribunal in which it was noted that the cases reported by organisation such as Human Rights Watch, Freedom from Torture and Tamils Against Genocide in their reports were not representative and that the sample groups were small, distorted by its origin and unverifiable.
42. The Tribunal does not accept on the evidence before it that the applicant has a profile which would be of any concern or interest to the Sri Lankan authorities. Considering the information put to the applicant in the hearing, as well as applicant's profile as someone who was of no interest to the authorities and was not suspected of having links with the LTTE, the Tribunal does not accept that the applicant faces a real chance of persecution on his return to Sri Lanka, now or in the reasonably foreseeable future, as a failed asylum seeker or a Tamil failed asylum seeker or as a person who fled to a western country seeking asylum or as a suspected supporter of the LTTE.
43. The Tribunal notes in the delegate's decision, a copy of which was provided to the Tribunal, there was reference made to claims that the applicant will face persecution due to his Hindu religion. According to the submission received from the applicant's previous adviser on 31 March 2014, the applicant had instructed that he had been discriminated against on the basis of religion. When asked in the hearing if he had ever experienced any problems in the past because of his Hindu religion, the applicant stated no. He also gave evidence to the Tribunal suggesting that he was able to practise his religion in Sri Lanka. When asked if he believes he would have any problems or experience serious or significant harm if he returned to Sri Lanka because of his Hindu religion, the applicant stated no. The Tribunal finds that the applicant does not have a subjective fear of harm based on his Hindu religion. Taking into consideration his evidence that he was able to practise his religion and did not experience any problems in the past related to his religion, the Tribunal does not accept the applicant faces a real chance of serious harm, now or in the reasonably foreseeable future, for reasons of his Hindu religion.
44. Considering the applicant's claims individually, and cumulatively, the Tribunal does not accept that he faces a real chance of being persecuted by the CID or any other authorities or anyone else because of an imputed political opinion based on his father's alleged suspected association with the LTTE, his Tamil ethnicity, an imputed political opinion of supporting the LTTE based on his Tamil ethnicity or as young Tamil male or as a failed asylum seeker or Tamil failed asylum seeker. Nor does the Tribunal accept that the applicant faces a real chance of persecution because of his illegal departure from Sri Lanka. For the reasons provided above, the Tribunal finds the applicant's fear of persecution is not well-founded.

#### **Complementary protection obligations**

45. On the basis of the applicant's claim to be a national of Sri Lanka and documentation submitted in support of his application, the Tribunal finds that Sri Lanka is the applicant's receiving country for the purposes of s.36(2)(aa).
46. As the Tribunal does not accept that the applicant is a refugee as defined in the Refugees Convention, the Tribunal has considered the alternative criteria in s.36(2)(aa), whether there are 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 that he will suffer significant harm as defined in subsection 36(2A) of the Act.

47. Having regard to the definition of significant harm in s.36(2A) of the Act as set out under the heading 'relevant law' above, and the findings above, the Tribunal does not accept that what the applicant might experience upon return to his home in Sri Lanka will involve a real risk of being arbitrarily deprived of his life; having the death penalty carried out on him; or being subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. The Tribunal does not accept the applicant's father was detained for three years in [District 1] on suspicion of involvement with the LTTE based on him having scars as a result of either being shot or being shelled or his employment as [an Occupation 1]. For the reasons discussed above, the Tribunal does not accept that there were any visits by the army or the CID to the applicant's home in [his home town] following the alleged release of his father, that any weapons were found during a search conducted at his family's property or that his father was questioned and/or detained as result of this alleged discovery. The Tribunal does not accept that the applicant was ever questioned, threatened or harmed by the authorities during any of these visits or that he was taken to an army camp and tortured or that the army requested the applicant join them and act as a spy. It does not accept that the applicant's father has been in hiding since the alleged visit when weapons were found at the applicant's family property or that any specific enquiries have been made about the applicant's whereabouts since his departure from the country. The Tribunal finds the applicant's claims regarding his father's problems in Sri Lanka, and his subsequent difficulties as a result, are not credible. As such, for the reasons discussed above, the Tribunal does not accept there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia, there is real risk the applicant will suffer significant harm from the army, the CID or any other the authorities in Sri Lanka because of his father's suspected involvement with the LTTE based on the scar he allegedly had or because of his employment as [an Occupation 1] or because the applicant allegedly refused to join the army and act as a spy for them.
48. Nor does the Tribunal accept that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia, there is a real risk the applicant will suffer significant harm from grease men. For the reasons discussed above, the Tribunal does not accept that the applicant had any contact with grease men in the past. The Tribunal also notes the country information it put to the applicant in the hearing regarding the cessation of grease men activity prior to 2012.
49. In light of the relevant definitions set out at s.5(1) of the Act, and the independent information regarding the situation for Tamils in Sri Lanka since the cessation of the civil war in 2009, the Tribunal does not accept that there is a real risk of the applicant being arbitrarily deprived of his life, subjected to the death penalty, tortured or subjected to cruel or inhuman or degrading treatment or punishment from the Sri Lankan authorities or anyone else because of his Tamil ethnicity or his profile as a young Tamil male or an imputed political opinion based on his Tamil ethnicity or any combination of these factors. The Tribunal refers to the country information it put to the applicant in the hearing which suggests that the situation has improved somewhat for Tamils since the end of the war. UNHCR have said that that there was no longer a need for group-based protection mechanisms for Tamils. Rather, they identified amongst its potential risk profiles persons suspected of having links with the LTTE, which for the reasons provided above, the Tribunal does not accept the applicant falls within.
50. The Tribunal notes the applicant's illegal departure from Sri Lanka and the possibility that he may be subject to a lawful penalty. While the Tribunal accepts on the basis of the country information cited above, that the applicant would likely face arrest on charges of leaving the country illegally, he may be detained briefly (depending on when he arrives in the country) prior to being released on bail and he will face a penalty, the Tribunal does not accept on the country information before it, and the Tribunal's earlier reasoning referred to above, as well as having regard to the PAM 3 complementary protection guidelines in relation to imprisonment and prison conditions, that he faces a real risk of being significantly harmed



during this process. Although sources suggest that prison conditions in Sri Lanka are poor, the Tribunal does not accept that there is the necessary intention on the part of the Sri Lankan authorities to inflict pain, suffering or extreme humiliation. Further, given the country information suggests that any period of detention the applicant may face would be for a short term, the Tribunal does not accept that this would constitute significant harm. In regard to the penalty the applicant may face, based on the information cited above, the Tribunal does not accept that this will manifest itself in the mandatory imposition of a term of imprisonment or that the applicant would not be able to pay any fine that may be imposed on him as he would have the assistance of family members to meet such a financial penalty.

51. The Tribunal does not accept that the process of questioning the applicant may be subjected to, the imposition of a fine as punishment and the applicant's charge and conviction under the Immigration and Emigration Act amounts to significant harm because there is no intention on the part of the Sri Lankan authorities to inflict pain, suffering or extreme humiliation in relation to these matters. Further, the Tribunal finds on the country information cited above, that any treatment the applicant may face upon return to Sri Lanka, including a fine and detention and poor prison conditions, would not amount to significant harm as this would apply to every person in Sri Lanka who breached the illegal departure law. As this is a real risk faced by the population generally and not the applicant personally, under s.36(2B)(c) this is taken not to be a real risk that the applicant will suffer significant harm.
52. The Tribunal is also not satisfied on the country information that there is a real risk the applicant would face significant harm on arrival in Sri Lanka as a person who has fled to Australia and sought asylum. As discussed above, the Tribunal accepts that the applicant as a failed asylum seeker or Tamil failed asylum seeker may be subjected to a process of questioning by the Sri Lankan authorities immediately on his return to Sri Lanka. However the Tribunal does not accept that the process of questioning of the applicant amounts to arbitrary deprivation of his life, being subject to the death penalty, torture, cruel or inhuman treatment or punishment or degrading treatment or punishment. The Tribunal is therefore not satisfied that as a necessary and foreseeable consequence of the applicant's return to Sri Lanka there is a real risk he would suffer significant harm at the hands of the Sri Lankan authorities as part of a process of questioning he may be subject to as a Tamil failed asylum seeker.
53. Based on the applicant's evidence in the hearing that he was able to practice his Hindu religion in Sri Lanka and that he did not experience any problems in the past because of his religion, the Tribunal does not accept that there are 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 he will suffer significant harm such as arbitrary deprivation of life, the death penalty, torture, cruel or inhuman treatment or punishment or degrading treatment or punishment because he is Hindu.
54. Having regard to the applicant's claims both individually and cumulatively, the Tribunal does not accept on the evidence before it, that there are substantial grounds for believing that as a necessary and foreseeable consequence of the applicant being removed from Australia to Sri Lanka that there is a real risk he will suffer significant harm. The Tribunal is therefore not satisfied that the applicant meets the alternative provisions in s.36(2)(aa).
55. 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).
56. 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).

57. 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**

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

Sydelle Muling  
Member