

1312181 (Refugee) [2015] AATA 3512 (29 September 2015)

DECISION RECORD

DIVISION:	Migration & Refugee Division
CASE NUMBER:	1312181
COUNTRY OF REFERENCE:	Sri Lanka
MEMBER:	Antoinette Younes
DATE:	29 September 2015
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act.

Statement made on 29 September 2015 at 12:33pm

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] November 2012 and the delegate refused to grant the visa [in] August 2013.
3. The applicant appeared before the Tribunal on 6 May 2015 and 16 September 2015 to give evidence and present arguments. The Tribunal hearings were conducted with the assistance of interpreters in the Tamil (Sri Lankan) and English languages.
4. The applicant was represented in relation to the review by his registered migration agent.

THE LAW

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.

CLAIMS AND EVIDENCE

10. In support of the application for a protection visa, the applicant provided a statement in which he claimed that:
 - a. He is a Sri Lankan Hindu Tamil from [his home town], Amparai district but he grew up in Trincomalee which is a mixed area of Tamils, Sinhalese, and Muslims. When he was [a child], his family moved [overseas] on two occasions, namely in [year] and in [year].
 - b. In [year], the Sri Lankan police and army detained him in jail on suspicion and he was questioned about a bomb blast in [his home town]. They released him after two weeks because he was innocent.
 - c. He was frightened to remain in Sri Lanka because of the general level of suspicion of Tamils so he went to [Country 1]. He tried to travel to [another country] but whilst he was travelling through [Country 2], he was caught by the police and deported to Sri Lanka.
 - d. Subsequent to his deportation from [Country 2] and on arrival to Sri Lanka, he was detained at the airport and he was jailed for four weeks in [two venues] in [another location].
 - e. In 2007, Karuna party members came to a restaurant where the applicant was with a friend. They were looking for him and they took them to a remote place outside the town where he was kept and he was ill-treated. They suspected him of giving money to the LTTE and they threatened that they would kill him if he supported the LTTE. At that time, he worked as [an official] of [a local agency]. Karuna members went to his house and demanded the key to the office of the [agency] which "*put the LTTE representatives in the area offside*" and they threatened him as well.
 - f. From 2007 to 2008, he was forced to go to the Karuna party office in [a local place] to sign a book each Sunday. From 2008, they told him this was no longer required.
 - g. Between 2008 and until his departure from Sri Lanka in June 2012, he lived in fear of the Karuna group and government forces but he did not get the opportunity to leave earlier. There were still kidnappings and he was scared that he would be kidnapped and killed.
 - h. He decided to leave Sri Lanka because he feared that the Karuna party would capture him, torture him and execute him. He left Sri Lanka at the first opportunity which was in June 2012 when his [brother] got to know a group of people organising a boat. His brother made all the arrangements.
 - i. If he were to return to Sri Lanka, he would be captured, tortured and killed by the Navy, the army and the Karuna party. The government would not protect him because Tamils are still being kidnapped and the government does not have the power to prevent this from happening. He does not have the skills to survive in any part of Sri Lanka. He is [occupation] and he will not be able to survive anywhere else.

11. The applicant provided a number of documents relating to his identity and:
 - a. Copy of the letter from the *People's Liberation Organisation of Thamileelam* (PLOT) dated [in] 2013 referring to the applicant being "*an ardent supporter*" of the party, that he was [an official] of the [local agency], that he was kidnapped and interrogated by the Karuuna group in [year] on suspect of assisting the LTTE.
 - b. Copy of a "*diagnosis ticket*" referring to the admission of "*[the applicant]*" [in] October 2012 in relation to multiple injuries following assault.
 - c. Refugee identity card.
12. The applicant was interviewed by the Department [in] August 2012 and in relation to his protection claims [in] June 2013. In the course of the interview held [in] June 2013, amongst other things, the applicant claimed that:
 - a. The [local agency] gave money to the LTTE during the years he acted as [an official] of the [agency], namely in 2006 and 2007.
 - b. His father was beaten by unknown persons in October 2012 and the group was asking about the applicant's whereabouts.
 - c. His father's [relative] named *[Relative A]* fought for the LTTE and the applicant has recently discovered that the [relative] was killed by the Sri Lankan authorities.
 - d. [A further relative] was part of a political group in Sri Lanka from 1983 until 1992 when he was killed. He does not know who killed his [relative].
13. The delegate found the applicant generally credible and accepted a number of the applicant's claims, namely that he is Tamil who had lived most of his life in Trincomalee (Eastern province, Sri Lanka), that he and his family resided [overseas] as refugees, that the applicant was questioned and detained in [year], that the applicant attempted to seek asylum between 1997 and 1998 in [various countries], that he was detained in [Country 2] and involuntarily returned to Sri Lanka and that following his return, he was in prison for four weeks, that he was employed as [occupation] from 1998 until 2012, that he was a member of his local [agency] and that he was [an official], that his [agency] provided financial assistance to the LTTE, that the applicant was kidnapped and detained by members of the Karuna party in 2007, and that he had to report to the group once a week during 2007 and 2008.

Material provided to the Tribunal

14. The applicant provided a copy of the delegate's decision record, copies of photographs and submissions dated 4 May 2015. In summary, the applicant's representatives submitted that:
 - a. The applicant has relatives who have had links to and were active in Tamil separatist movements including the PLOT and the LTTE. Two of the applicant's [relatives] were in the PLOT and one of whom was shot dead in [year]. The other is still receiving a monthly stipend from the organisation in recognition of his service. The applicant's brother has had links to the PLOT through the [relatives].

- b. The applicant's [relative], [*Relative A*] was in the LTTE and he was shot (photographs attached showing the [relative] being detained by the Sri Lankan security forces prior to and following his extrajudicial execution).
 - c. The applicant's two [relatives] were in the LTTE. One [relative] was shot dead and the other one was imprisoned until his release last year.
 - d. The applicant's family links to the LTTE and the PLOT have resulted in great suspicion being placed on other family members and ongoing mistreatment of the applicant's immediate family by Sinhalese members of the community. The applicant's daughter continues to be harassed when passing the village and she is afraid to venture out and go to school. She has also been sexually abused and is unable to obtain assistance from the Sri Lankan authorities to protect. The applicant's wife has been harassed through unsolicited telephone calls making sexual propositions. She is also unable to obtain state protection. Individuals have approached the applicant's family last year looking for the applicant and his brother
 - e. The applicant's links to the LTTE and the PLOT will result in the applicant being imputed with links to the LTTE and PLOT. The attached letter from [an official] of PLOT confirms that the applicant was a supporter of that organisation.
15. The representative cited a number of independent country reports about Sri Lanka and essentially argued that the applicant has a well-founded fear of being persecuted for Convention reasons and that relocation is not reasonable in the applicant's case.

FINDINGS & REASONS

Country of nationality

16. On the basis of the available information, the Tribunal finds that the applicant is a national of Sri Lanka. He has provided copies of documents relating to his identity. The applicant made no claim to be a national of any other country.
17. The Tribunal finds that the 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).

Has the applicant suffered any of the claimed harm?

18. In consideration of the evidence as a whole, the Tribunal is satisfied that the applicant's evidence in the course of the hearings was generally consistent with his written claims. The Tribunal is satisfied that the applicant's central claims have not significantly changed throughout the process. The applicant attended to hearings before the Tribunal and his evidence has extensively been tested. The Tribunal notes that the delegate had found the applicant to be generally credible and accepted significant aspects of the applicant's claims. Whilst the Tribunal has some doubt and is of the view that the applicant might have embellished some aspects of his claims, overall and on balance, the Tribunal is satisfied that the applicant is credible and that his claims are consistent with independent country information about Sri Lanka.
19. The Tribunal accepts that the applicant is a young Tamil male from the Eastern Province of Sri Lanka, an area that was formerly under the control of the LTTE, although the applicant's evidence was that the area where he lived was never under the control of the LTTE. The Tribunal further accepts that he worked as [occupation] and owned [equipment] which he had purchased in 2004.

20. In the course of the hearings, the Tribunal discussed with the applicant the circumstances surrounding his trip to [Country 1]. The applicant confirmed that he went to [Country 1] and that he was arrested in [Country 2] where he spent 12 months in a camp. He said he was returned to Sri Lanka on a chartered flight with [a number of] other asylum seekers and that on arrival, they were handed to the police and they were jailed for four weeks. He said he was released on payment of Rs.10,000. Whilst at detention, he was questioned by the police about how he managed to depart Sri Lanka. He was not ill-treated and when he was asked about any Association with the LTTE, he told the authorities that he was not involved in the LTTE and that he had gone overseas for a better life. He was required to return to court and he returned on one occasion but as the security situation deteriorated, he was not able to travel from Trincomalee to Colombo. He said there were never any consequences as a result of not returning to court.
21. On the basis of the available information, the Tribunal is satisfied that the applicant was arrested in [Country 2] and involuntarily returned to Sri Lanka and that on his return he was detained for four weeks and paid Rs.10,000 for his release.
22. The applicant gave evidence that in around [year], he was detained for two weeks on suspect of planting a bomb. He said he was badly beaten and tortured during that period but subsequent to the questioning, the authorities concluded that he had nothing to do with the incident. He said he was produced before a court and he was found to be innocent. The Tribunal is satisfied that this incident occurred as claimed.
23. The applicant gave evidence that in 2007 members of the Karuna came when he was with a friend. He said they were both abducted and taken in a white man. He said he did not know where they were taken. They were beaten and tortured. In consideration of the evidence as a whole, the Tribunal accepts as plausible that this incident happened as claimed, that subsequently, from 2007 to 2008, the applicant was forced to go to the Karuna office in [a location] to sign a book every Sunday, and that from 2008, he was told that this was no longer required.
24. The Tribunal asked the applicant about his role as [an official] of the [agency]. The applicant stated that he was in that role for two years. In relation to his activities, the applicant stated that he was responsible for [several duties] for [members]. In relation to questions about whether he had suffered any harm as a consequence of those activities, the applicant stated that the [agency] got funds from membership and made payments to help the LTTE. He said he was questioned by the Karuna people about the money. In consideration of the evidence as a whole, the Tribunal accepts that the applicant was [an official] of the [local agency] for two years and that it is plausible that the [agency] contributed funds to the LTTE. The Tribunal is satisfied that this would have given the applicant an imputed pro-LTTE profile.
25. The applicant gave evidence that subsequent to his departure from Sri Lanka, men came looking for him in Sri Lanka and his wife was questioned. He said they took his ID and family cards. The Tribunal asked the applicant if anything had happened to his father because of the family's revealed association with the LTTE and the applicant stated that he understood that the home had been searched and his father had been questioned in 2013 after the applicant came to Australia. The applicant stated that his father's [relative's] family have also had problems and they have gone to [Country 3] where they have been granted refugee status.
26. The Tribunal has decided to give the applicant the benefit of the doubt and accept as plausible that subsequent to the applicant's departure, men came to the house and questioned his wife, his ID and family cards were taken, his home had been searched, his father had been questioned and beaten, and that the father's [relatives] have been granted refugee status in [Country 3]. The Tribunal is satisfied that the refugee grant to the applicant's relatives could potentially give the applicant an anti-regime profile.

Does the applicant have any connection with the LTTE or PLOT?

27. The applicant gave evidence that [a further] relative was involved in PLOT and was killed in 2006. He said one of his father's [relatives] was also an active member of PLOT but he was no longer active. He said he knew people who were connected with PLOT. The Tribunal asked the applicant if he was ever involved in the PLOT and the applicant stated that subsequent to his return from [Country 2], he did not stay in his village and sometimes he stayed in [another location]. He said he is a supporter of the PLOT. The Tribunal asked him how he supported the group and the applicant stated his [relative] was a senior member of the group and consequently the applicant got to know many people.
28. The Tribunal asked the applicant if he had any connections with the LTTE and the applicant stated that [specific relatives] had links to the LTTE, and that one of whom was killed in either 2008 or 2009 and the other one was detained in an IDP camp at the end of the war. He said his father's [relative] served in the LTTE in 1983. The applicant gave evidence that he only found out that he had relatives in the LTTE who had died after his salt reports about them in the media whilst he was in Australia. He said there were [media] references published on the Internet. The stated that he had not mentioned this on arrival because he was scared that if he had disclosed any association with the LTTE in Australia, he would be detained. He said he did not get this information directly but someone else had told him about it on the Internet. He said it was not until 2013 that he found out that his relative had been killed and that it was in the [media source].
29. In consideration of the evidence as a whole, and on the basis of the available information, the Tribunal is satisfied that the applicant has had relatives who had links to and were active in Tamil separatist movements including the LTTE and the PLOT. For those reasons, the Tribunal is satisfied that the applicant's father's [relative] called [Relative A] fought for the LTTE, that [another relative] was killed by the Sri Lankan authorities, that [a further relative] was part of a political group in Sri Lanka from 1983 until 1992 when he was killed, and that the applicant does not know who killed his [relative]. In consideration of the evidence as a whole, the Tribunal is satisfied that the applicant's links, albeit indirect, give the applicant a profile of adverse interest to the Sri Lankan authorities because the applicant would be imputed with links to the PLOT and the LTTE.

Is there a real chance that the applicant would be harmed?

30. The applicant gave evidence that he did not know what would happen to him if he were to return to Sri Lanka but he was sure that he would be arrested and harassed because of his family members' involvement in the LTTE and the PLOT. He stated that the fact that he had applied for asylum in Australia would cause him problems. In relation to the illegal departure, the applicant stated that the last time he was before the court, he was warned that if he were to leave Sri Lanka again unlawfully, or severe sentence would be imposed.
31. The Tribunal indicated to the applicant that generally speaking and on balance country information would appear to suggest that being Tamil, an unsuccessful asylum seeker, a returnee from a Western country, and being a person who left Sri Lanka unlawfully, do not necessarily mean that there is a real chance or a real risk of harm. Moreover, the Tribunal indicated that arguably the laws in relation to illegal departure are laws of general application, applied in a non-discriminatory manner and for a legitimate purpose. The applicant stated that he feared returning to Sri Lanka.
32. For the stated reasons, the Tribunal has accepted that the applicant, through his family members' active involvement in the PLOT and the LTTE, has a profile that would be of adverse interest to the Sri Lankan authorities. The Tribunal is also satisfied that the applicant's involvement as [an official] in the [local agency], through donations to the LTTE, increase the

applicant's adverse profile. The applicant does not claim that he personally is, or has ever been, an LTTE member, supporter or sympathiser, however the family members' involvement in the LTTE and the PLOT give the applicant an adverse profile.

33. On the basis of the available information, the Tribunal accepts that the applicant would be considered as a failed asylum seeker and a forced returnee from a Western country, and that he departed Sri Lanka unlawfully. In consideration of the evidence as a whole, the Tribunal is satisfied that cumulatively, those factors do mean that the applicant has an adverse profile, that he would be perceived as having actual significant links and associations with the LTTE and the PLOT, that he would be perceived as being a sympathiser, that he would be considered to be a dissident, and that he would face more harm when returned to his area, that he would be subjected to more scrutiny than other returnees because of his profile.
34. The Tribunal notes that credible independent country information essentially indicates that it is those who have actual or perceived strong LTTE links/sympathisers who can be targeted. Relevantly, the UNHCR refers to the harm that can be suffered by persons with actual or perceived links to the LTTE *"Information has been published documenting cases of mistreatment and torture of women and men in detention (police custody or other forms of detention), for reason of their or their family members' alleged former links with the LTTE. Killings have been reported which appear to be politically motivated, targeting persons believed to be LTTE sympathizers. Sexual violence, including but not limited to rape, against Tamil men in detention has also been reported recently, including reports of cases perpetrated in the post-conflict period. Sexual harassment of former LTTE combatants in rehabilitation centres has also been reported."*¹
35. In January 2014, Human Rights Watch (HRW) reported that it had published new evidence in February 2013 *'that rape and sexual violence has been a key element of broader torture of suspected LTTE members and supporters even since the war's end'. Sri Lanka's 'government rejected these findings and claimed they were fabrications by individuals seeking to embellish their overseas asylum claims'. HRW was 'unaware of any government investigations into the reported sexual abuse'*.² A November 2013 BBC report also refers to Human Rights Watch reporting cases of sexual violence involving the security forces following the end of the civil war in Sri Lanka, and to other allegations of rape and torture of Tamils suspected of links to the LTTE.³
36. In July 2014, Amnesty International commented on Tamil asylum seekers returned to Sri Lanka: *Sri Lankan Tamils remain a target of harassment and arrest upon return because of their ethnicity and suspected links to the Liberation Tigers of Tamil Eelam (LTTE). Asylum seekers have faced torture upon return to Sri Lanka from countries such as the UK and Canada. Amnesty International has interviewed a number of people who were tortured by the Sri Lankan security forces 'on suspicion' of being members of the Liberation Tigers of Tamil Eelam (LTTE) in the last two years. All ethnic groups in Sri Lanka are at*

¹ UN High Commissioner for Refugees (UNHCR) 2012, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka*, 21 December, pp.27-28 (CISLIB Sri Lanka CIS29707)

² Human Rights Watch 2014, *World Report 2014 – Sri Lanka*, 21 January <<http://www.hrw.org/world-report/2014/country-chapters/sri-lanka>> Accessed 29 January 2014 (CISNET Sri Lanka CX317506); *We Will Teach You a Lesson" - Sexual Violence against Tamils by Sri Lankan Security Forces*, 26 February 2013, ISBN: 1-56432-993-3, available at: <http://www.refworld.org/docid/5130850f2.html>

³ Harrison, F 2013, *"Tamils still being raped and tortured" in Sri Lanka*, *British Broadcasting Corporation (BBC)*, 9 November <<http://www.bbc.co.uk/news/world-asia-24849699>> Accessed 12 November 2013 (CISNET Sri Lanka (CX315497))

*risk of torture and other ill-treatment in police custody, including sexual violence, which is pervasive.*⁴

37. An October 2014 background paper by the Human Rights Law Centre⁵ also refers to the treatment of persons suspected of having links to the LTTE who return to Sri Lanka.⁶

38. The Amnesty International briefing on Sri Lanka dated September 2014 indicates that:

*Persistent surveillance, intimidation and monitoring of former LTTE members by the security forces continues to restrict their freedom of movement and association, and has, according to witnesses interviewed by Amnesty International and others, inhibited them from reintegrating into the social and economic life of their communities. Amnesty International has received numerous accounts from male and female former LTTE members who describe repeated arrests and mistreatment including sexual harassment, rapes and other violence at the hands of security forces since the end of the conflict. Individuals arrested and detained for their suspected involvement with the LTTE, particularly Sri Lanka's many victims of torture, also face obstacles to reintegration as a result of the physical and psychological harm inflicted on them in detention.*⁷

39. In an October 2014 report on Sri Lanka⁸, the Department of Foreign Affairs and Trade (DFAT) states that whilst a person's real or perceived links with the LTTE may give rise to protection, this depends on the nature of the links, including:

- a. Persons who held senior positions with considerable authority in the LTTE civilian administration, when the LTTE was in control of large parts of what are now the northern and eastern provinces of Sri Lanka.
- b. Former LTTE combatants or —cadres. Former LTTE combatants or —cadresll who, due to injury or other reason, were employed by the LTTE in functions within the administration, intelligence, —computer branchll or media (newspaper and radio).
- c. Former LTTE supporters who may never have undergone military training, but were involved in sheltering or transporting LTTE personnel, or the supply and transport of goods for the LTTE.

⁴ Amnesty International 2014, *Urgent Action: Asylum Seekers at risk of return to Sri Lanka*, ASA 12/003/2014, 9 July <<http://www.amnesty.org/en/library/asset/ASA12/003/2014/en/8cc91d75-f243-4194-be98-88fcb3d693b9/asa120032014en.pdf>> Accessed 29 July 2014 (CISLIB Sri Lanka CIS29216)

⁵ The Human Rights Law Centre describes itself as 'an independent and not-for-profit organisation' which 'protects and promotes human rights in Australia and beyond through a strategic mix of legal action, advocacy, education and capacity building'. Human Rights Law Centre 2014, *Can't flee, can't stay: Australia's interception and return of Sri Lankan asylum seekers*, March <http://www.hrlc.org.au/wp-content/uploads/2014/03/HRLC_SriLanka_Report_11March2014.pdf> Accessed 22 August 2014 (CISLIB Sri Lanka CIS29695)

⁶ Human Rights Law Centre 2014, *Torture, rape and ill-treatment suffered by Sri Lankans who return home*, 1 October <<http://hrlc.org.au/wp-content/uploads/2014/10/HRLC-background-brief-on-Sri-Lankan-returnees-update.pdf>> (CISLIB Sri Lanka CIS2F827D91350)

⁷ Amnesty International 2014, *Ensuring Justice: Protecting human rights for Sri Lanka's future*, ASA 37/011/2014, September, p.11 <<http://amnesty.org/en/library/asset/ASA37/011/2014/en/4c09c88e-a298-4cba-bdee-4b6a077ef55a/asa370112014en.pdf> > (CISLIB Sri Lanka CIS2F827D91324)

⁸ Department of Foreign Affairs and Trade 2014, *DFAT Thematic Report - People with Links to the Liberation Tigers of Tamil Eelam*, 3 October, s.4.1-4.2

- d. LTTE fundraisers and propaganda activists and those with, or perceived as having had, links to the Sri Lankan diaspora that provided funding and other support to the LTTE.
 - e. Persons with family links or who are dependent on or otherwise closely related to persons with the above profiles.
40. The Tribunal is satisfied that on balance, credible independent country information fundamentally indicates that it is those who have actual or perceived strong LTTE links/sympathisers who can be targeted. As the Tribunal has found that the applicant has a profile of being associated with, or suspected of being involved with the LTTE and the PLOT, the Tribunal accepts that such profile is significant enough and would mean that the applicant would be imputed with an adverse political opinion by the Sri Lankan authorities.
41. In consideration of the evidence as a whole and for the stated reasons, the Tribunal is satisfied that when considered cumulatively, there is a real chance that the applicant faces serious harm amounting to persecution on the basis of his Tamil ethnicity and imputed adverse political opinions.

Would the applicant be harmed on the basis of being a failed asylum seeker or a returnee from a western country?

42. The Tribunal notes that DFAT has indicated that those arriving in Sri Lanka are subject to the same entry procedures. The advice from DFAT was that returnees, regardless of ethnicity, may be questioned by both the police and the State Intelligence Service and checked against intelligence databases.⁹ In its Eligibility Guidelines, the UNHCR has referred to questioning of returnees by Immigration officials and the State Intelligence Service.¹⁰
43. In its 16 February 2015 *Country Reports: Sri Lanka*, DFAT continued to indicate that Sri Lankan returnees are treated according to standard procedures, namely:

Upon arrival in Sri Lanka, involuntary returnees, including those on charter flights from Australia, are processed by the Department of Immigration and Emigration (DoIE), the State Intelligence Service (SIS) and Airport CID. Officers of the Australian Department of Immigration and Border Protection (DIBP) based in Colombo endeavour to meet all commercial flights and charter flights with involuntary returnees from Australia on arrival. DIBP has observed that processing arrivals typically takes several hours, primarily due to the manual nature of the interview process and staffing constraints at the airport. Voluntary returns eligible for an Australian Government Assisted Voluntary Return package are usually met by the International Organization for Migration. Other voluntary returnees are usually met by DIBP staff based at the Australian High Commission in Colombo.

During the processing of returnees, DoIE officers check travel document and identity information against the immigration database. SIS checks the returnee against intelligence databases. Airport CID verifies a person's identity to then determine whether the person has any outstanding criminal matters.

For returnees travelling on temporary travel documents, police undertake an investigative process to confirm the person's identity, which would address

⁹ DFAT 2012, *DFAT Report 1446 – RRT Information Request: LKA40999*, 22 October; see also DFAT 2012, *Country Information Report No. 12/67*, 29 November, CX299951

¹⁰ UNHCR 2012, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka*, 21 December

*whether someone was trying to conceal their identity due to a criminal or terrorist background, or trying to avoid, among other things, court orders or arrest warrants. This often involves interviewing the returning passenger, contacting the person's claimed home suburb or town police, contacting the person's claimed neighbours and family and checking criminal and court records. DFAT assesses that Sri Lankan returnees are treated according to these standard procedures, regardless of their ethnicity and religion—Tamil, Sinhalese and Muslim returnees are treated the same way on arrival in Sri Lanka. DFAT further assesses that detainees are not subject to mistreatment during their processing at the airport.*¹¹

44. DFAT has also indicated that returnees suspected of illegal departure face being charged under the *Immigrants and Emigrants Act* (penalties under the *Immigrants and Emigrants Act* are discussed further below). In this regard, it stated:

*Most Sri Lankan returnees from Australia are questioned by police on return and, where an illegal departure from Sri Lanka is suspected, are charged under the I&E Act. DFAT understands that in most cases, these individuals have been arrested by the police at Colombo international airport. As part of this process, most returnees will have their fingerprints taken and be photographed. They are transported by police to the Magistrates Court in Negombo at the first available opportunity after investigations are completed, when custody and responsibility for the individual shifts to the courts or prison services. The Court 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 are held at the nearby Negombo Prison.*¹²

45. In August 2011, the Immigration and Refugee Board of Canada (IRBC) reported on the treatment of those returning to Sri Lanka, including failed asylum seekers. The report cited information provided by the Canadian High Commission in Colombo, which noted that “[t]he screening process is the same for all persons returning to Sri Lanka – whether voluntary or by escort. The process is not impacted by ethnicity”.¹³
46. The IRBC report provides information on the process for persons removed to Sri Lanka. Further information on procedures at the airport can also be found in the UK Home Office Country of Origin Information report of March 2012.¹⁴
47. The UNHCR has indicated that returnees may receive further contact from the authorities after arriving in their village of destination:

UNHCR post-return monitoring data indicate that in 2011, upon arrival in the village of destination, 75% of the refugee returnees were contacted at their homes by either a military (38%) or police (43%) officer for further “registration”.

¹¹ Department of Foreign Affairs and Trade (DFAT), ‘DFAT Country Report Sri Lanka’, 16 February 2015.

¹² Department of Foreign Affairs and Trade (DFAT), ‘DFAT Country Report Sri Lanka’, 16 February 2015

¹³ Immigration and Refugee Board of Canada, ‘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 2011 [CIS29896](#)

¹⁴ UK Home Office, ‘Sri Lanka: Country of Origin Information (COI) Report’, 7 March 2012, 7 March, pp.202-203
<<http://www.ind.homeoffice.gov.uk/sitecontent/documents/policyandlaw/coi/srilanka12/report-070313.pdf?view=Binary>> Accessed 9 May 2012 [CIS29709](#)

*26% of these returnees were again visited at home for subsequent interviews, with a handful receiving a number of additional visits by the police or military.*¹⁵

48. In advice of November 2012, DFAT stated that it had not received any evidence to support allegations of mistreatment of returning Tamils to Sri Lanka. DFAT stated that it had spoken to NGOs involved in facilitating the voluntary return of former asylum seekers/refugees and that NGOs had told DFAT that they had not witnessed or received any allegations of mistreatment from any of the Tamil Sri Lankans they had facilitated. DFAT referred to advice from the British High Commission in Colombo to the effect that they had received no substantiated cases of mistreatment on return for their returnees.¹⁶ DFAT has also stated that NGOs had not raised specific issues regarding the treatment of Tamils returning to the north and east. It stated that NGOs had not raised with them issues concerning the treatment of Tamils who had lived in other countries where the LTTE was active for extended periods.¹⁷
49. In its *Country Reports: Sri Lanka* of 16 February 2015, DFAT provided the following information on the experience of returnees following return:

Between October 2012 and November 2013, over 1,100 Sri Lankan Irregular Maritime Arrivals were returned from Australia to Sri Lanka. This is in addition to the many Sri Lankan asylum seekers who have been involuntarily returned from other countries, including the US, Canada, the UK and other European countries. The majority of these returnees are Tamil. Although the experiences of individual returnees will vary, many Tamil returnees choose to return to the north, because it is their place of origin, where they have existing family links and the relatively lower cost of living compared to Colombo and other urban areas in the south.

*Many returnees will have incurred significant expenses to undertake their outward journey and, in some cases, will have incurred debt to do so. Many are apprehensive about finding suitable employment opportunities on return. Those who have skills which are in high demand in the labour market will be best placed to find well-paid employment. Returnees who receive reintegration assistance on their return to Sri Lanka find it easier to resettle.*¹⁸

50. Sources such as Human Rights Watch, Freedom from Torture and Amnesty International¹⁹ have referred to mistreatment of returnees or failed asylum seekers. Sources such as Freedom from Torture and Human Rights Watch identify a risk of harm in particular to persons with certain links to the LTTE. In November 2011, the UK-based Freedom from Torture published a report entitled *Out of the Silence: New Evidence of Ongoing Torture in Sri Lanka, 2009-2011*. Freedom from Torture reported that those at particular risk included Tamils who had an actual or perceived association with the LTTE.²⁰ In September 2012, Freedom from Torture released a further report on cases of reported torture. The organisation concluded that it was a combination of residence in the UK and an actual or perceived association with the LTTE which placed

¹⁵ UN High Commissioner for Refugees, 'UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka', 21 December 2012, p.8

<<http://www.unhcr.org/refworld/docid/50dla08e2.html>> Accessed 25 August 2014 CIS29707

¹⁶ DFAT 2012, *Country Information Report No. 12/67*, 29 November, CX299951

¹⁷ DFAT 2013, *MRT/RRT Information Request: LKA41452*, DFAT Report 1478, 28 February and 16/2/15

¹⁸ Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Report Sri Lanka', 16 February 2015

¹⁹ Amnesty International, 'Urgent Action: Asylum Seekers at risk of return to Sri Lanka', 9 July 2014, <<http://www.amnesty.org/en/library/asset/ASA12/003/2014/en/8cc91d75-f243-4194-be98-88fcb3d693b9/asa120032014en.pdf>> Accessed 29 July 2014 CIS29126

²⁰ Freedom from Torture 2011, *Out of the Silence: New Evidence of Ongoing Torture in Sri Lanka, 2009 – 2011*, 7 November

individuals at risk of torture and inhuman and degrading treatment. It stated that those at particular risk included “*Tamils with an actual or perceived association with the LTTE, including those returning from abroad*”.²¹ Human Rights Watch has expressed the view that “*Sri Lankan nationals who have been affiliated with or are considered to be supporters of the Liberation Tigers of Tamil Eelam (LTTE), would be at significant risk of persecution if deported back to Sri Lanka*”.²²

51. Other sources, including the current United Nations High Commissioner for Refugees (UNHCR) Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka point to a risk for those suspected of certain LTTE connections.²³
52. In *GJ and Others (post-civil war: returnees) Sri Lanka* CG [2013] UKUT 00319 (IAC)²⁴, the UK Upper Tribunal (Immigration and Asylum Chamber) found the following categories of persons to be at real risk of persecution or serious harm on return to Sri Lanka:
 - (a) Individuals who are, or are perceived to be, a threat to the integrity of Sri Lanka as a single state because they are, or 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.
 - (b) Journalists (whether in print or other media) or human rights activists, who, in either case, have criticised the Sri Lankan government, in particular its human rights record, or who are associated with publications critical of the Sri Lankan government.
 - (c) Individuals who have given evidence to the Lessons Learned and Reconciliation Commission implicating the Sri Lankan security forces, armed forces or the Sri Lankan authorities in alleged war crimes. Among those who may have witnessed war crimes during the conflict, particularly in the No-Fire Zones in May 2009, only those who have already identified themselves by giving such evidence would be known to the Sri Lankan authorities and therefore only they are at real risk of adverse attention or persecution on return as potential or actual war crimes witnesses.
 - (d) A person whose name appears on a computerised “stop” list accessible at the airport, comprising a list of those against whom there is an extant court order or arrest warrant. Individuals whose name appears on a “stop” list will be stopped at the airport and handed over to the appropriate Sri Lankan authorities, in pursuance of such order or warrant.
53. In consideration of the evidence as a whole, the Tribunal finds that there is not a real chance that the applicant would suffer harm amounting to persecution simply on the basis of being a

²¹ Freedom from Torture 2012, *Sri Lankan Tamils tortured on return from the UK*, 13 September, pp.1-2 <http://www.tamilnet.com/img/publish/2012/09/Freedom_from_Torture_briefing92012.pdf> Accessed 17 September 2012

²² Human Rights Watch 2011, *Letter to United Kingdom's Home Secretary Theresa May and Foreign Secretary William Hague on Deportation of Rejected Asylum*, 16 June, <http://www.hrw.org/news/2011/06/16/letter-united-kingdom-s-home-secretary-theresa-may-and-foreign-secretary-william-hag>; see also Human Rights Watch 2012, *United Kingdom: Document containing cases of Sri Lankan deportees allegedly tortured on return*, 15 September, <http://www.hrw.org/node/110167>

²³ UNHCR 2012, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka*, 21 December

²⁴ <http://www.refworld.org/pdfid/51da951c4.pdf>; this has been upheld on appeal by the Court of Appeal (England and Wales) in *MP and NT (Sri Lanka) v Secretary of State for the Home Department* [2014] EWCA Civ 829 at <http://www.refworld.org/docid/53a463a14.html>

Tamil failed asylum seeker, or a returnee from a Western country. On balance, country information indicates that it is essentially those with an adverse profile, who could encounter harm in Sri Lanka, if returned from a western country as failed asylum seekers. The Tribunal is therefore satisfied that there is a real chance that the applicant would suffer serious harm on the basis of the adverse imputed political profile.

Would the applicant be harmed on the basis of illegal departure?

54. According to the Department of Foreign Affairs and Trade (DFAT), entry and exit from Sri Lanka is governed by the *Immigrants and Emigrants Act* (the I&E Act). With regard to illegal departure DFAT has advised as follows:

Under Section 45(1)(b) of the Act, it is an offence to depart other than via an official port of entry or exit, such as a seaport or airport. Penalties for leaving Sri Lanka illegally can include custodial sentences of up to five years and a fine of up to 200,000 Sri Lankan rupees (around AUD 1,600)....Returnees are generally considered to have committed an offence under the I&E Act if they depart Sri Lanka irregularly by boat. Where a returnee is travelling voluntarily on their own passport on a commercial flight they may not come to the attention of local authorities if they departed Sri Lanka legally through an official port on the same passport, because they have not committed any offence under the I&E Act.²⁵

55. While there is provision in the law for a custodial sentence, there is information, including advice from DFAT, consistent with the advisor's submissions, suggesting that in practice fines have been issued to act as a deterrent to joining future boat ventures. DFAT advised in October 2012 that, under Sri Lankan law, people who depart from any place other than an approved port of departure and/or depart without valid travel documents can be charged with an offence under the *Immigration and Emigration Act*. DFAT reported that for offences committed under the Act a prison sentence from one to five years and a fine of LKR 50,000 to LKR 200,000 may be applicable but that this was seldom enforced. DFAT subsequently advised that, since 2 November 2012, Sri Lankan irregular maritime arrivals returned from Australia have been charged under the law for offences related to their irregular departure. Since then Sri Lankan nationals who arrived in Australia by boat have been charged for offences regarding their illegal departure.²⁶ It was reported in December 2012 that 50 asylum seekers returned from Australia had each spent three nights in prison before being bailed to reappear before the court. The report cited a lawyer as saying that, if found guilty of leaving the country improperly, the people would likely be fined between 50,000 and 100,000 rupees (\$880 and \$1760).²⁷

56. In its *Country Report: Sri Lanka* of 16 February 2015²⁸, DFAT advised:

DFAT was informed in March 2014 by Sri Lanka's Attorney-General's Department, which is responsible for the conduct of prosecutions, that no returnee who was just a passenger on a people smuggling venture has been given a custodial sentence for departing Sri Lanka illegally but fines have been issued to act as a deterrent towards joining boat ventures in the future. The Magistrates Court in Colombo typically levies fines of around 5,000 Sri Lankan Rupees (around AUD 40) for persons attempting to depart Sri Lanka irregularly

²⁵Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Report Sri Lanka', 16 February 2015.

²⁶DFAT 2012, *SRI LANKA: CIS Request Sri Lanka: Questions arising from recent applications*, Country Information Report No.12/67, 29 November, CISNET CX299951; DFAT 2013, *MRT/RRT Information Request: LKA41452*, DFAT Report 1478, 28 February

²⁷Doherty, B. 2012, "Asylum denied, a penalty awaits at home", *The Sydney Morning Herald*, 8 December

²⁸DFAT, *Country Report - Sri Lanka* 16 February 2015

on boats. However, in Negombo, the magistrate, who handles a large number of these cases, typically levies fines of around 50,000 Sri Lankan Rupees (around AUD 400) to act as a deterrent. In most cases, returnees have been granted bail on personal recognisance immediately by the magistrate, with the requirement for a family member to act as guarantor. Sometimes returnees then need to wait until a family member comes to court to collect them.DFAT has been advised that no returnees from Australia to Sri Lanka have been charged under the PTA. While credible, DFAT cannot verify this claim.

57. Advice from DFAT and other sources²⁹ indicate that returnees charged with offences related to illegal departure may be held on remand for a period before being released on bail. DFAT has advised that returnees are arrested and held at the airport for up to 24 hours. They are then produced before a magistrate to apply for bail. All persons are granted bail on personal recognisance, with the requirement for a family member to stand as guarantor. There is no requirement to pay for bail. If the person needs to be held for more than 24 hours, for instance when a person arrives on the weekend or a public holiday, they are placed in the remand section of the Negombo Prison until the court is in session.³⁰
58. In December 2013, DFAT advised that 'For bailable offences under the I&E Act [Immigrants and Emigrants Act], post has been informed that, as a matter of practice, bail is granted to almost all people that were passengers on people smuggling ventures. Bail will be granted at the first available instance (and minors will not be charged with any offence)'.³¹ In March 2013 DFAT advised that it "is not aware of allegations of mistreatment of returnees while on remand. [DFAT] does not monitor the treatment of returnees while on remand."³²
59. The Tribunal has carefully considered the submissions as well as other material, and is satisfied that the laws in relation to illegal departure are laws of general application, applied in a non-discriminatory manner and serving a legitimate purpose of dealing with people who depart their country unlawfully. Having considered the relevant country information, the Tribunal is satisfied that the laws regarding unlawful departure, which includes being arrested, charged and fined (irrespective of amount) are not selectively enforced or applied in a discriminatory way for a Convention reason, as they apply to all persons who depart illegally. This includes processing at the airport, questioning, and being held on remand for a few days awaiting a bail hearing and being fined. With regards to the loss of liberty while on remand, because it arises from the non-discriminatory operation of a law of general application, the Tribunal finds that it does not amount to persecution for the purposes of s.91R(1)(c).
60. Having considered the information before it, the Tribunal is satisfied that whilst the treatment faced by Sri Lankan returnees who have departed Sri Lanka unlawfully, does not normally amount to persecution or give rise to such harm in the reasonably foreseeable future, when assessed cumulatively with what is accepted of the applicant's personal profile and circumstances in Sri Lanka, the Tribunal is satisfied that the process involves and gives rise to differential treatment for Convention reasons. Because of his specific profile, including his previous illegal departure, the Tribunal is satisfied that there is a real chance of serious harm occurring as a result of differential treatment the applicant faces during interrogation, questioning, detention, and penalty. Therefore, in consideration of the evidence as a whole, the Tribunal is satisfied that the applicant does now and in the reasonably foreseeable future has a

²⁹ See, for instance, Doherty, B. 2012, "Asylum denied, a penalty awaits at home", *The Sydney Morning Herald*, 8 December

³⁰ DFAT 2013, *MRT/RRT Information Request: LKA41452*

³¹ Department of Foreign Affairs and Trade (DFAT), 'Country Information Request No: LKA15326: Personal surety', 18 December 2013 [CX316873](#)

³² Department of Foreign Affairs and Trade (DFAT), 'RRT Country Information Request LKA41955 - Treatment of returned failed asylum seekers', 28 March 2013 [CX305410](#)

well-founded fear of persecution arising essentially and significantly for one or more of the five Convention reasons if he returns to Sri Lanka.

61. In essence, in consideration of the evidence as a whole, including the applicant's individual circumstances either singularly or cumulatively, the Tribunal is satisfied that the applicant faces a real chance of persecution and that relocation is not reasonable in his circumstances. It follows that the Tribunal is satisfied that the applicant has a well-founded fear of persecution for a Convention reason in Sri Lanka now and in the reasonably foreseeable future.
62. Accordingly, the Tribunal is satisfied that the applicant is a refugee under section 36(2)(a) of the Act. There is nothing to suggest that the applicant has the right to enter and reside in any country other than his country of nationality, namely Sri Lanka, of the kind referred to in subsection 36 (3) of the Act.

CONCLUSIONS

63. For the reasons given above, the Tribunal is satisfied that the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention. Therefore the applicant satisfies the criterion set out in s.36(2)(a).

DECISION

64. The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act.

Antoinette Younes
Senior Member