**Asylum and Immigration Tribunal**

LP (LTTE area – Tamils – Colombo – risk?) Sri Lanka CG [2007] UKAIT 00076

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 27 and 28 November 2006**
**and on 12 April 2007**

**Before**

**SENIOR IMMIGRATION JUDGE MACKEY**
**SENIOR IMMIGRATION JUDGE MATHER**
**MRS E MORTON**

**Between**

**LP**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr A. MacKenzie, Counsel instructed by Birnberg Peirce & Partners Solicitors, London.
For the Respondent: Miss J. Richards, Counsel instructed by the Treasury Solicitor

*(1) Tamils are not per se at risk of serious harm from the Sri Lankan authorities in Colombo. A number of factors may increase the risk, including but not limited to: a previous record as a suspected or actual LTTE member; a previous criminal record and/or outstanding arrest warrant; bail jumping and/or escaping from custody; having signed a confession or similar document; having been asked by the security forces to become an informer; the presence of scarring; return from London or other centre of LTTE fundraising; illegal departure from Sri Lanka; lack of an ID card or other documentation; having made an asylum claim abroad; having relatives in the LTTE. In every case, those factors and the weight to be ascribed to them, individually and cumulatively, must be considered in the light of the facts of each case but they are not intended to be a check list.*
*(2) If a person is actively wanted by the police and/or named on a Watched or Wanted list held at Colombo airport, they may be at risk of detention at the airport.*
*(3) Otherwise, the majority of returning failed asylum seekers are processed relatively quickly and with no difficulty beyond some possible harassment.*

*(4) Tamils in Colombo are at increased risk of being stopped at checkpoints, in a cordon and search operation, or of being the subject of a raid on a Lodge where they are staying. In general, the risk again is no more than harassment and should not cause any lasting difficulty, but Tamils who have recently returned to Sri Lanka and have not yet renewed their Sri Lankan identity documents will be subject to more investigation and the factors listed above may then come into play.*
*(5) Returning Tamils should be able to establish the fact of their recent return during the short period necessary for new identity documents to be procured.*
*(6) A person who cannot establish that he is at real risk of persecution in his home area is not a refugee; but his appeal may succeed under article 3 of the ECHR, or he may be entitled to humanitarian protection if he can establish he would be at risk in the part of the country to which he will be returned.*
*(7) The weight to be given to expert evidence (individual or country) and country background evidence is dependent upon the quality of the raw data from which it is drawn and the quality of the filtering process to which that data has been subjected. Sources should be given whenever possible.*
*(8) The determinations about Sri Lanka listed in para 226 are replaced as country guidance by this determination. They continue to be reported cases.*

## DETERMINATION AND REASONS

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## 1. Introduction and Conclusions on First Stage Reconsideration Setting Out Material Error of Law

1. This matter came before us as a second stage reconsideration and was identified as a potential country guidance determination. The appellant is an ethnic Tamil from Jaffna in the north of Sri Lanka. Following problems and involvement of the appellant and other family members in the LTTE and later problems with the Sri Lankan authorities the appellant fled Sri Lanka via Colombo Airport on 29 December 1999. He arrived in this country on 5 January 2000 and claimed asylum that day. After an interview with the respondent in May 2000 he was given permission to work and did so. In late 2004 his work permit was withdrawn. He applied for it to be reinstated. His asylum claim was refused in July 2005. Detailed reasons were given in the refusal letter dated 11 July 2005. That refusal letter did not challenge the appellant's credibility. The appellant then appealed to an Immigration Judge. After a hearing before Immigration Judge E B Grant on 27 September 2005 she dismissed his appeal on both asylum and human rights grounds, in a determination promulgated on 13 October 2005. The appellant applied for reconsideration. An order for reconsideration was made by Senior Immigration Judge Gill on 31 October 2005. The matter then came before Senior Immigration Judge Chalkley on 23 April 2006. He found that there were material errors of law in the determination for the reasons set out below.

2. He said:-

> **"Reasons for the Determination that there is an Error of Law in the Determination**
>
> The Home Office Presenting Officer accepted that the Immigration Judge did not appear to accept Dr Smith as an expert witness, save only in relation to arms, as per the final sentence of paragraph 33 of the determination. The Home Office Presenting Officer suggested that in all other respects, the Immigration Judge rejects Dr Smith's expertise and for that reason rejected his reports since it was un-sourced. I find that in not making a clear finding as to whether or not she did accept him to be an expert witness, the Immigration Judge erred in law. In any event, if the Judge did, as the respondent maintains, only accept his expertise in one area dealt with in his report, she should have clearly given her reasons for rejecting his claimed expertise in other areas dealt with by him in his report. Grounds one and two of the application were found to have been made out and in the circumstances it was thought by the representative to be unnecessary for me to go on to consider the remaining challenges to the determination."

3. The matter was then adjourned for a second stage reconsideration before a senior panel of the Tribunal, both on the issues of country expert witnesses, and the risks on

return to this appellant as a known LTTE supporter with scars, who was released on bail and subsequently failed to report to sign on.

4. We were provided with a main respondent's bundle, supplementary respondent's bundle, 4 appellant's bundles (A, B and C and D) and an appellant's bundle of authorities. We were also given a note from the appellant on existing Country Guidance ("CG") cases in response to a request made to both parties. Ms Richards addressed us orally on this matter. Skeleton arguments for both the appellant and respondent were also submitted and on the second day of the hearing a BBC News Report "Tamil statehood 'is only option'", dated 27 November 2006. A full list of the country evidence, including the expert reports, is set out in the appendix to this determination.

## 2. The Issues

5. Because of the problems identified in the grounds in respect of the use or assessment of country expert witnesses at preliminary hearings and in skeleton arguments, the first issue considered by us was the role of country expert witnesses, particularly in country guidance cases before the Tribunal. The submissions of both parties and our conclusions are set out in Part (4) of this determination.

6. The other issues identified by us are:

   (a) General conclusions to be reached after full consideration of all the background evidence, case law and expert witnesses in relation to the twelve areas of potential risk, either separately or cumulatively, set out in paragraph 161.

   (b) Based on our conclusions in relation to those risks, objectively (and to a limited extent only, subjectively), on the facts as found, does that evidence indicate a well-founded fear of persecution for one or more of the five Refugee Convention reasons, or is the appellant entitled to humanitarian protection within the provisions of the Refugee or Person in Need of International Protection (Qualification) Regulations (2006/2525) and/or Immigration Rules (Paras 339C – 339Q) and/or would there be a breach of either Article 3 or 8 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) 1950 if this appellant were returned to Sri Lanka?

7. In the hearing the issue of the current apparent impossibility of returning this appellant to his former home district of Jaffna because of the state of emergency in Sri Lanka was discussed and submissions invited from the parties as to how we should proceed.. Ms Richards conceded that it would not be possible at this time to return him directly to his home district of Jaffna and thus this claim must be assessed against the risks to him on return to Colombo, that is including risks at the airport. For the above reasons we have primarily assessed the risks to the appellant in Colombo(including the airport risk) from the Sri Lankan authorities, although we have addressed in passing the risks from LTTE operatives to the appellant in the Colombo district, but not in other parts of Sri Lanka (including the original home district), because of the above concession of an impossibility of return to Jaffna, at this time. We also note no exclusion issues were raised before us.

## 3. The Appellant's Case

8. This matter proceeded on the basis that there was no challenge to the appellant's credibility on past events and thus the issues, as noted above, before us related to the well-foundedness of the risks to the appellant if returned to Sri Lanka.

9. The appellant relied on a statement, contained at A1-8 of the appellant's bundle A. Immigration Judge Grant in her determination of 13 October 2005 set out at paragraph 42 under the heading "My Findings of Credibility and Fact":

> "42. The appellant was not cross-examined by Mr Beaumont because the Home Office file containing details of the appellant's claim appears to have been mislaid by the Home Office. Consequently Mr Beaumont was unable to prepare for the hearing before me in any meaningful way. Nevertheless the refusal letter accepts the appellant may have been ill-treated whilst in detention. No issue was taken with his claim to have been released by payment of a sum of money at court by his uncle and no issue was taken with the claimed history with the LTTE. The issues for me to determine are whether in the light of this history there is any real risk of a breach of the Refugee Convention on return; whether there is a risk of a breach of his protected human rights on return, whether from the Sri Lankan authorities or from the LTTE from which he would not receive effective protection?"

10. In summary his claim is that while living in an LTTE controlled area of Sri Lanka between 1995 and 1999 he assisted the LTTE, albeit unwillingly. In October 1999 he moved to a government controlled area of Sri Lanka in order to avoid being pressurised into undertaking military training with the LTTE. He was suspected of supporting the LTTE and was detained and tortured by government forces in November 1999. Under torture he admitted assisting the LTTE. He was eventually released on bail by a court, in Colombo, with his uncle acting as surety. He then continued to be of interest to the authorities and was pressurised by them into agreeing to become an informer against the LTTE. In order to avoid this he fled the country and claimed asylum in the UK in January 2000. Since that time he advises that his uncle, who stood bail for him, was detained, questioned and ill-treated in August 2001 on account of his association with the appellant. The appellant has documented scars resulting from torture.

11. A medical report from Dr Michael Seear, dated 10 September 2005 records the background, physical examination, details of scarring, and comments on the appellant's back pain and other restrictions. The appellant reported to Dr Seear that during a period from October 1995 to 1999 when he was forced to work with the LTTE he developed back pain as a result of digging bunkers and his hands were lacerated. In November 1999 he was detained at the Vavuniya CID Camp for about five days. During that time he stated that he had been questioned, suffocated with a petrol soaked polythene bag, hung upside down and beaten, beaten with canes, sticks and plastic pipes filled with sand, and kicked in his back. After that five days of detention he was transferred to the Kalutara Prison. There he was harassed by Sinhala prisoners, who poured water on the sheets and bedding he was sleeping in, put sand in his food, and forced him to do cooking. While there he was also beaten by the Sinhala prisoners and guards. He was then taken to court and then released

on bail of Rs 50,000, with a requirement to report weekly to W Police Station. He received some treatment for his injuries at a private clinic in W.

12. The physical examination reported by Dr Seear set out areas of scarring. These were: on his arm where he stated he had been beaten with a stick with an object in it; on his chest, as a result of blows, a group of small hyper-pigmented scars which were also stated to be the result of blows; highly pigmented scars on his feet caused by digging bunkers barefoot; on his knee, which was stated to be the result of a motorbike injury and on his right leg said to be the result of being hung upside down and an appendectomy scar. With the exception of the appendectomy, and the scar resulting from a motorbike accident, the doctor found the scarring consistent with the appellant's claims of torture and mal-treatment.

13. Additionally the doctor noted the appellant had tender areas in his back, back pain and restricted movement in his legs and hips.

14. A psychiatric report, dated 24 September 2005 by Dr Gunam Kanagaratnam, Consultant Psychiatrist, Kingston and Richmond Assertive Outreach Services and Psychiatric Intensive Care Unit, Tollworth Hospital, Surrey, diagnosed that:

> "On account of Mr P mental state and his torture/traumatic experiences in Sri Lanka I am of the opinion that Mr P suffers from Post Traumatic Stress Disorder."

An assessment of availability of treatment in Sri Lanka is also set out in the report. Because our conclusions in this matter have not extended to consideration of availability of psychiatric treatment in Sri Lanka for persons with traumatic disorders, details of the treatment available as recorded by Dr Kanagaratnam are not set out.

15. Statements in support of the appellant's claim were included in the appellant's bundle from P M and Ms K C (the appellant's bundle A, pages 9-30). Neither of these witnesses gave oral evidence.

16. Mr P M, a British citizen, stated that the appellant was related to him, as his brother-in-law's nephew. He stated that he had given emotional support to the appellant since his arrival in the UK and helped him financially until he started working. The appellant lived with him. He records the appellant became depressed and his mental health deteriorated after his asylum claim was turned down. He assisted him in arranging medical appointments and reminding him about medication he should take.

17. Ms K C states that she had arrived in the UK in August 2001 and was recognised as a refugee, after an appeal to an Immigration Judge, on 7 September 2005. She states that her father was a friend of the appellant's father and confirmed that when the appellant and his family moved to C in July 1995, they stayed in a refugee camp and her family provided food and other essential items to the appellant's family when they stayed in the refugee camp. She stated that the appellant's family moved away when the Sri Lankan forces started advancing into C and she did not see the appellant again until he was in the United Kingdom.

## 4. The Role of the Country Expert Witness

18. The issue of the role of expert witnesses in asylum appeals was raised by the respondent. His position was summarised in a position paper. The points raised were as follows:-

> "2. The Secretary of State hopes that the Tribunal and the Appellants will be assisted by an indication of the Secretary of State's position regarding the role of expert reports relating to country conditions in appeals before this Tribunal.
>
> 3. The Secretary of State will submit that the role of a 'country expert' is different in a number of significant respects from that of most expert witnesses in ordinary civil litigation. In many areas of law the Court will be required to assess expert evidence in a field where specialist knowledge is required in order to interpret "raw data". So for example, a medical expert may be able to assist the Court in relation to the significance of test results, or by explaining diagnostic findings made on clinical examination of an individual. These are matters where the Court could not be expected to have the specialist knowledge required to interpret the underlying information. Even in these circumstances, an expert is required to consider all material facts, including those that might detract from his opinion.
>
> 4. The role of a 'country expert' in an appeal before the AIT is rather different. Here, the issue relates to conditions in a specified country or region. It is unlikely that any specialist knowledge is required in order to *interpret* the information. Rather the role of a 'country expert' is to assist with the provision of the 'raw data', in terms of providing comprehensive and balanced factual information relating to the issues the Tribunal must resolve. In this regard, it is important to bear in mind that the AIT is a specialist tribunal, which itself has a level of expertise. Whilst the AIT may be assisted by the opinion of a 'country expert', it is important that the Tribunal is provided with the factual material upon which that opinion is based, in order to conduct its own assessment of the conclusions to be drawn from it.
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> 5. The Secretary of State respectfully submits that it is of central importance to the fair conduct of proceedings that the Tribunal should be able to assess whether a country expert is presenting a balanced picture and/or is exaggerating or presenting a partial or inaccurate account of the underlying information. In making that assessment, the Tribunal may be assisted by cross examination of the witness. It is difficult (if not impossible) to conduct a proper cross examination (or indeed for the Tribunal to conduct an assessment of the evidence) without access to the underlying information (as to the importance of considering the underlying evidence see for example the assessment of the expert evidence in the recent Sudan CG case (*HGMO Sudan* [2006] UKAIT 00062).
>
> 6. In particular, the Secretary of State will submit that:
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> (i) Where a country report relies upon information contained in a publicly available document, it should provide sufficient details to enable a copy of that document to be obtained;
>
> (ii) Where the author of the report relies upon information contained in a document that is not publicly available, he should annexe a copy of any such document to the report (with redactions if necessary – see below);

(iii) Where the author of the report relies upon information provided orally, it is important that he provides a full account of what was said (including any notes of the conversation). As well as providing a full account of the contents of any discussion, the author should identify the source of the information (even if not by name). The Tribunal has power to take steps to protect the identity of sensitive sources, and if agreement cannot be reached as to the extent of the identification, the parties can seek directions.

The Secretary of State considers that this is a matter of some importance, particularly in country guidance cases: the Tribunal should endeavour to avoid the situation where it bases findings on an incomplete account of hearsay evidence from an unidentified primary source, that account having been provided by an expert witness whose interpretation of the conversation may be coloured by his own views.

7. With specific reference to the reports relied upon by the Appellants in the present appeals, the Secretary of State would wish to cross examine Dr. Smith. However, he is concerned that Dr. Smith's reports do not provide sufficient information as to the sources of the author's information to enable the Secretary of State to conduct a meaningful cross examination, or to assist the Tribunal to make a proper assessment of the weight to be accorded to Dr. Smith's opinions.

8. The Secretary of State would therefore invite the Tribunal to direct that the Appellants serve an indexed bundle containing the materials relied upon by Dr. Smith in compiling his reports, and indicating which sections of each document are relied upon. The Secretary of State's position regarding Dr. Smith's reports may need to be reviewed in the light of any such further disclosure."

In paragraph 5 of the paper there is reference to *HGMO (Relocation to Khartoum*) *Sudan CG* [2006] UKIAT 00062, paragraphs 161 to 170. The part of the decision relied upon has not been affected by the recent decision on that case by the Court of Appeal (*AH & Ors (Sudan)* [2007] EWCA Civ 297).

19. Miss Richards developed her argument by going to *English Exporters (London) Limited v Eldonwall Limited [1973] 1 CH 415*. Megarry J had noted, in that case, the experts involved were both fellows of the Royal Institution of Chartered Surveyors. That, she argued, showed that professional qualifications can be recognised. (We would add that any expert with a professional qualification also needs demonstrable expertise in an appropriate part of his or her discipline.) She referred to the following passage, at page 421, having reminded us that Megarry J had earlier dealt with the unsurprising assertion that experts may give factual evidence as well as expressing an opinion. He then said:-

> "It seems to me quite another matter when it is asserted that a valuer may give factual evidence of transactions of which he has no direct knowledge, whether per se or whether in the guise of giving reasons for his opinion as to value. It is one thing to say, "From my general experience of recent transactions comparable with this one, I think the proper rent should be £*x*": it is another thing to say, "Because I have been told by someone else that the premises next door have an area of *x* square feet and were recently let on such and such terms for £*y* a year, I say the rent of these premises should be £*z* a year". What he has been told about the premises next door may be inaccurate or misleading as to the area, the rent, the terms and much else besides. It

> makes it no better when the witness expresses his confidence in the reliability of his source of information. A transparently honest and careful witness cannot make information reliable if, instead of speaking of what he has seen and heard for himself, he is merely retailing what others have told him. The other party to the litigation is entitled to have a witness whom he can cross-examine on oath as to the reliability of the facts deposed to, and not merely as to the reliability of information which was given to him not on oath, and possibly in circumstances tending to inaccuracies and slips. Further, it is often difficult enough for the Courts to ascertain the true facts and witnesses giving direct evidence, without the added complication of attempts to evaluate a witnesses' opinion of the reliability, care and thoroughness of some informant who has supplied the witness with the facts that he is seeking to recount."

20. Although Miss Richards did not rely on it, it is perhaps helpful to quote the next part of the judgment which went on to say:-

> "It therefore seems to me that details of comparable transactions upon which a valuer intends to rely in his evidence must, if they are to be put before the Court, be confined to those details which have been, or will be, proved by admissible evidence, given either by the valuer himself or in some other way. I know of no special rule giving expert valuation witnesses a right to give hearsay evidence of fact, and… I can see no compelling reason of policy why they should be able to do this."

21. We of course recognise that in this Tribunal, in dealing with asylum and protection issues, the rules of evidence, applicable in most other parts of the law, are not strictly applied, and we quote this passage not in relation to the hearsay point but only to illustrate the need for caution in establishing the underlying facts upon which an expert opinion is based. Caution is also needed in the use to which the *English Exporters* judgment is put. Megarry J was writing his judgment in 1973 and was sitting in a jurisdiction in which hearsay was, in principle, inadmissible. He was therefore concerned to prevent hearsay becoming admissible by being put through the mouth of an expert. It is clear that, even in that jurisdiction that both as an exception to the hearsay rule, and as part of the admissible evidence of an expert (to the extent that those are different) the position has moved on considerably over the past 30 years. At most, Megarry J was stating that the valuer was entitled to rely on the expertise he had gained from all sources in expressing his opinion, which is different from allowing him to give evidence of the information he had gathered and which backed up the expertise. Refugee and Protection law has developed over the last 30-40 years and, for entirely logical reasons, as noted, the rules of evidence that are applicable in other fields of civil law are not applicable here. Those reasons relate to the unique nature in which claims arise and the serious consequences that may occur if a wrong decision is reached. They also relate to the inherent difficulty that can arise in assessing whether an appellant has a well-founded fear of persecution (or other serious harm) on return to [usually] his home country. That assessment must be made by considering the totality of the evidence, including hearsay evidence, from the appellant and an often vast array of other sources, of variable quality. That much has been recognised in a number of cases, including *Sivakumaran* [1988] AC 958 and *Karanakaran* [2001] ImmAR 271.

22. Miss Richards asked us to bear in mind Megarry J's judgment, especially with reference to Dr Smith. She was not suggesting that his evidence was inadmissible, but said care needed to be taken in assessing the weight to be put upon it, because only some of his sources are identified, others are not. She argued we should have

regard to the fact there is little information about the conversations which Mr Smith had with his sources. She said we do not know the agenda of the people that he was speaking to, or the context in which the conversations took place.

23. She then turned to *Slimani* (Content of Adjudicator Determination) Algeria* [2001] UKIAT 00009, a decision of the Immigration Appeal Tribunal chaired by the President, Collins J. At paragraph 17 the Tribunal, dealing with expert country evidence, and said this:-

> "Often those opinions are in letters or statements and the writer is not called to give evidence or be cross-examined. Some such experts are highly respected…and at the very least their evidence can be said to have been given in good faith and to be based on reliable sources. Others range from the generally reasonable to the unacceptable, and even venal. But all suffer from the difficulty that very rarely are they entirely objective in their approach and the sources relied on are frequently (and no doubt sometimes with good reason) unidentified. Many have fixed opinions about the regime in a particular country and would be inclined to accept anything which is detrimental to that regime. This means that more often than not the expert in question, even if he has the credentials which qualify him in that role, will be acting more as an advocate than an expert witness. While the principles which apply to expert witnesses called in High Court actions are not directly applicable, they give guidance when the weight to be attached to such evidence is considered. The most important are the need for independent assistance to the Adjudicator or Tribunal, the prohibition against assuming the role of an advocate and the need to specify the facts upon which an opinion is based: see *National Justice Compania Naviera S.A. v. Prudential Assurance Co Limited ("the Ikarian Reefer")* [1993] 2 Lloyds Rep.#68 at 81-82 per Cresswell, J."

24. Miss Richards dealt with *Markos* [2002] UKIAT 08313 a short decision of the Immigration Appeal Tribunal chaired by Mr T S Culver. She mentioned this, in anticipation that the appellant would be relying upon it, because at paragraph 20 the Tribunal said:-

> "It is in the nature of an expert that he does not need to refer to sources. He is the source. It may add force to his opinion to refer to his sources and he is only an expert if he satisfies the Court he has sound basis for his opinions".

25. Miss Richards did not believe that decision was particularly helpful. We agree and note it is not a citable decision. She argued that if an expert had lived in a country, or seen matters for himself, there would arguably be no need for him to quote sources. But, if it is simply a question of his having collated information, then he does need to refer to sources.

26. She emphasised the importance of sources. She said that the function of an expert is twofold. Firstly, to provide and analyse material and to make it available to the Tribunal and, secondly, to see that the material is relevant to the appellant's case. She said particular caution is needed in relation to that second task because otherwise the boundaries between the expert witness and the Tribunal are in danger of being blurred. She emphasised that an expert's evidence is only one piece of evidence and the Tribunal is not obliged to accept it. She argued that in order to be able to ascertain what weight should be put on it, it was essential that the material should be verifiable as to the facts and it is important that the expert makes material available to enable the opinion to be assessed. Miss Richards summarised her

position by saying that she did not suggest that country guidance evidence such as that adduced in this case is inadmissible; but she did contrast the role and function of the country guidance expert in this Tribunal with expert witnesses in other jurisdictions. She emphasised that these experts did not belong to a profession where there was a qualification as a country expert, and that their role was simply to put information and material before the Tribunal which it was then the Tribunal's task to assess.

27. For the appellant, Mr MacKenzie argued that the respondent's submissions about experts were simply wrong. He argued that it is not the expert's role solely to provide "raw data". Nor is it the case that no specialist knowledge is required to interpret the country information. In his skeleton argument, he said that the experts provide not only factual information but opinions on those facts. He submitted that those opinions constitute evidence to which the Tribunal is bound to give appropriate weight. He said that is clear from both the earlier jurisprudence, and the amended AIT Practice Directions which were published in draft at the time of the hearing. (They have since been issued). At paragraph 8(A) the Practice Directions say:-

> "*8A Expert evidence*
>
> 8A.1 A party who instructs an expert must provide clear and precise instructions to the expert, together with all relevant information concerning the nature of the appellant's case, including the appellant's immigration history, the reasons why the appellant's claim or application has been refused by the respondent and copies of any relevant previous reports prepared in respect of the appellant.
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> 8A.2 It is the duty of an expert to help the Tribunal on matters within the expert's own expertise. This duty is paramount and overrides any obligation to the person from whom the expert has received instructions or by whom the expert is paid.
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> 8A.3 Expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation.
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> 8A.4 An expert should assist the Tribunal by providing objective, unbiased opinion on matters within his or her expertise, and should not assume the role of an advocate.
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> 8A.5 An expert should consider all material facts, including those which might detract from his or her opinion.
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> 8A.6 An expert should make it clear:-
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> (a) when a question or issue falls outside his or her expertise; and
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> (b) when the expert is not able to reach a definite opinion, for example because of insufficient information.
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> 8A.7 If, after producing a report, an expert changes his or her view on any material matter, that change of view should be communicated to the parties without delay, and when appropriate to the Tribunal.

8A.8 An expert's report should be addressed to the Tribunal and not to the party from whom the expert has received instructions.

8A.9 An expert's report must:-

(a) give details of the expert's qualifications;

(b) give details of any literature or other material which the expert has relied on in making the report;

(c) contain a statement setting out the substance of all facts and instructions given to the expert which are material to the opinions expressed in the report or upon which those opinions are based;

(d) make clear which of the facts stated in report are within the expert's own knowledge;

(e) say who carried out any examination, measurement or other procedure which the expert has used for the report, give the qualifications of that person, and say whether or not the procedure has been carried out under the expert's supervision;

(f) where there is a range of opinion on the matters dealt with in the report –

(i) summarise the range of opinion, so far as reasonably practicable, and

(ii) give reasons for the expert's own opinion;

(g) contain a summary of the conclusions reached;

(h) if the expert is not able to give an opinion without qualification, state the qualification; and

(j) contain a statement that the expert understands his or her duty to the Tribunal, and has complied and will continue to comply with that duty.

8A.10 An expert's report must be verified by a Statement of Truth as well as containing the statements required in paragraph 8A.9(h) and (j).

8A.11 The form of the Statement of Truth is as follows:

> 'I confirm that insofar as the facts stated in my report are within my own knowledge I have made clear which they are and I believe them to be true, and that the opinions I have expressed represent my true and complete professional opinion'.

8A.12 The instructions referred to in paragraph 8A.9(c) are not protected by privilege but cross-examination of the expert on the contents of the instructions will not be allowed unless the Tribunal permits it (or unless the party who gave the instructions consents to it). Before it gives permission the Tribunal must be satisfied that there are

reasonable grounds to consider that the statement in the report or the substance of the instructions is inaccurate or incomplete. If the Tribunal is so satisfied, it will allow the cross-examination where it appears to be in the interests of justice to do so."

28. He argued that in this jurisdiction "raw data" effectively needs to be eye-witness evidence. He said that, even if eye-witness evidence was quoted, the Tribunal would need to know a lot about the witness in the sense of his or her history, what records were kept and where the account came from. The Tribunal would quickly become overwhelmed and therefore it is a legitimate function of the expert to subject the evidence to a filter and make value judgments as to its relevance. He argued that this was true not just of a country expert but of the Country of Origin Information Report ('COIR'), letters from the British High Commission (or an Embassy), and reports by, for example, Amnesty International and Human Rights Watch. The respondent implies that raw data is provided in the COIRs but, he argued, on the contrary the reports comprise data that has been sifted and selected. The COIR is very far from raw data. In many cases it is not even secondary data and as presented in the COIR has often been through a double filtering system. That this is the case is apparent from the COIRs where, in the standard preface, it is said:-

> "i This Country of Origin Information Report (COI Report) has been produced by Research, Development and Statistics (RDS), Home Office, for use by officials involved in the asylum/human rights determination process. The Report provides general background information about the issues most commonly raised in asylum/human rights claims made in the United Kingdom. The main body of the report includes information available up to 30 September 2006. The 'latest news' section contains further brief information on events and reports accessed from 1 October 2006 to 30 October 2006.
>
> ii The Report is compiled wholly from material produced by a wide range of recognised external information sources and does not contain any Home Office opinion or policy. All information in the Report is attributed, throughout the text, to the original source material, which is made available to those working in the asylum/human rights determination process.
>
> iii The Report aims to provide a brief summary of the source material identified, focusing on the main issues raised in asylum and human rights applications. It is not intended to be a detailed or comprehensive survey. For a more detailed account, the relevant source documents should be examined directly."

Mr Mackenzie also argued that the same is true of the British High Commission letters in this case. There, primary material was analysed before the letters were written. He said any criticism of Dr Smith is equally applicable to the letters written by the High Commission. He said one important question is always "who is doing the filtering?"

29. Whilst Mr MacKenzie reminded us that Section 3 of the Civil Evidence Act 1972 makes opinion evidence admissible in civil proceedings when a witness is qualified to give expert evidence, that did not assist us as the provision is not applicable in this jurisdiction. He said that paragraph 8(A)4 of the Practice Direction says that an expert is expected to assist the Tribunal by providing independent evidence and not in the role of advocate; that he or she must sign a statement of truth; and needs to

show relevant experience, expertise and independence in order to qualify to assist the Court. He argued that it is not the case that an expert needs a formal qualification to be an expert. He argued that the quotation from *Markos,* to which we have already referred, is a clear statement of principle that is correct.

30. Mr MacKenzie relied on several authorities. The first is *Zaraur* 01TH00078, a decision of the Immigration Appeal Tribunal chaired by Mr Freeman. Paragraph 22 of the decision says:-

> "…the material presented by the country expert must be verifiable as to the facts, and, so far as it consists in opinions, given a proper basis in either verifiable fact or the country expert's own relevant experience."

31. He referred to re*: B* [1996] l FLR 667 where, at page 674 Butler-Sloss L J said, in the context of a family case:

> "…Judges are not expected to suspend judicial belief simply because the evidence is given by an expert. An expert is not in any special position and there is no presumption or belief in a doctor however distinguished he or she may be. It is, however, necessary for a Judge to give reasons for disagreeing with experts' conclusions or recommendations. …a Judge cannot substitute his views for the views of the experts without some evidence to support what it is he concludes."

Mr MacKenzie made the point that the Family Court, like this Tribunal, is also expert in its own jurisdiction and therefore it cannot be said that the experts in that jurisdiction are any different from this.

32. He then turned to *English Exporters (London) Limited v Eldonwall Limited.* He quoted Megarry J, at page 420:-

> "…He will also have learned much from many other sources, including much of which he could give no first-hand evidence. Textbooks, journals, reports of auctions and other dealings, and information obtained form his professional brethren and others, some related to particular transactions and some more general and indefinite, will all have contributed their share."

33. He also reminded us of the passage in which it is said that experts can give factual evidence as well as expressing an opinion. He said that everything goes into the pot, written sources, unwritten sources, general background material.

34. Mr MacKenzie went on to say again that it is inherent, in deciding what is relevant, that a filtering process needs to be applied to the evidence and that is why an expert is needed. It is the expert's duty to tell everything that is relevant, not everything that he knows. The safeguard for a Tribunal is in the independence and qualifications of the expert. He emphasised the importance of independence and went on to say that the COIR authors and the British High Commission are not independent of the respondent and do not have a duty to the Court. He argued that the value of the expert is in his expertise and is not dependent upon agreement with other sources. He argued that we were being asked by the respondent to depart from previous case law and Practice Directions, and to redefine the role of an expert.

35. Mr MacKenzie asked the Tribunal to consider who can be trusted to carry out the sorting exercise. He made the point that in the case of the evidence produced by the respondent it is not known who has carried out that exercise. The respondent usually declines to produce any expert evidence of his own.

36. Nothing in argument has changed our view of the role of the expert in this jurisdiction. Whilst it is true that the rules of evidence do not apply in this jurisdiction, as they do in the civil courts, the Tribunal should be very slow to accept opinion evidence from a person who cannot demonstrate a sufficient expertise in the subject on which they are called to give evidence. There is no formal qualification to reliably identify someone as a person country expert. The expert is usually a person who has, for whatever reason, taken a particular interest in a country and has the resources to gather information. He may or may not be an academic. He may or may not be a person with first-hand knowledge of the country concerned. It is the assessment of that information, and any opinions arising from it that can cause difficulty. One problem is that it is rare to have either competing experts' reports as in many civil cases or, as is increasingly the case in the civil courts, a jointly instructed expert. Experts in this Tribunal are invariably instructed by appellants.

37. As Collins J said in *Slimani*, experts can vary in their independence and expertise to a very large degree. Some are well known as reliable, others perhaps equally well known as unreliable. In the centre ground comes the majority. It is the task of the Tribunal to decide what evidence they accept and what weight they can put upon the evidence they receive. We do not entirely agree with Miss Richard's analysis of the difference between an expert in this jurisdiction and an expert elsewhere. She argued that experts in this jurisdiction are the providers of raw data whereas those in the civil courts tend to be the interpreters of such data. In fact, in this jurisdiction, experts are not merely the providers of raw data but they can be the interpreters of it as well. Their interpretation, and any opinion based on that interpretation, can only be as good as the raw data itself. By that we mean not only the quality of the data, but the selection or filtering, of it.

38. We agree with the concept of the expert as a filter of evidence. A real problem arises in this jurisdiction from the use of the word “expert”. In this context an “expert” is merely a witness giving factual, hearsay and opinion evidence. No witness is prohibited from doing that. The question is not therefore the admissibility of the evidence (as it would be in the criminal and civil courts) but the weight to be given to it. The task for us is therefore to decide, simply, how much weight is to be put on the conclusions and/or the filtered evidence that is put before us. The fact that it is demonstrably wrong may help to assess it. However, the fact that it is not demonstrably wrong does not engender reliance upon it, whether or not the person giving the evidence is, or claims to be an “expert”. Additionally, in order to accept an expert as a competent and reliable filter mechanism it is necessary to trust the expert and to have confidence that he or she has filtered the evidence objectively and independently, not partially. The extent to which that trust can be established may depend on a number of factors including the reputation of the expert, and any established track record. It may also depend on the quality of the sources and whether there is a variety of sources. For example, a report on Sri Lanka that relied only on LTTE sources, without countervailing evidence from sources that did not support the LTTE, would be likely to carry little weight. The age of the source

material and the number of sources is also important. An expert may not have any track record with the Tribunal, in which case particular care is needed in assessing the weight to be put on the evidence, and any opinion said to be derived from it.

39. An expert who cites a source enables the parties' opponent, and the Tribunal, to check the source in order to decide whether it has been selectively quoted and, if so, whether the selections were justifiable or partial.

40. It seems to us that difficulty arises where an expert says, as does Dr Smith, that his source is a particular individual with whom he has had a conversation. In this case some of his sources were, on the face of it, people who were well-positioned to give an informed view. The respondent argued that an expert should produce interview notes so that the quotations relied on can be checked and put in context. It is not our view that such interview notes can properly be required before the expert evidence is considered, but if they are not produced that may well result in less weight being put on that source because there is no possibility of testing it. We agree with Miss Richards that where the source is a publicly available document, details to enable it to be identified and obtained should be provided. However, there is no requirement for a document which is not in the public domain to be appended to the report but, if it is not, the weight that can be given to the evidence, or any opinion based on it, may be very seriously reduced, and sometimes possibly extinguished.

41. That is particularly important in a case such as this. Some of the evidence given by Dr Smith appeared to be simply wrong. There are a number of places where he demonstrably exaggerated the risk to the appellant. For example, he said at paragraph 74 of his report that:

> "[The appellant] will automatically have been placed on one of the two lists that are provided to immigration services at the airport by the security forces".

Yet on close examination it became apparent that there was no basis for saying that at all. As a result doubt has to be cast upon Dr Smith's ability to give expert opinion evidence impartially and objectively. In such a case, it becomes very difficult to put weight on un-sourced, unsupported assertions even if it is said that a particular person said a particular thing on a particular occasion. Dr Smith thus has not fully demonstrated that he has provided an objectively filtered impartial and independent view, based on evidence. The amount of reliance and weight that can be put upon his other assertions, which have not been expressly sourced, or fully quoted, or supported by primary evidence is, as a result, limited. In paragraph 134 he referred to an asylum seeker who was returned by the United Kingdom and killed by agents of the Sri Lankan government but failed to mention the long gap between the return and the death. There is, in our view of the evidence, no apparent link. At paragraph 132 there is reference to a returnee who committed suicide in the airport detention room which did not mention that at the time he was returning from a visit to Madras.

42. None of what we say undermines the earlier jurisprudence, or the Practice Directions. It serves to underline the need to properly assess the expert, his or her qualifications and experience to give opinion evidence, and the extent to which the data provided can be relied upon as independent, objective and reliable, and to have been impartially sifted. We would also stress that each "expert" must of course only be

assessed in respect of the report submitted in each individual case. Thus even a generally reliable expert must be judged in the context of their individual reports. In simple terms an "expert" is only as good as her or his last report.

43. The COIRs, which are regularly used by all parties, are not a special case. The evidence on which they rely has been filtered, but is sourced. They should be treated in the same way as any other background evidence. That means they can be considered in the light of their reputation (and we bear in mind that they have in the past been criticised). Under the provisions of S142 of the Nationality, Immigration and Asylum Act 2002, they are overseen by the APCI (Advisory Panel on Country Information) but it is important to remember that that committee is there to oversee the process, and not to endorse the content of the reports.

44. Material from NGOs, such as Amnesty International and Human Rights Watch among many others, can be selective and also depends, to some extent, for the weight that can be put upon them, on the reputation of the source. Immigration judges are aware that much of the background evidence which is adduced before them comes from sources with a special interest or a specific agenda. That must be borne in mind when assessing the weight to be put on any background evidence.

45. As to evidence, such as the letters from the British High Commission, it is true to say that High Commissions and Embassies come within the auspices of the Foreign and Commonwealth Office. That, like the respondent, is an arm of the executive. In this case the evidence in the letters has been obtained at the specific request of the respondent. Little is known about the information-gathering process, where the raw data came from, or the extent to which it has been filtered. It is also unclear whether more than one source was consulted and, whether competing views were sought. That all goes to how much weight can properly be put on the evidence. Immigration judges should be slow to find bad faith on either side, even though they must approach the evidence with an open and enquiring mind as to the appropriate weight to be put upon it. We comment further on the BHC material later in this decision.

## 5. The Respondent's Background Evidence

### The UN Committee Against Torture

46. The first of these noted by us was a determination of the UN Committee against Torture under Article 22 of the Convention against Torture*, ST (Sri Lankan National v. the Netherlands – 23 November 2001).*

47. We have viewed the seven page decision of the CAT and found it of little value at this time. The Committee reached the conclusion that the petitioner, a Sri Lankan Tamil, who was arrested and detained twice in October 2000 was found by the Committee not to have been suspected of involvement with the LTTE as he was only held on each occasion for one day and had not been a member of the LTTE. The Committee also noticed that the petitioner had only worked for the LTTE some six years before his first arrest. They went on to find that the petitioner had not alleged any other circumstances, other than the presence of scars on his body, which would appear to make him vulnerable to risk of being tortured in the future. For these reasons the Committee considered the petitioner had not provided substantial grounds for

believing that he would be at risk of being tortured were he to be returned to Sri Lanka. The determination does not provide any significant or detailed analysis of risks on return to Sri Lanka and is of course now several years old.

The Canadian Immigration Refugee Board (IRB) Search Report of 5 August 2003

48. The coverage of this report is stated to be:

> "Treatment of returnees and in particular the implementation of the Immigrants and Emigrants Act of 1988; whether Tamils are targeted under the Act". (2002-2003)

This report is over three years old. At the outset, states that current information on the treatment of refugees who have returned to Sri Lanka was scarce among the sources consulted by the IRB Directorate. The report provides information from an Immigration Official at the Canadian High Commission in Colombo that, to the best of their knowledge, allegations that returnees to Sri Lanka (deportees and failed asylum seekers) are tortured on return was a complete fabrication and that there was a well-established procedure for dealing with returnees, which had been discussed on several occasions with the Ministry of the Interior of Sri Lanka. The Official's report goes on to state:

> "Although standard procedure is for deportees to be generally referred to the airport division of the Criminal Investigation Division (CID) for interview on return, in our experience there are no arbitrary detentions without due process, and certainly no torture. Returnees who do not have impending arrest warrants or active charges in Sri Lanka are simply released… . The Dutch have returned large numbers of failed asylum seekers on a special flight, no adverse results reported… . We liaise regularly with GOSL (the Government of Sri Lanka), authorities on removal cases from Canada, and have seen no evidence of extra-judicial ill-treatment."

49. The same report notes that a senior UNHCR official had stated that:

> "Some deportees are questioned for a short period and then allowed to leave the airport; others are not questioned at all." (23 May 2003).

The report also notes that the UNHCR had no knowledge of returning Tamils having been singled out for adverse treatment, whereas prior to the ceasefire agreement Tamil returnees were at times singled out for questioning upon return by investigative units such as the CID, but this was done under the Prevention of Terrorism Act (PTA) and not under the Immigrants and Emigrants Amendment Act. At the time of the reports the state of emergency had lapsed and had not been re-imposed. The same report notes that the UK IND stated that unless rejected asylum seekers were travelling on false documentation it was unlikely they would be prosecuted on return…"99% of cases brought against returnees…are discharged without charges being laid."

50. The IRB report also notes in that the 2003 Amnesty International report it is stated that returnees to Sri Lanka may face problems from the LTTE. The LTTE had issued threats to some of its former members who returned to Sri Lanka and were living in Colombo (Amnesty International Report 28 May 2003).

Country of Origin Information Service (COIS), Home Office UK, Reports of September 2005, 31 October 2006 and 8 Feb 2007

51. We were provided with these three lengthy reports. We have had the opportunity to consider relevant parts of them.

52. Firstly, in the general background, section 1.01, we noted the estimated population of Sri Lanka in July 2006 was 20,220,240 and that:

> "The CIA World Fact-book also noted that since the outbreak of the hostilities between the government and the armed Tamil separatists in mid-1980s, several hundred thousand Tamil civilians have fled the island and more than 200,000 Tamils have sought refuge in the west."

In the section of the report relating to Tamils we noted, at paragraph 20.04, that it is reported from the latest census, 2005, in the Colombo district there were 247,739 Sri Lankan Tamils, and 24,821 Indian Tamils out of a total population of 2,251,247. Sri Lankan Tamils accordingly make up over 10% of the population of Colombo. We were referred to a historical review of Sri Lanka set out in paragraph 3 of the October 2006 Report, in particular paragraphs 3.07 and 3.08. These paragraphs note that the height of the ethnic conflict between the LTTE and the Sri Lankan government was in the period 1999-2000 and the ceasefire agreement was signed in February 2002 between the government and the LTTE. That ceasefire agreement committed the government of Sri Lanka and the LTTE to accept on site monitoring of the implementation of the agreement by the Sri Lankan Monitoring Mission (SLMM).

53. However, comments by the COIS on the recent developments were brought to our attention by both parties. These are recorded between paragraphs 4.01 and 4.26 of the October 2006 report. The general deterioration in the north and the east of the country is not disputed by the respondent. Full details are set out in "Recent Developments" section. These obviously should be taken into account as background in the assessment of all Sri Lankan determinations. The deteriorating situation is, at this time, changing day by day and indeed, as noted on the last day of the hearing, the most up to date COIR, and additional news material, some of it from the Sri Lankan government itself, show actions taken by both the government and the LTTE indicate a sharp deterioration in the confrontation. This supports the claim that the "ceasefire" has virtually broken down.

54. We were directed to the COIR (October 2006) section on human rights, paragraph 7.01 – 7.05, relevant quotations from "Human Rights Watch (HRW) – improving civilian protection in Sri Lanka" – released 19 September 2006, the US Department of State Report 2005 (US State Department) released 8 March 2006, an Amnesty International Report of February 2006 entitled "Sri Lanka – climate of fear in the east" and the Human Rights Watch (HRW)- “World Report of 2006 on Sri Lanka” published in January 2006. All of these are relevant to the current situation and have been noted by us although not fully recorded. The US Department of State Report noted, at paragraph 7.02 of the COIR, fully sets out the human rights problems reported in the past twelve months as:

- “Unlawful killings by government agents.

- High profile killings by unknown actors.
- Politically motivated killings by paramilitary forces in the LTTE.
- Disappearances.
- Arbitrary arrest and detention.
- Torture.
- Poor prison conditions.
- Denial of fair public trial.
- Government corruption and lack of transparency.
- Infringement of religious freedom.
- Infringement of freedom of movement.
- Discrimination against minorities."

55. The other reports noted, or referred to, in the October 2006 COIR, refer to an escalation in the number of ceasefire breaches and human rights abuses, particularly since the assassination of the Foreign Minister Lakshman Kadirgamar, in August 2005. That same report also relevantly notes:-

> "Torture and mistreatment by police continued to be a problem… the police continued to enjoy great impunity. While some cases of deaths in custody and torture have been investigated, no-one has been prosecuted or punished as yet."

56. The 8 February 2007 COIR, was provided by the respondent (along with the Operational Guidance Note – Sri Lanka (9 March 2007 to which we refer later). This February report is an update of the October 2006 report. It notes reports and incidents published or accessed since 1 January 2007. The additional reports included an International Committee of the Red Cross (ICRC) report on Sri Lanka dated 19 January 2007, the annual "Freedom House" report released on 17 January 2007 and the Human Rights Watch (HRW) report of January 2007. These report a number of significant incidents that took place in January reflecting significant levels of conflict between the LTTE and the Sri Lankan government authorities. For example the Sri Lankan Navy on 27 January sank three suspected Tamil Tiger vessels off Colombo's main harbour and a large explosion aboard one suggested it was a suicide boat packed with explosives. There are reports of heavy fighting in the east of the country and the UNHCR stated that for three weeks in January over 20,000 people had fled fighting and harsh conditions in eastern Sri Lanka. The UNHCR reported that at the beginning of 2007 there were 465,000 displaced persons including 216,000 people forced to leave their homes by the previous year's violence.

57. In Colombo there are reports of Tamil youth and civilians being arrested by the police in search operations following the attempted attack on the harbour and in cordon and

search operations. On 24 January the Deputy Minister for Vocational Training stated that 400 Tamils of Indian origin had been arrested by the security forces during the previous weeks, and 116 of those arrested had been sent to the infamous military detention camp at Boossa. The COIR also notes reports from “Tamil Net”, including one dated 19 January 2007, recording that 40 civilians, the majority of them Tamils, were taken for questioning in a cordon and search operation carried out the previous night in Colombo City, and that it was reported that many of those detained had failed to prove their identity or their reason for staying in Colombo.

Letters from British High Commission Colombo, Sri Lanka (BHC)

58. We were provided with five letters from BHC going back over the past 18 months. The first of these was dated 26 September 2005 (page 40-42 of the respondent's main bundle). The letter set out the answers to various questions asked of the BHC by COIS. Under the section 'Treatment of returnees" it notes that there have been very few forced returns of Sri Lankans by the UK Immigration Service and therefore there is no direct experience on how they are treated. There was only one ongoing case. The BHC reports that the International Organisation of Migration (IOM) says that to their knowledge most returnees are detained briefly and then released to their families. A liaison officer contacted the Canadian, Australian and German missions about their experiences. All reports to the officer were stated as similar, including the treatment of a charter plane from Germany with 40 failed asylum seekers on it. The Sri Lankan CID reported that those 40 had been processed "in a few hours".

59. The letter also confirms that Sri Lankan Immigration Services and CID are informed in advance of passenger's arrivals and:

> "The passenger is handed over to immigration who briefly interview them and then hand them to CID. In most cases a record is kept by both of the returnees' arrival and they are then allowed to proceed. Usually family are at the airport to meet them."

It goes on to state:

> "In a few cases CID have detained people where there was an existing warrant for their arrest when they left Sri Lanka. DII (Directive of Internal Intelligence) may also have an interest in these individuals and keep records on them. There is no reason to think that they have information regarding asylum claims in the UK or elsewhere. There does not appear to be any involvement in the process by the Sri Lankan army."

60. On the issue of scarring the letter notes that this is extremely difficult to assess and that no detailed reports have been found, merely anecdotal evidence giving rise to suspicion. The letter claims that the key issue is not "what triggers suspicion but how suspects are treated." It also notes that membership of the LTTE and fund raising for the organisation are no longer criminal offences in Sri Lanka, (although they are in the UK), so this gives the authorities limited powers to act. It notes: "unarmed members of the LTTE are permitted to operate in government areas under the 2002 ceasefire agreement." The letter confirms the introduction of new anti-terror laws on 6 December 2006, and notes although the government has stopped short of banning the LTTE "rebels" it has tightened existing emergency laws which had been dormant since the 2002 ceasefire.

61. The third section of this letter deals with the emergency regulations. It notes that these were introduced on 13 August 2005, after the death of Foreign Minister Lakshman Kadirgamar. The letter notes that the political party representing Tamils in Colombo reports serious harassment of Tamils and that they had documented over 500 detentions under the regulations and re-introduction of house registration (which is used to track the identity of individual members of houses), and which had been suspended since 2002. It also notes that in the "chaos" after the assassination of Kadirgamar some of the police had gone too far and had detained "everybody they could find". However, the situation was said to be settling down and the regulations were more aimed at finding killers, not suppressing legitimate political activity.

62. The second BHC letter, dated 4 April 2006 (set out between pages 228 and 239 of the respondent's main bundle) is also addressed to the COIS in response to enquiries about the application of the state of emergency and violence in Sri Lanka. It states no great change since a previous letter in February (2006) although violence and other hostile incidents have continued to ease. It notes that 87 people had been detained under the emergency regulations as at 13 February 2006. From a discussion with the Human Rights Commission it was understood those 87 people were the number still in detention, rather than a cumulative total. An Annex was provided giving the breakdown of numbers. A UNICEF Report was annexed setting out details of child recruitment. The levels of violence were also reported in Annex C of the Report. Under the topic "Treatment of low-level operatives" the letter states that this was a difficult area with no real hard evidence available and:

> "Generally violence between the LTTE and rival paramilitary groups has followed the trends in the graphs. The Karuna faction officially announced a ceasefire, although some of the violence in the east that took place after the Geneva talks appears to have been carried out by it".

63. The third BHC letter, dated 24 August 2006, (set out in pages 305 and 307 of the respondent's main bundle), states that the Sri Lankan authorities have good IT systems to track arrivals and departures at the main airport and are able to track in most cases whether an individual is in the country or not. The experience of the BHC in relation to returning failed asylum seekers and shared information with other missions, particularly Canada, and the IOM, is said to be quite clear. It is stated:

> "As we have reported earlier the vast majority are questioned for a short period of time to establish identity and possibly on security issues and then released. Normally only when there is an outstanding arrest warrant are individuals detained for longer periods."

64. The letter also records strong anecdotal evidence of scarring being identified in the past to identify suspects. The writer notes a conversation with the police and in the media specifically referring to physical examinations being used when suspects have undergone military style training. There is a reference to a UK member of staff at the British High Commission, who was present at the processing of two recent returns at Colombo Airport in August 2006. It is noted that no such examinations took place on the two returnees and that they were both ethnic Tamils from the north. They were able to make their onward journeys without delay. The observations, in their view, supported the claim from the government ministries that the practice had either ceased or was used less frequently:

"At the very least it appears to only take place when there is another reason to suspect the individual rather than a routine measure for immigration returnees."

65. It also notes that the Sri Lankan authorities often require households, predominantly Tamil, to register all residents and that those lists are used in cordon and search operations to identify people:

"Lists of failed asylum seekers could form part of this, although the areas covered by the cordon and search operations (normally a few blocks) would not yield very many. A big push took place in November and December 2005 which was said to culminate in "Operation Stranger's Night II". It also reports that in June here was public discussion about implementing police registration across the island as had been done in the past but nothing had come of that. Cordon and search operations were stated to still continue in mainly Tamil pockets in predominantly Sinhalese and Muslim areas."

66. The fourth BHC letter gives a brief on the bail system in Sri Lanka. It states:-

"It is common practice to be released on bail without being charged. Reporting conditions are usually issued when bail is granted. Anyone flouting reporting conditions is liable to be served with a warrant for arrest.

As far as we have been able to establish Immigration Officers are notified only when a court decides to impound the suspect's passport or an arrest warrant is issued. This apart, there is no other mechanism to make sure Immigration Officers are aware of such instances. The other method which is rare and case specific is that the NIB (National Investigation Bureau) informing (sic) the Immigration Officers of individuals suspected of terrorist activity and those on the wanted list.

Without court sanction the Immigration Officers are powerless to put an individual in detention if they are otherwise satisfied they have the right to enter or live in Sri Lanka."

The BHC material included a copy of the Sri Lankan Bail Act and relevant parts of the Criminal Procedure Code relating to summonses, arrest warrants and other procedures.

67. The fifth BHC letter of 10.4.2007 was provided at the resumed hearing. This relates to the implementation of the Emergency Regulations. The BHC view is that the information has been patchy and the courts have remained willing to get involved in some individual cases of persons being arrested to force their release. The letter states that in some areas of the country the Regulations are being used to compel Tamil populations (of Colombo) to register residents and that there are checkpoints throughout the city; and the number of vehicles on the road has reduced during the quiet hours. It reports the government has used the Emergency Regulations to search the property of those who oppose the regime. In respect of round-ups/cordon and search operations in Colombo the letter reports:

"There seems to be a link between large scale cordon and search operations and the environment created by the ERs. We are not aware of the total number of arrests – many of whom are only detained briefly, but ICRC reports that about 900 people have been registered as detained for longer periods since September 2006 and have been visited by them.

> Our assessment of the profile of the detainees is similar to that reported in the media. They are overwhelmingly male, Tamil (either Sri Lankan or Hill Tamil) and generally young. Most are detained because they are unable to produce ID, or unable to explain the reason for being in a particular area. Migrant and casual workers are therefore particularly vulnerable."

68. The letter then comments on the Boossa Detention Centre and notes a conversation with the senior officer of that centre on 10 April 2007. He reported that there were 110 people in security detention. Almost all were Tamils and the bulk were detained following cordon and search operations. He reported that the numbers had varied from between 100 and 150 over the last few months and there is a "quite heavy churn of detainees as investigations come up …… or the courts order releases and new detainees arrive." They had no independent confirmation on conditions but were not aware of any former detainees complaining about the conditions. The letter also refers to recent information on abduction/disappearances in Colombo, stating that the Civil Monitoring Committee reported 84 disappearances in Colombo. Of these 80 were Tamil, 23 were business people and 61 appeared to be for political crimes. The victims were generally male and political actors who tended to be young. The letter also states:

> "There are three other hotspots of disappearance activity, Jaffna, Vavuniya and Batticaloa. A reliable NGO, who did not wish to be named, thought that 584 people had disappeared in Jaffna in 2006, and 165 in the first three months of this year. A senior Tamil MP thought that the country-wide figure was 900 since August 2006."

Reports on Removal/Voluntary Departures to Sri Lanka from the UK, 2005 and 2006

69. These were provided to us by the respondent. The latest figures are for the first two quarters of 2006. They state that 185, and 195 respectively, principal asylum applicants, were removed, along with 120 and 95 voluntary removals and 65, and 100 assisted voluntary returns. A copy of a letter from Liam Byrne MP, Minister of State at the Home Office to Harry Cohen MP dated 17 November 2006 sets out details of investigations carried out by the BHC in Colombo relating to a Tamil failed asylum seeker who was reportedly killed on return on 20 August 2006. The letter refers to two cases the investigations had turned up. The first individual, JJ, was reported killed on 20 August 2006. The enquiries revealed that he had been shot dead by an unidentified gunman while working in a shop which he owned. The second individual, RS, was said to have been killed in his shop on 17 April 2006 although that could not be confirmed. The letter from the Minister states that it was notable these incidents took place in the far north and the east "where the security situation is precarious, and not in Colombo to where all returns take place. The letter concludes by stating:

> "I would also make clear that the circumstances of Mr J and Mr S's death, while tragic, occurred some considerable time after they departed the UK and were not related to their prior asylum claims or their subsequent returns."

Operational Guidance Note of SSHD (OGN)

70. The Home Office Operational Guidance Note Sri Lanka of 9 March 2007 was made available at the resumed hearing. We asked the parties for comments on the weight that should be given to the Operational Guidance Notes from the Home Office. Mr MacKenzie submitted that they were a published position of the respondent's own opinion and did not have the status of the COIR which he considered was the prime source of COI from the respondent. Ms Richards said that the OGN status was nothing more than general guidance to case workers. Individual situations and cases could vary and the OGN should not be seen as equivalent in status to a COIR. She submitted however, that before the Tribunal it could be a useful document and the basis for attaching additional weight to Country of Origin evidence. She referred to the recent Court of Appeal judgment in *AH, IG and NM v Secretary of State for the Home Department* [2007] EWCA Civ 297, at paragraph 55, and submitted that these could be treated as additional evidence from the respondent, obtained through diplomatic and consular channels and that there should not be any penalty placed on the respondent through a lack of "expert reports" provided in support of statements in the OGN. We agree they are certainly nothing more than these submissions and are the Respondent's view(s) on issues only.

## 6. The Appellant's Background Evidence

Dr Smith's Reports

71. These are set out in bundle A, pages 48 - 78 and an update, in bundle C, pages 1 - 36. We heard evidence from Dr Smith on 28 November 2006. He is an Associate Fellow, Royal Institute for International Affairs, Chatham House, London. He states that until January 2005 he was the Consultant Director and formerly Deputy Director at the International Policy Institute, King's College, London where he worked predominantly on security issues in South Asia over the past two decades. He states he has been appointed as a visiting Fellow at the Department of Politics, Bristol University, the Royal United Services Institute, London, the Centre for Research in Innovative Management at the University of Brighton, and the Royal Institute for International Affairs. He now works mainly as an independent researcher undertaking academic research, consultancy and policy research projects. He adopted his report and the update to it. In his reports he states that based on his considerable knowledge of Sri Lankan politics and security issues he is frequently asked to advise on policy matters on Sri Lanka. He has advised the Foreign and Commonwealth Office, the BHC in Sri Lanka, the Ministry of Defence and the Department for International Development. He has also been a technical advisor to the Government of Sri Lanka on the reconstruction of the armed forces and, in May 2004, assisted the Metropolitan Police Service with a study on Sri Lankan Diaspora organised crime in the UK. His next major research in Sri Lanka will be the survey of weapons for the National Commission of Illegal Firearms (Sri Lanka) sponsored by the UN. He has also been asked to undertake work on decommissioning of weapons in Sri Lanka for which he is seeking funding. His most recent fact-finding visit to Sri Lanka was in September 2006 but was unavoidably cut short. He states that he has followed recent events extremely closely and a further fact-finding visit is planned in 2007. His last full fact-finding visit was in May 2005 and he has been a frequent visitor to Sri Lanka and had spent approximately 25% of his time in-country (i.e. in the UK) over the three years up to September 2005. He states that his report is significantly based on interviews conducted and knowledge acquired during visits. In

particular he notes that much of the information cannot be found on websites or newspapers, or even commercial intelligence sources, as it is the outcome of field research conducted over many years across Sri Lanka and not just Colombo. He also notes that he has completed many expert witness reports on South Asian asylum seekers, mainly Sri Lankans. In the preliminary investigation of his work on decommissioning of arms he had the opportunity to meet the LTTE leadership who had said that they would co-operate. However, this has not taken place as the situation had recently deteriorated. At the outset, before he was cross-examined by Ms Richards he was asked for comments on the BHC letter of 22 November 2006. He stated that he would make similar comments about those on "wanted lists". He suggested that at the airport in Colombo computer facilities had been upgraded and that there may now be more direct links between the CID and immigration enabling them to communicate between their databases. Dr Smith was then cross-examined.

72. He stated that his areas of interest were in arms decommissioning and investigation into organised crime. However, his work had allowed him to broaden his research into risks to asylum seekers on return.

73. When asked about the reliability of conversations he had with various officials in Sri Lanka and whether that information could be verified he replied that generally that quotations and comments in his report were based on interviews named individuals. In some situations sources were not named to protect the security of the person involved. Many of his sources were senior security officials and he trusted the information that they gave him but he did attempt to cross-reference where possible, as he recognised such officials could have their own agenda. He stated that he hoped he could detect this by obtaining a range of information. He considered that his methods were better than those of the press or NGOs, including websites such as "Tamil Net" which he considered was partial. He was not suggesting however, that his research was necessarily better than that of NGOs who he found excellent in the main.

74. In reply to questions about a reluctance to hand over additional or secondary material Dr Smith stated that he was happy to provide secondary material but not to hand over "off the record" material as he could not see the need for this as all of his reports were based on his own research notes.

75. The reports from Dr Smith are lengthy and detailed and we have had the opportunity to read them in full and consider the submissions in cross-examination that took place in relation to them. While the totality of the reports has been noted, we have concentrated on the core comments made by Dr Smith as they related to the main issues before us which are well summarised in the twelve principal risk factors identified in the skeleton argument put forward by the appellant. Our conclusions on each of these twelve issues are set out later in part 9 of the decision

76. In his 2005 report Dr Smith considered the assassination of Lakshman Kadirgamar, the Sri Lankan Foreign Minister on 12 August 2005 to be a particularly relevant event. He considered that the peace process was "melting at the edges" while it had been widely thought that the decision of the LTTE to sue for peace heralded a return to a unified Nation State under the control of the central government in Colombo, controlled by the Sinhalese majority, that had not happened. The early pledge by

Prabakharan to forgo Eelam (as a separate State) was a political tactic in his view aimed at the international community. The LTTE was never prepared to concede the substantial "uncleared" areas of the north and east it had under its control. "Uncleared" we understand to be a Sri Lankan Government term for areas of the country where the LTTE had been cleared from control by the SLA. Over the past three years he considered the LTTE had increased its efforts to construct a State within a State. As we understand this LTTE would set up an independent country within the island of Sri Lanka. Centred on the town of Killinochchi the LTTE is setting up its own taxation system, civil servant training, judiciary, police, health, education and welfare as well as the infrastructure to run a separate State. It also became clear during the peace process that peace was delivering far more to the LTTE than it was obtaining in the latter stages of the war. Thus, despite the proclamation and acclaim that an independent State aim had been abandoned, the LTTE began to reflect growing confidence in its ability to obtain a greater measure of independence. A critical part of the LTTE strategy appeared to be to engineer a situation in which post-tsunami humanitarian assistance for reconstruction and development pledged in massive amounts by the international community would be handed over to its own administrative capacity. Eventually, fearing the empowerment of the LTTE, the Prime Minister, who was also engaged in a bitter political feud with the President herself, produced a blueprint for an interim self-governing authority. However, the President suspended Parliament and forced a General Election which was won by her party, the People's Alliance who, with the support of the JVP (Marxist, who are hostile to any conciliatory move towards the LTTE) formed a government. Dr Smith stated that despite literally thousands of minor violations the two sides have not joined battle in the form of a full-blown civil war and the situation therefore remained as "no war, no peace either".

77. Other particular events noted by Dr Smith are the "Karuna Defection" in April 2004 where the LTTE was rocked by the defection of Colonel Karuna who had long been considered one of Prabhakaran's most loyal and trusted comrades in the east of Sri Lanka. This significant split in LTTE ranks caused the LTTE forces from the north to move to the east in search of Karuna supporters who were quickly defeated. Karuna then opted to disband his remaining troops. The dynamics of the post-Tsunami situation were also seen as relevant. Dr Smith suggests that what is clear at this point is that there is no hope of a political peace dividend and that there has been a rapid drop in support by donors, who are increasingly robust in attempting to ensure good governance must be shown as a prerequisite to aid. Many of them are stated to be considering leaving Sri Lanka. He considers that at this juncture the most logical conclusion is to assume that the Tsunami has not weakened the LTTE itself, but more its political and financial support base.

78. The LTTE denied involvement in the assassination of Lakshman Kadirgamar, the Foreign Minister, in 2005. However, there has been little doubt in Colombo that this was the work of the LTTE. As a direct result the government introduced a state of emergency hours after the assassination whereby it could deploy troops as it pleases, detain without charge anyone suspected of terrorist activities, and search and demolish buildings. Dr Smith suggests many arrests have already taken place under the emergency powers and that this may be the end of the peace process whilst not necessarily adding up to outright return to war, because both parties wish to maintain good relationships with the donor community.

79. Dr Smith then gives a very detailed statement of his views on the predicament of the appellant. He suggests that the new security measures will have implications on failed asylum seekers and that while they should be treated with greater tolerance, in the interests of confidence building, he considers this can no longer be expected. In his view they may be more vulnerable than ever due to well-documented excesses by the Sri Lankan authorities. He contends that there is widespread evidence that the Sri Lankan security forces, including the police, routinely fail to comply with international standards on human rights in the course of their work and there is a systematic use of torture in Sri Lanka. Beyond this he considers the appellant would have little opportunity of taking any complaint to a higher authority if he became the victim of harassment. He refers to an interview with the current Inspector General of Police who told him in December 2004 that he was facing "such corruption and ineptitude amongst his staff, … so much that if anything is to succeed in policing, it has to be supervised by himself and himself alone." Dr Smith also claimed the Inspector General had commented recently that the rule of law has collapsed in Sri Lanka.

80. Dr Smith's view on risks to the appellant is set out as:

> "The appellant's previous stated status as a recorded LTTE suspect means that he is almost certainly to be of interest to the authorities and, as such, he will axiomatically have been placed on one of the two lists that are provided to the immigration services at the airport by the security forces. The first is a 'stop list', which the National Intelligence Bureau provides to ensure that those in which the authorities have an interest are detained on arrival. The second is a 'watch list", which alerts the authorities on the return of a person in which there is an interest and is used to trigger covert surveillance. If the appellant is on one of these lists, he will be extremely vulnerable on return either to arrest at the airport or following his arrival."

81. In this regard Dr Smith relied on an interview with a Mr P B Abeykoon, Controller of the Department for Immigration and Emigration, held in Colombo in May 2005.

82. Dr Smith also considered that the consular staff of the Sri Lankan High Commission in London were under instructions to pass on details of all deportees to the security forces in Colombo.

83. In the situation report of September 2006 and opinion given in October 2006 Dr Smith considers that:

> "After four petulant and unsatisfactory years, Sri Lanka's unstable peace process has finally disintegrated. At this juncture there appears to be no way back to either the peace talks or the ceasefire agreement (CFA). The Government of Sri Lanka and the LTTE have now joined battle, albeit tangentially and asymmetrically. Over a thousand lives mostly civilian, have been lost over the nine month period since the start of 2006 … over 200,000 people have been displaced. Disappearances in the north and the east are on the rise. Suicide bombers have mounted attacks in and around Colombo and there are well-founded fears that more is to come."

84. He suggests that although both sides must take responsibility for the political impasse that preceded the burgeoning military action that followed, it was the LTTE

that broke loose from the cease fire agreement (CFA) in the closing weeks of 2005. The LTTE is now totally frustrated with the peace process and in his view acting to prove its military capabilities and acquire significant territorial gains before contemplating a return to the peace talks. Dr Smith notes that in the first half of 2006 around 1,000 lives were lost in conflict-related incidents and that although outbreaks of conflict were localised and sporadic it is difficult to avoid the conclusion that the peace process in Sri Lanka is now at an end. He notes that the government have made their intentions clear with the attacks in the Sampur district and in Elephant Pass.

85. Between paragraphs 73 and 75 of the update opinion Dr Smith sets out his assessment of Sri Lanka in the following terms:

> "73. It is clear without equivocation that Sri Lanka has returned to war. It may be a 'half war', primarily an insurgency and it may not develop into the scale of past engagements but it is a civil war nevertheless. In all likelihood, battle will be joined in fits and starts, with the LTTE moving its point of engagement from Jaffna, to Trincomalee, to Colombo and so on. It will follow classical insurgency lines of engaging the GoSL forces at the time and place of the LTTE choosing and, as such, can in theory, prolong the conflict for as long as it wishes. Given that the options made available through the peace process were clearly unacceptable to the LTTE and are likely to be even more unacceptable whilst Rajapakse holds power, recourse to war, 'half' or otherwise, would seem to be the only option for the LTTE.
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> 74. This situation is likely to continue into the foreseeable future. Neither side is now disposed towards peace, if indeed it ever was (with the benefit of hindsight). Neither side can prevail over the other unless a major change in capability occurs to make the contest more uneven. Neither side is prepared to put forward options or adopt positions that might lead to a meaningful peace process. The international community appears to have lost a good deal of its ability to influence and cajole either side. Sri Lanka looks set to endure a long and costly civil war based upon attrition.
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> 75. Apart from the obvious implications for the civilian population domiciled in or near the theatre of conflict, the LTTE will doubtless ensure that the conflict brings sustained discomfort and insecurity to the civilian population in the south where possible, Colombo especially. The fear of further LTTE infiltration and operations in the south will keep the security forces on high alert, as indeed they are at the moment. The security implications for ordinary citizens in the south may not be too onerous – suicide bombers tend to be extremely targeted and the LTTE will continue to eschew operations that risk collateral damage. However, both sides will become even more focussed than they are now on individuals they consider a potential threat or security risk. This will inevitably raise the level of vulnerability for returned asylum seekers in whom the security forces and associated paramilitary groups or the LTTE feel they have an adverse interest. For example, the security forces will be on a higher state of alert to seek out returning LTTE cadres, fundraisers and sympathisers. The LTTE will heighten its intelligence gathering operations in Colombo to ensure that its networks are not infiltrated and that operations can be carried out without compromise. Both sides can be expected to be ruthless in the pursuit of their objectives."

86. In reply to comments requested on whether the Sri Lankan authorities keep records of details of those LTTE suspects who have been arrested and detained, Dr Smith suggests (paragraph 118) that according to on-the-record information provided by the then Inspector General of Police (Fernando) the Directorate of Internal Intelligence (DII) maintains a centralised database. His view is that:

> "The quality of the database is, in his opinion, fairly good. The records go back 10 - 15 years and the database is being chronologically extended all the time. It is my opinion the database that is available at the airport is derived, or possibly the same as, the centralised database maintained by the DII."

Dr Smith also expresses the view based on a recent interview with a senior intelligence officer, off the record, that once details of a detainee have been entered into the database they remain there for life and that even if a detainee was released from a camp without charge the system would identify them on return. He also notes at paragraph 122 that, based on his own personal observations, the airport has a completely modernised arrivals section and electronic checks at immigration are very swift and efficient which suggest to him that the security system has been updated. As the appellant has been away from Sri Lanka for six years he would be returned on an emergency travel document which would have to be obtained from the Sri Lankan High Commission in London.

87. Dr Smith referred to the fate of some returned asylum seekers between paragraphs 131 and 135 of his report. This includes a reference to a returnee who was detained at Colombo Airport from the UK and had allegedly committed suicide at the airport detention room on 10 September 2006.

88. Finally at paragraph 137 Dr Smith claimed that the appellant could conceivably be of adverse interest to the LTTE as well as the Sri Lankan authorities as although they were unlikely to know of his return, it would almost certainly be the case that owners and managers of Tamil lodges would provide details of their guests to the LTTE, as they would also do to the authorities. Dr Smith stated:

> "During a recent interview with a lodge manager in Puttah, I was told that the LTTE do not monitor the lodge guest lists in the same way as the police, CID, military intelligence, the army and so on. On questioning as to why this is the case the lodge manager told me that the LTTE do not need to monitor guest lists as their intelligence capability is so robust even in Colombo that any stranger in the area will come to their immediate scrutiny."

<u>Dr Smith's Oral Evidence</u>

89. When cross-examined about his statement that many arrests had already taken place under the emergency powers, Dr Smith said that he did not have a numerical record but the sources were in his report. He agreed that most of them had been released quickly but if they were of interest they would be detained for a considerable time. He was referred to the BHC letter of 13 February 2006 and the reference to detentions – a number of cordon and search operations, particularly one called "Strangers Night II" where 1,000 people had been arrested, most detained briefly but released after fingerprinting and photographing. He accepted this statement as correct.

90. When asked about comments on scarring in paragraph 40 of his first report and the comment that Professor Goode concluded that scarring was an extremely significant issue in the context of suspected LTTE members, he stated that he had read Professor Goode's reports and that this was an overall conclusion taken from Professor Goode's material.

91. Also in relation to scarring he referred us to discussions he had had with the Inspector of Police Fernando when he was accompanied by a UK Metropolitan Police Officer (in relation to Tamil organised crime in the UK). He had been told that inspection of scarring was a useful tool, particularly around the elbows and knees, for those who had seen actual service. He stated there had been discussion of the types of scars and strip-searching being routine.

92. In relation to comments that he considered it was highly likely the appellant would be on an LTTE database, he said that it was his view that the LTTE had its own database. He had two references for that, one from the Sri Lankan Intelligence Officer and the other on the basis of it being a fundraising tool for the LTTE. He considered that if the appellant was of adverse interest to the LTTE he was likely to be on the database and if he had been an informer then he would be of real interest.

93. When asked about the returnees mentioned in letters from the BHC, he said that he did not know specifically the people referred to. It was put to him that the appellant had left Sri Lanka in 1999 and there was no record of a charge against him or a long detention. He was asked to comment why there would be interest in him after some seven years. He considered this was the case because the appellant had disappeared from the radar/records in Sri Lanka and therefore an interview on his past would be conducted. He considered he would be released within 24 to 36 hours but the relevance of the appellant having jumped bail was important and thus if security at the airport were doing their job properly, even after seven years, there would be real interest in the appellant and in particular, interest in what he had been doing in London. In the "half war" situation that was now prevailing he contended that information and intelligence by the security services had to be seen at a broad level and they would be endeavouring to obtain information from those who had been overseas, and possibly involved in arms dealing. This would be particularly relevant in the case of a returnee who was found to have absconded from bail.

94. He stated that a key point in relation to the database was that it had recently been expanded backwards by some ten to fifteen years and in his view, now went back some twenty years. On this reasoning he considered that those who had family in LTTE-controlled areas would be of interest. It was also relevant in his view that the appellant had been guided through the airport on his departure by an agent and thus it was unsurprising he had not been arrested as he left. Dr Smith was not asked whether this showed that the avoidance of official interest is apparently easy. He agreed, in relation to lists held at the airport, that there was speculation in his comments as they were based on his own personal experience, although he did observe that the speed of entry appeared to be up to First World standards.

95. He considered that in Colombo in 2006, from his own experience, security had been increased dramatically. He agreed however, that he had not personally seen anyone

detained. He was then referred to the comments in his report about the suicide of someone returning from the UK and how it appeared this person had in fact been deported from Madras having previously been in the UK. He agreed on examination the information in his report appeared to be wrong on this point.

96. In re-examination, when referred to his report's lack of sourcing, he stated his report had to be read as a whole and to be seen as one presented by an expert witness who had intelligence information and background on all issues. In the round he considered he had the ability to make such judgments on all issues.

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97. We were also provided with a joint report from Dr Smith and Detective Inspector Hibberd (bundle C, 37-58). This was not of direct application to this case but has been taken into account where relevant.

Professor Goode's Report (Bundle B, 1 - 62 and Bundle C, 37 - 58) and Oral Evidence

98. The two reports from Professor Anthony Goode are firstly the report on the fact-finding visit to Sri Lanka, 10 - 20 February 2006, which covers a range of issues including the background political and human rights situation, security at the international airport, the Emergency Regulations, the significance of scarring, the movement of refugees, the incidence of torture, release through bribery, the situation in the north and the east and the future of the peace process. The second report is dated 3 October 2006 and was prepared specifically for the appellant. Professor Goode is a Professor of Social Anthropology at the University of Edinburgh where he is currently Head of the School of Social and Political Studies. He holds Doctorates in Chemistry and Social Anthropology. One from the University of Edinburgh and one from Durham. He lived from 1970 – 72 in Sri Lanka where he was a senior lecturer and he has since also lived for three years in Tamil Nadu in South India. He states that he makes regular visits to both countries and is engaged in continuing teaching, writing and research on South Asian society, history and culture, with particular reference to the Tamils. He made fact-finding visits to Sri Lanka in August 2003 and as noted, in February 2006. Both visits were funded at his own expense. We assume that as they were not of relevance to his employment, they were as part of his separate "business" which includes giving evidence as an expert for appellants. He states that he has now written a number of expert reports for asylum appeals involving Sri Lankans and has participated as a presenter at seminars on expert evidence organised by the IARLJ and ILPA and at the Refugee Study Centre in Oxford.

Oral Evidence

99. Professor Goode adopted both of the reports. He gave some brief comments at the outset on additional material since the reports were written. He noted in this regard the continuing breakdown of the peace talks, including a speech by the LTTE leader on 27 November 2006 (set out in a BBC news report), where the leader had said the LTTE would settle for nothing less than a separate State and the ceasefire was defunct. Professor Goode stated that while this appeared to be a signal to a return to

conflict, neither side will actually say this as it would impact on the donor community and could lead to the loss of aid money. He considered that the Sri Lankan Government would continue to maintain that it wants a peaceful solution as it too recognises the risks of losing donor aid. However, at the same time the government was effectively blockading the north and the LTTE and Tamil community saw themselves as under siege. He agreed that the general situation was a deteriorating one and in the recent escalation 3,500 had been killed. The majority of these deaths were in the north and the east where the conflict is widespread. At the current time he considered that the north and the east had to be distinguished. In the east there was no separate alliance and both the government and the LTTE had moved in following the split in the LTTE caused by the Karuna defection. Thus, in his view, the security situation in the east was more frightening as it was difficult to know who was responsible for various actions. In the north there was far more certainty in concluding that the LTTE and the government were involved.

100. From the specific report we have noted, particularly his comments on the twelve specific areas of risk we discuss in part 9.

101. In relation to records held by the security forces and how this information is stored, Professor Goode made some general comments based on the information which is available. He considered that the evidence suggests that the Sri Lankan Army are expected to pass on police information regarding all those detained by them. Returned asylum seekers can generally be easily identified by Sri Lankan immigration officials because of their temporary travel documents issued by the High Commission in London; one can presume, he said that these alert the authorities in Sri Lanka when such documents are issued. In this situation the background of returned asylum applicants, including records of offences previously committed, prior detentions, appearance on wanted lists etc are likely to be known by the authorities. This is in accordance with the background evidence on record-keeping. He noted the Dutch Ministry of Foreign Affairs report of 30 September 1999 in this regard. He considered that it did not follow that the police had information on every case, but it was likely, if a person had previously been arrested or informed upon. In his February 2006 report he noted that passports were being swiped electronically and this was confirmed in the October 2005 Home Office Country Report. He considered that there had been further moves to enhance the availability of suspects' records and that computerised records existed for Colombo and other parts of the country. These computerised records were available at the airport and the information technology was being improved and developed. In this situation, he considered "If there is a file on Mr P K, which appears highly likely given he was detained, imprisoned, taken to court and bailed subject to a reporting requirement, that such evidence will be available, possibly to Immigration Officers, but in any event to the CID."

102. He stated that the Home Office Visit report of March 2002 indicated that the army indeed maintained paper records which it communicated to the police in the south.

103. He mentioned regulation 20 of the Emergency Regulations currently in force. This regulation sets out that any public officer, including a member of the army, navy or air force, may search and detain or arrest without warrant any person suspected of an offence under the Emergency Regulations. Those persons are to be handed over to

a police station within 24 hours. Beyond this he noted that the appellant was fingerprinted on at least one occasion and there is centralised storing of fingerprint data, as discussed in his 2006 visit report.

104. Professor Goode was unable to state the circumstances in which members of security forces would consult records, but said that such records are kept and consultations took place in the context of cordon and search operations, such as the large scale one conducted in Colombo in December 2005. He appeared to have no direct knowledge of such consultations however.

105. His views as to the risk on return specifically to the appellant are set out in the report. In this regard he noted the role of confession evidence under the PTA and Emergency Regulations and the overwhelming evidence of continued and routine use of torture with impunity by security forces. He also noted the continuing risk from visible scarring. In his opinion, the body of evidence indicated that if the appellant:

> "is detained for questioning on arrival, it would seem very probable because of the records likely to be held concerning him, and because his scarring may attract adverse attention, ill-treatment, possibly amounting to torture, is highly likely to occur."

He notes that the Prevention of Terrorism Act allows confessions to be made to the police with no magistrate present and the burden of proof that these were obtained coercively lies with the defendant. This, in his view, has led to the widespread use of torture. He also notes that PTA trials do not involve juries and depart in other ways from the normal Sri Lankan court procedures.

106. At paragraph 52 of his report he notes interviews he held with several attorneys in August 2003 and February 2006. They confirm that people held under the PTA were commonly held in custody for very long periods before being indicted and trials were very much delayed.

107. Professor Goode then gives a number of references from various bodies, including the UN Committee Against Torture, Asian Human Rights Commission, and Amnesty International which all referred to the use of torture as a routine part of criminal proceedings. He therefore concludes that torture appears to be endemic and not just confined to terrorist suspects.

108. On the issue of scarring he notes that it has been an issue of debate with the Home Office Visit report of 2001 accepting obvious scarring could draw attention and result in further enquiries and detention by the authorities. Professor Goode's understanding is that scarring per se does not lead to detention, but visible scarring makes further enquiries and the discovery that the person has "record", more likely. After a review of material from the UNHCR, the respondent's COIR and other material Professor Goode concludes that:

> "despite Home Office assertions to the contrary that, visible scars may indeed still play a part in increasing risk on return. It seems clear that scarring is one factor among several which may serve to trigger adverse interest on the part of the authorities."

109. On the issue of treatment on return, Professor Goode notes there is a dearth of recent information regarding treatment by the security forces of returned failed

asylum seekers at Colombo Airport and thereafter. He notes two determinations of the Tribunal where persons giving such accounts were found to be credible. He also relies on a report from Dr Smith.

110. On the issue of absconding after release on bail Professor Goode concludes that in his opinion, the evidence suggests that release under any circumstances cannot be taken as evidence of cessation of adverse interest. Where a person is released on bail, with strict reporting requirements, that seems to suggest clear continuation of interest. The fact that he absconded could only reinforce that view.

111. In conclusion, like Dr Smith, he finds that:

> "It is clear that the two sides in the ethnic conflict are at war in all but name, and that the security situation throughout the country at present can only be described as desperate."

112. In cross-examination Professor Goode clarified his views on a number of issues. When asked whether he suggested that there were records kept of all detentions he stated his view was that it depended on the circumstances. Some detentions were extra-judicial and in conflict situations. However, evidence indicated record keeping was improving and particularly for a person who had jumped bail.

113. When asked about evidence of what happened to failed asylum seekers on return and comments by the BHC that such returnees are held very briefly, and why his conclusions did not appear to reflect their evidence, Professor Goode stated that he was talking about detention at the airport and that it was more likely than not that records would be held at the airport for a person with the profile of the appellant, as he had been in the formal legal process and therefore was likely to be on record. He thus presumed that those absconding from bail would be recorded.

114. In relation to confession evidence he noted that it was relevant that Tamil defendants did not have access to documents He referred to a case he had dealt with where the court document was in Sinhalese and the appellant had to pay to have it translated.

115. On the issue of scarring he stated that he would go no further than the evidence appeared to indicate, and that he was being cautious in this area including his comment that strip-searching may no longer be routine or was less common.

Dr Gunaratna's Report (Bundle C, 93 – 97)

116. Dr Gunaratna presented written evidence only. His report is dated 6 October 2006. Dr Gunaratna was contacted by the appellant's solicitors. He states that he is a terrorism and insurgency analyst with over twenty years of research. Currently he serves as the Head of the International Centre for Political Violence and Terrorism at the Nanyang Technological University in Singapore and one of his specialities is the conflict in Sri Lanka, especially the LTTE. He states he had previously worked at the University of St Andrews from 1996 to 2002. For source material he states he relied heavily on his experience, participating closely and observing developments in Sri Lanka including visits to the country and indeed meeting the LTTE leader,

Prabhakaran. Most of his report, while directed to this specific appellant is set out in a rather generalised manner. On the issue of databases he comments:

> "In Sri Lanka such records of detention, trial and even medical records are not properly catalogued and stored. Even if they were, they are difficult to obtain."

However, he goes on to state that like most government operational agencies worldwide the Sri Lankan authorities store information on LTTE members, supporters and suspected members and supporters. The CID and Department of Military Intelligence are the main custodians and users, as well as the police and military. The airport has a watch list and an alert list managed by a number of agencies. He states that although he has not been able to verify it, it is "very likely the Sri Lankan Government will have a record of Mr P K for two reasons, firstly because he has been arrested and secondly because he jumped bail." He also considers it very likely the government's records will state the appellant is either a member or a supporter of the LTTE.

117. He considers that on return, particularly because the appellant is scarred either from torture or battle, he will be subjected to close scrutiny and suspicion as a terrorist. He also notes that if the LTTE finds out the appellant has collaborated with the security forces, once the government releases him, he would be detained by the LTTE, tortured, interrogated and executed.

The Report of Dr Basil Fernando (Bundle C, 98 – 101)

118. Dr Fernando also presented a written report, which is unfortunately undated, but appears to have been sent on 6 October 2006. Dr Fernando is an Attorney at Law in the Supreme Court in Sri Lanka and has worked as a counsellor for refugees under the UNHCR programme for Vietnamese refugees in Hong Kong. He states he has written several books on human rights issues in Asia, particularly in Sri Lanka, and for the past five years has been the co-ordinator of a prevention of torture programme with a group of six Sri Lankan non-governmental organisations. His report is of a generalised nature and in broad terms expresses agreement with the UN High Commissioner for Human Rights, the UN Special Rapporteur against extra-judicial killings and other international human rights organisations such as Amnesty International, Human Rights Watch, the International Commission of Jurists and AHRC that report the situation in Sri Lanka is now one of grave violation of human rights and that no local mechanism exists to stop such violence. He therefore rejects the views expressed in the letter from the BHC of 13 February 2006 that he was asked to comment upon.

Dr Alan Keenan Report (Bundle C, 102 – 113)

119. This is another written report. It is dated 6 October 2006. Dr Keenan is stated to be South Asia Regional Editor and Senior Analyst, International Crisis Group. He reports on a number of political killings, abductions and the failure of domestic remedies for human rights violations whether committed by the government, the LTTE or other armed groups. He also notes that the PTA and Emergency Regulations authorise a range of human rights violations in their own right and the

fact that they allow coerced confessions as evidence in trial enables virtually endless detention and re-detention of suspects without them being brought to trial:

> "The message that the system has sent to the police and to the army has been clear: one is allowed to torture and detain suspects without evidence for as long as one likes without any legal liability or chance of punishment. Sri Lanka is now, sadly but predictably, reaping the harvest of extra-judicial violence from both State and non-State actors – that such practices have sown."

The Report of Dr Yolanda Foster (Bundle C, 114 – 125)

120. This written report is from Dr Foster, an academic researcher whose specialist area is Sri Lanka. She is stated to have regularly visited Sri Lanka since 1995 and her last fact-finding trip was in September 2006. This report is directly related to the appellant's case and she was provided with the expert report of Dr Smith, the letters from the BHC up to August 2006 and the report of Professor Goode. Her report describes the human rights situation in Sri Lanka as extremely grave. She sets out a commentary on the climate of impunity, disappearances, abductions and killings of Tamils in Colombo. She also reports that in the current security environment most Tamils are treated as if they are suspects and that this applies not only in the north and the east but also in Colombo where search and cordon operations targeting Tamil-dominated suburbs take place.

121. In reply to the specific written question as to whether someone like the appellant would be released on bail, and what were the consequences of absconding from bail, she states that under the Emergency Regulations(ERs) LTTE suspects are routinely detained under these provisions and that while, under ordinary law, most people receive fair trials, the ERs allow arrest without warrant and lengthy detention without charge. A human rights lawyer she spoke to states that the appellant would be unlikely to receive release on bail having absconded in the past. Dr Foster considered that it would be challenging for the appellant to find employment in Colombo as he would not have a network of contacts and with the current suspicion of Tamils, particularly someone like the appellant whose national identity card would show he was from Jaffna, his economic opportunities would be hard. If he found shelter at a lodge he may become the target of suspicion as security forces have recently conducted sweep operations in the capital, Colombo, targeting lodges in the belief that LTTE cadres may be hiding there. She states that the security forces have asked three-wheeler drivers in the city as well as bus drivers to be alert for suspicious behaviour. She gives an example of how a young Tamil travelling by bus was detained as directions written on his hand were deemed "suspicious".

Numerous COI Reports (Bundle B, 1 - 331)

122. We have had the opportunity of considering specific reports we were referred to in this bundle. A number of these are support material for the other reports provided.

UNHCR Position Paper, December 2006

123. This report we considered of particular significance as it came to our attention after the first two days of hearing. It was one of the prime reasons why we decided it was

necessary to reconvene. Consideration of this report is covered fully in the submissions and our conclusions.

US Department of State Report 2006

124. The US Department of State "Country Reports on Human Rights Practices 2006: Sri Lanka" published 6 March 2007 was also included in the appellant's bundle D and again has been taken into account in the submissions and conclusions noted below.

Canadian IRB Report, 22 December 2006

125. This report was also submitted with the appellant's bundle D (pages 32 - 36). It covers treatment of failed asylum seekers returning from Canada to Sri Lanka (2004 – 2006). This material is also dealt with in the submissions and conclusions.

The Hotham Mission Report.

126. A Report from the Hotham Mission Asylum Seeker Project (ASP) on a field trip to Sri Lanka, October 2006 was also included in the appellant's bundle D (pages 57 – 59). This report was published 15 November 2006. The report states that the ASP has a long history of working with Sri Lankan asylum seekers of all backgrounds and has conducted considerable research into the humanitarian protection needs of this group. Following concerns, the Hotham Mission conducted a field trip to Sri Lanka and to refugee camps in Tamil Nadu, India in October 2006 which aimed to evidence and prepare a report for community and government (of Australia) on regional and situational concerns facing returnees on specific issues related to protection and security, governance and the peace process, welfare and humanitarian concerns, and return and repatriation. The group met with 35 groups in the field trip. The trip was hosted by the National Christian Council of Sri Lanka and funded by the Lonely Planet Foundation. Again submissions and our conclusions drawn from them are set out below.

127. Also with the additional material provided at the resumed hearing on 11 April 2007 and included in the appellant's bundle D were reports from Amnesty International, Human Rights Watch, Reuters, the BBC, Tamil Net, and Associated Press. These are set out in bundle D at pages 94 – 145. We have noted the material we were directed to in these reports and conducted a general overview of them.

## 7. The Respondent's Submissions on the Appellant's Case and Evidence

128. Ms Richards, in her skeleton argument on behalf of the respondent dated 13 November 2006, covered the factual background of the appellant, the role of country experts, a review of the case law concerning Sri Lanka (this material has been noted by us and taken into account in the section of this decision where we review the current country guidance (CG) case list in its entirety), some Strasbourg case law, and general submissions on the appellant's case. We now set out briefly a summary of those submissions and the oral submissions presented to us by Ms Richards throughout the hearing of the case.

129. In relation to the appellant himself Ms Richards asked us to note that the appellant had never been a member of the LTTE and had only undertaken activities for them reluctantly and under duress at a low level in non-military, non-violent activities. For this reason he was in a similar position to many or most Tamils from LTTE-controlled areas. She agreed that he had been detained by the Sri Lankan authorities but this was for a relatively short period of three weeks and had been released on the payment of money by his uncle when he agreed to assist the police by providing information. He was then released on bail but was not charged with any offences. She submitted there was no evidence of outstanding arrest warrants or charges. Beyond this there was no evidence of ongoing interest in the appellant by the Sri Lankan authorities other than the questioning of his uncle, who had put up bail, in 2001. She noted that on departure he had passed through several checkpoints and underwent personal searches without difficulty. All of these events had taken place before the ceasefire in 2002. She asked us to note that the appellant has not been in Sri Lanka for seven years.

130. The respondent acknowledged that during 2005 – 2007 the situation in Sri Lanka has worsened with violent clashes between the LTTE and the Sri Lankan Army and a number of civilian deaths and disappearances and significant ceasefire violations. Her submission was however, that most of these problems have been and continue to be concentrated in the north and east of Sri Lanka and while there have been problems in Colombo, particularly with suicide bombers and attacks on high profile targets, the situation in Colombo could not be compared to the north of the country where this appellant originated from but would not be returned to.

131. It was also acknowledged that since the assassination of the Foreign Minister in August 2005 there had been re-introduction of the ERs and these remained in force. It was thus accepted that an individual detained by the Sri Lankan authorities and seriously suspected of involvement in LTTE attacks or planned attacks would be at risk of serious ill-treatment. In her submission none of this led to a person of the appellant's profile being likely to be at a real risk on return, or a conclusion that anyone who had previously escaped custody, or breached reporting conditions or bail, is at risk of serious ill-treatment on return.

132. From the background evidence she asked us to note a number of factors. The first of these was an IRB report "Treatment of Returnees" and in particular the implementation of Amended Immigrants and Emigrants Act of 1998 (5 August 2003) which recorded:

> "Although standard procedure is for deportees to be routinely referred to the Airport Division of the Criminal Investigation Division (CID) for interview on return, in our experience there are no arbitrary detentions without due process, certainly no torture. Returnees who do not have pending arrest warrants or active charges in Sri Lanka are simply released … the Dutch have returned numbers of failed asylum seekers on a special flight with no adverse results … we liaise regularly with GOSL authorities on removal cases from Canada, and we see no evidence of extra-judicial ill-treatment."

The same report, she noted, recorded a senior UNHCR official, at that time, stating that some deportees were questioned for a short period, then allowed to leave the airport and others were not questioned at all.

133. More information was provided in the BHC, Colombo letters of 26 September 2005, 13 February 2006, 4 April 2006, 24 August 2006 and 10 April 2007. From these she asked us to note that the IoM (para 48 ante) on in September 2005 stated that to their knowledge most returnees were detained briefly and then released to their families and that the Canadian, Australian and German Missions had similar experiences (in 2005). In a few cases the CID detained people where there was an existing warrant. Cordon and search operations had been conducted in December 2005 (Strangers Night II) when about 1,000 people were arrested and briefly detained. The Human Rights Commission had summoned the Inspector General of Police to explain the purpose of that cordon and search operation. As at February 2006, 87 persons had been detained under the ERs. An update of this information was provided in the 10 April 2007 letter.

134. The letter of 24 August 2006 noted that the vast majority of returnees were questioned for a short period of time to establish identity and check security issues but normally it was only when there was an outstanding arrest that individuals were detained for longer periods. It was also acknowledged that occasional cordon and search operations still take place.

135. Specifically she informed us that some 750 enforced and voluntary returns to Sri Lanka from the UK took place between 1 April 2005 and 30 June 2006 and that "it is likely that many will have had a profile similar to that of the appellant, whose case is not unusual." Her submission was that there was no evidence to suggest such returnees had experienced difficulties that would breach either the Refugee Convention or the ECHR thresholds. She also submitted that while those who face arrest warrants may attract the attention of the authorities, the evidence did not support a conclusion that those who merely failed to comply with reporting restrictions would be of equal interest.

136. She then turned to the evidence of Dr Smith and Professor Goode. This she submitted was being largely speculative and to an extent anecdotal, often unsupported by the main Country of Origin reports. She submitted that Dr Smith had not responded to points raised by the respondent in his position statement that had been filed in August 2006.

137. Her submission was that there was no evidence to suggest that the presence of scars alone created a material risk of ill-treatment. She suggested that the evidence from Dr Smith and Professor Goode should be compared with that of the UN Committee on Torture (23 November 2001) and the letter from the BHC of 26 September 2005 that stated:

> "The role of scarring is extremely difficult to assess … anecdotal evidence is that it can play a part in rousing suspicion."

A later letter of August 2006 suggested that consideration of scarring did take place only when there was another reason to suspect an individual. She submitted that findings in earlier cases such as *Jeyachandran* [2002] UKIAT 01869 had correctly noted that "the fact that a person bears scars does not, by itself, engender an increased risk of suspicion of LTTE involvement, of arrest or detention longer than 48 – 72 hours."

138. She noted that Professor Goode (at paragraph 107 of his report) noted that scarring was "one factor amongst several which may serve to trigger adverse interest on the part of the authorities". Her submission was that scarring is in the majority of cases unlikely to play a material part or to give rise to a risk of ill-treatment in the absence of other more weighty factors.

139. In respect of the appellant's mental health she acknowledged that for the purpose of this appeal there was no dispute over the diagnosis of post-traumatic stress disorder however, there was nothing in the appellant's case that suggested on return there would be an impact on his mental health placing the UK in breach of its obligations under Article 3 of the ECHR.

140. Ms Richards supported many of her submissions by references to the COIS reports of October 2006 and February 2007.

141. On the bail issue she asks us to note particularly the BHC letter of 22 November 2006 which observed that it was common practice to release detainees on bail without being charged, as was the situation with this appellant. She submitted that, contrary to the evidence of Professor Goode, this was common practice and that the appellant was not in an exceptional situation and that it did not follow that arrest warrants were issued for appellants such as this one who had apparently skipped bail.

142. In reference to the letter to the Secretary of State for the Home Department by an MP relating to a returnee who had apparently been killed on return, she submitted that there did not appear, on enquiry, to be a temporal connection between the two events. The letter indicated a six year gap and that the returnee had been killed in an incident in eastern Sri Lanka. Her submission was that there was no reason to draw adverse conclusions from this incident that all failed asylum seekers from the UK were at risk.

143. Ms Richards helpfully reviewed the current case law, particularly the CG cases for us. As noted later in this determination, apart from some unique, esoteric cases, we have concluded that all on the existing list of cases should be taken from the CG list and that this determination will form the basis of the current findings of the Tribunal on risks from Sri Lankan authorities. We deal with this in paragraphs 227 and 228. (A later CG determination will be needed to cover the situation on LTTE risks).

144. We now note the submissions of Ms Richards in respect of the two expert reports. Firstly, she submitted that the risks to returnees of suicide or death, had been overstated and were misleading for the reasons we have noted above. The comments by Dr Smith that strip searches were routine she submitted were not supported by the evidence. The only reliable reports on this issue that were available went back to 1997 and were reports from the Medical Foundation about its clients. These did not give evidence of strip searching being routine.

145. In respect of the Stop and Watch lists she agreed that while the sources indicated they existed, she did not agree with the conclusions of Dr Smith that there would axiomatically be a real risk of persons such as the appellant being on such lists. Her

submission was that on the evidence this was not a conclusion that could be firmly reached. Thus, his evidence on this issue should be treated with caution. She submitted that as most of his conclusions had been reached without recourse to underlying sources or evidence, we should adopt a cautious approach to all of his conclusions.

146. In respect of Professor Goode's reports she noted agreement with the conclusions in respect of problems in the north and the east of Sri Lanka but did not agree that the situation in Colombo was of the same nature as indicated by Professor Goode. There was also agreement by the respondent that round-ups were taking place in Colombo, but in a manner that was set out in the BHC letters. She submitted that the reports of Professor Goode were better sourced than those of Dr Smith but many of his conclusions were not justified on the full analysis of the background evidence provided. She noted his reference to Dutch, German and BHC material in respect of the Stop and Watch lists but found it difficult to see how some of the conclusions had been justified. Whilst she agreed that it was right to bring attention to the new Emergency Regulations which continue to be enforced, and that information could be passed from various departments in Sri Lanka under these Regulations, this, of itself, did not show that any records on this appellant were held, particularly given he had not been detained under the latest Regulations. Conclusions therefore that he was extremely likely to be stopped and questioned by the CID, and sustain ill-treatment, did not concur with the reports of the BHC, or the Canadian Mission. The examples given by Professor Goode of detainees in Colombo were not comparable to the appellant's situation and therefore did not assist in assessing risk to him. She agreed that there was a dearth of recent information in relation to returnees and in this situation the reports by the BHC were relevant and did not appear to have been given weight by Professor Goode. On the issue of bail she submitted that Professor Goode had based his findings on a presumption that the police were bound to take an adverse interest in persons, such as the appellant. However, this was not supported by actual evidence before us of it happening to such people.

147. In respect of the three written reports she submitted that these appeared to be improperly catalogued, or not at all, and that most of the material provided was anecdotal and really did not throw great light on the core issues before us.

148. We now turn to Ms Richards' submissions on the most recent material provided to us in the UNHCR report, the latest COIR and OGN, the BHC letter of April 2007 and the other reports provided by the appellant (set out in bundle D). In respect of the UNHCR Position Paper of December 2006 she submitted that it contained a number of very generalised statements and positions which may have been relevant to the full scope of "protection" that the UNHCR was obligated to undertake. We should note that the full remit of the UNHCR is to cover a wide range of humanitarian issues that go beyond the specific issues of real risks of persecution or serious maltreatment that are before us. The task therefore before the respondent and the AIT was not the same as that of the UNHCR.

149. Again the UNHCR noted that the security situation had deteriorated in the north and the east and to a lesser extent in Colombo. Thus the comments in paragraph 14 of the UNHCR report related to the human rights situation for Tamils from the north and the east. To extrapolate that all Tamils faced widespread insecurity and are at risk of

targeted violations of their human rights, harassment, intimidation, arrests, detentions, torture, abduction and killing at the hands of government forces was too wide a conclusion to reach, in her view, and the comment was not sourced with references. There was not a blanket risk to all Tamils and even the footnotes in the report did not suggest this.

150. The comments in paragraph 20 that checkpoints had been re-instated making it particularly difficult for Tamils to travel in government-controlled areas and in particular those born in LTTE-controlled areas, was not disputed. However, as confirmed in footnote 37 from the US Department of State report, the treatment at these checkpoints was, in her submission, harassment not persecution. Again, in the comments on Tamils from Colombo, set out from paragraph 23 of the UNHCR report, which describes Tamils in Colombo as being at "heightened risk of security checks, arbitrary personal and house-to-house searches, harassment, restrictions on freedom of movement and other forms of abuse", she submitted this again showed evidence of harassment, rather than serious maltreatment. Even the recording, at paragraph 24, that under the Emergency Regulations registration of Tamils was taking place in Colombo, to enable accurate information on ethnicity and the location of all inhabitants, did not of itself indicate real risks of persecution/serious ill-treatment. She agreed, with paragraph 25, that there were targeted sections of the community, such as young Tamil professionals including women, businessmen, political figures and activists with a pro-Tamil stance. Again, she submitted this was not a situation that was relevant to this appellant as the targeted groups did not include him.

151. The comment, at paragraph 33, that certain profiles in Colombo were at risk, she considered was unhelpful, as it did not state what those profiles were and failed to set out the distinction between risks in the north and the east of Sri Lanka, from those in Colombo. The comment she referred to was:

> "In Colombo, Tamils have been targeted while those with certain profiles are liable to suffer serious human rights transgressions. Therefore, UNHCR recommends that all asylum claims of individuals from Sri Lanka be examined carefully under fair and efficient refugee status determination procedures."

152. She then turned to the comments from paragraph 34(iv) "Internal Flight Alternative". She said it was not submitted by the respondent that this appellant should travel to the north or east of Sri Lanka but that he could find safety in Colombo. Effectively therefore we were dealing with an internal flight or relocation issue for this specific appellant. The comment by the UNHCR that individuals who flee targeted violence and human rights abuses by the LTTE had no realistic internal flight alternative given the reach of the LTTE and "the inability of the authorities to provide assured protection", she submitted was a view the UNHCR were entitled to hold, but was not one that necessarily accorded with the obligations of the United Kingdom under either Convention in respect of persons returned to Colombo.

153. In relation to paragraph 34(b) about Tamils from Colombo, she submitted that round-ups by the government authorities were not persecution of themselves and the report indeed states that "individual acts of harassment do not in and of themselves

constitute persecution". We agree this should be noted by us but also that this statement was followed by the additional comment:

> "Taken together they may cumulatively amount to a serious violation of human rights and therefore could be persecutory."

154. Turning then to the US Department of State report (March 2007) she again asked us to note that most of the incidents referred to were in the north and the east and related to disappearances or abduction of high-profile targets. She stated that the respondent agreed that torture did take place in Sri Lanka, however, this did not mean that everyone in detention was at a real risk of torture. Thus, while there was harassment at checkpoints and in short term detentions, this may be unpleasant and discriminatory it did not rise to the level of being persecutory. She reiterated her submission that this appellant would not be liable to be arrested on a warrant on return and thus, while he may be detained for short periods, he would soon be released and free to go. Thus, even in Colombo where it was acknowledged from the US report that there were checkpoints and registration requirements and the erosion of civil rights, these were not at the level of persecution, in her submission.

155. Ms Richards then took us to a number of comments and conclusions within the Hotham report. Findings and conclusions in this report she submitted also were evidence of the general erosion of civil rights but not widespread evidence of persecution for those with a profile such as this appellant. Again, she noted that the problem in this report, as with several others in respect of the "death in custody" case, was that this was another example of reports using the same (in this case inapplicable) reports to extrapolate and reach possibly desired conclusions. She questioned the research methodology used for that reason. A particular point she made in respect of the Hotham report was that there was a failure to obtain accounts from returned failed asylum seekers which, in her submission, was a substantive flaw in the methodology, particularly given that this was an organisation devoted to the welfare of such persons. Thus it would appear that the Hotham Mission would have been in a good position to contact such persons. Beyond this there were no interviews with political or government groups and accordingly, in her submission, the report must be seen as a partisan one with the serious limitations she had noted. Additionally, many of the comments were related to what were primarily humanitarian issues, rather than specific issues of risks of persecution or serious maltreatment that were before us. In this situation we should treat the report with caution, particularly the blanket statements made within it which were often based on unspecified or unidentified reports. It did not provide a clear picture of the situation in Colombo for persons who had actually returned recently.

156. Ms Richards then turned to the other documentation provided in bundle D from pages 94 – 145. She submitted that a number of these were merely news reports and whilst of useful background, did not show objective evidence of specific risks to persons such as this appellant.

157. She asked us to note with caution the Tamil Net reports, which she noted was openly acknowledged as a pro-LTTE organisation and was thus not necessarily reliable. The recent reports of the bombing of the airforce base near Colombo Airport she submitted did not necessarily show an increased risk to Tamils at the airport. It was

illogical to extrapolate a risk to every Tamil who may enter the airport because this attack had been acknowledged to have been carried out by the LTTE.

158. After finally covering some items in the latest COIS and OGN reports from the respondent and bringing to our attention the BHC letter of 10 April 2007, she submitted that the position of the Secretary of State had not changed over the past few months since she made her first submissions in this case. She agreed that there had been some changes with an increase in the cordon and search operations but this was not tantamount to a great deterioration nor, in her submission, would it place this appellant, or returnees of like profile, at risk. The evidence did not show, in this case, that a person, with no outstanding arrest warrant and only an outdated low level of support to the LTTE, would be ill-treated. She acknowledged that the appellant may be interviewed on return at the airport but, the evidence indicated, he would be soon released. Beyond this while in Colombo he could be at risk of cordon and search detention but again there was nothing to indicate that beyond short detention and registration, a Tamil with his profile would be at a heightened risk.

159. She acknowledged that there was no dispute by the respondent that records were kept at the airport and that interviews were conducted at the airport. This was in accordance with the information provided by the BHC. However, to state that this placed returnees, such as this appellant, at a real risk of torture or other inhuman or persecutory treatment was not justified on the evidence.

## 8. The Appellant's Submissions on the Appellant's Case and Evidence

160. Mr MacKenzie provided us with a skeleton argument dated 10 October 2006 and a further skeleton argument dated 30 March 2007. He also addressed us orally both at the original and resumed hearings.

161. Mr MacKenzie identified the twelve principal risk factors for a person returned as a failed asylum seeker from the UK to Sri Lanka who fears persecution or serious ill-treatment from the Sri Lankan authorities. We list these twelve factors and later use them as a helpful manner of setting out our country guidance findings. The risk factors identified are:

"(i) Tamil ethnicity.

(ii) Previous record as a suspected or actual LTTE member or supporter.

(iii) Previous criminal record and/or outstanding arrest warrant.

(iv) Bail jumping and/or escaping from custody.

(v) Having signed a confession or similar document.

(vi) Having been asked by the security forces to become an informer.

(vii) The presence of scarring.

(viii) Returned from London or other centre of LTTE activity or fund-raising.

(ix) Illegal departure from Sri Lanka.

(x) Lack of ID card or other documentation.

(xi) Having made an asylum claim abroad.

(xii) Having relatives in the LTTE."

162. (In our conclusions below we have added to the first risk factor of Tamil ethnicity, age and gender considerations.)

163. Mr MacKenzie submitted that these factors had to be considered both immediately on arrival at the airport and then afterwards if and when returnees try to re-establish themselves in Sri Lanka. Clearly they must be considered on a case-by-case basis. For this specific appellant it was submitted he was manifestly at risk of persecution and/or serious ill-treatment if returned because on the accepted evidence, he is a Tamil who had admitted helping the LTTE, has been charged with offences connected with the LTTE, has scars consistent with torture and has jumped bail after being pressurised to become a police informer. After addressing us on the role of country experts and CG cases discussed elsewhere in this determination, Mr MacKenzie asked us to note that the consistent position of the Tribunal over the past years has been that the ceasefire removed fears of persecution on return to Sri Lanka, other than "exceptional" cases. Those exceptional cases included individuals suspected of assisting the LTTE such as *TJ (Risks – return) Sri Lanka* CG [2002] UKIAT 01869 (also called *Jeyachandran*) and it has always been the case that persons suspected of assisting the LTTE were at risk, as was accepted by the Court of Appeal in *Selvaratnam* [2003] EWCA Civ 121. The appellant however, now submits that the risk categories that were then identified have now widened. The deteriorating situation over the past twelve to eighteen months in Sri Lanka, since the introduction of the Emergency Regulations in August 2005 and continuing major violations of the ceasefire, as noted in the background reports supplied, including the detailed analysis of Dr Smith showed that:

"(i) The ceasefire has effectively ended with both the government and the LTTE in open fighting and many insurgent attacks by the LTTE being reported,

(ii) the security forces remain in a high state of alert for possible actions by the LTTE,

(iii) there are regular and persistent reports of torture and mistreatment by the security forces, with apparent impunity,

(iv) the LTTE remains active in persecuting its actual or perceived opponents."

164. Effectively, in his submission, the civil war has resumed in all but name. This was noted by Dr Smith, paragraph 73, where he termed it as a "half war".

165. Mr MacKenzie stated that it was not argued that the fighting per se justified the grant of asylum to the appellant or others. It was rather the gross deterioration in the human rights, the ever-increasing vigilance on the part of the security forces and

many other factors led to the heightened risk to Tamils, including the use of torture with impunity by the police and the Sri Lankan Army.

166. Mr MacKenzie addressed us on the respondent's evidence. He submitted that it appeared to be common ground that: the appellant would come to the attention of the authorities in Sri Lanka on return and may be questioned; those seriously suspected of involvement in LTTE attacks or planned attacks were at risk of serious ill-treatment; lists of failed asylum seekers could form part of the information available to security forces in round-ups of Tamils, and there was evidence that the security forces have used the presence of scars to identify LTTE connections in the past (although the BHC letter of 24 August 2006 appears to imply this is no longer a problem). He submitted that the respondent was not taking a view that there was insufficient evidence to show no risk of detention or ill-treatment, but merely that it would not be prolonged or serious or and at most would be harassment which did not rise to the level of being persecutory. In this situation he submitted the respondent had carefully chosen his wording but the Tribunal was invited to conclude that as the respondent did accept some level of risk on the core issues, it was for us to conclude whether there was a reality to those risks.

167. He accepted that the reports provided by the respondent may be of assistance by way of general background where matters covered are uncontentious but that they should not be equated with the expert reports. The COIR does not identify the authors and clearly states that they are not intended to be detailed or comprehensive nor to provide full analysis of the evidence rather they just report it. In that respect he submitted they differ from the evidence provided by the appellant and the experts. The Tribunal should therefore place preferred weight on the latter.

168. In respect of the reports from the Canadian IRB we should note this was three or four year old research and thus out of date. The material from the BHC, he submitted, had been provided unsourced from un-named officials. In this situation there was no indication of the level of expertise, held by these authors, on Sri Lankan affairs, and there was no primary sourcing.

169. He submitted that the comments made in the BHC letter from Mr Selvakumaran, Acting Chair of the Human Rights Commission ("HRC") in Sri Lanka (BHC letter 13 February 2006) should be given little weight given the problems that were faced by the HRC, which no longer exists, and are referred to in the report by Mr Fernando, Professor Goode and Dr Foster.

170. On the issue of record keeping by the security forces Mr MacKenzie submitted that the Sri Lankan security forces should be seen as being well organised to counter threatening insurgency and that they do maintain copies of records of those known or suspected to have been involved with the LTTE. These records are available not only at the airport but also to the security forces more widely throughout the country. The appellant who has suspected LTTE connections, and has been photographed and fingerprinted will, in his submission, inevitably be included in those records. We were asked to note the comments of Professor Goode (at paragraph 29 onwards) that there was ample evidence that security forces maintained a database of suspects. He stated:

> "In the context of a bitter ethnic conflict where both sides display strong totalitarian tendencies, and given the understandable and overriding concern with security, in a country which until recently had the highest level of suicide bomb attacks of any country in the world, there is ample reason for keeping official records regarding previous suspicions against individuals, even if those individuals escaped or were released" (paragraph 37).

Mr MacKenzie noted that Dr Gunaratna also noted the record keeping and the COIS report of the Home Office delegation undertaken in March 2002 stated that computerised records in the south of the country were kept including computerised records at the airport.

171. In this appellant's case the fact that he was released on bail made it "overwhelmingly likely" that his records would be retained. Information on the position at Bandaranaike International Airport was recorded by Dr Smith (at paragraph 116) where he had stated:

> "The appellant's previous status as a recorded LTTE suspect means that, he [will] almost certainly be of interest to the authorities and, as such he will axiomatically have been placed on one of the two lists that are provided to the immigration services at the airport by the security forces. The first is a 'Stop list', which the National Intelligence Bureau provides to ensure that those in which the authorities have an interest are detained on arrival. The second is a 'Watch list', which alerts the authorities to the return of a person in which there is an interest and is used to trigger covert surveillance. If the appellant is on one of those lists, he will be extremely vulnerable on return both to arrest at the airport or following his arrival."

Dr Gunaratna and the BHC letter of 24 August 2006 agreed that there was an IT system at the airport and this is confirmed in the COIR.

172. Mr MacKenzie submitted we should note the letter of the BHC of 26 September 2005 which suggests that most returnees are detained briefly and the acceptance that people may be questioned on security issues. He submitted therefore that it must follow that any unsatisfactory answers or suspicion of LTTE membership will give rise to the risk of detention and/or ill-treatment; otherwise there would be no purpose in the detention and questioning. The contention in the 24 August BHC letter that "normally only when there is an outstanding arrest warrant are individuals detained for longer periods" he submitted showed that for those with an outstanding arrest warrant there would be a real risk. He submitted it was inconceivable that this appellant would not be wanted after jumping bail and that in some cases, as apparently acknowledged by the BHC, the risk extends beyond those with outstanding warrants.

173. Mr MacKenzie submitted that the risk of torture was so widespread in Sri Lanka that in any period of detention, for whatever purpose, there was a real risk that this could take place. We were referred to Professor Goode's comments at paragraph 47 stating there was "overwhelming evidence of continued and routine use of torture with impunity by security forces." Dr Smith dealt with the issue at paragraph 91ff and it was also noted by Mr Fernando and earlier reports. The COIS reports and US Department of State reports also suggested the use of police torture being endemic and conducted with impunity.

174. On the specific risk factors we have noted above Mr MacKenzie acknowledged that merely being a Tamil was insufficient to ground a claim for asylum but it was clearly a factor which would be taken into account by the security forces. Dr Smith had reported at paragraph 124 that "90% of those detained at the airport are Tamil". The BHC letter of 13 February 2006 noted that most arrested, in the December 2005 round-ups, were Tamil. Dr Foster also noted there were "already extensive police raids in poor and Tamil areas [of Colombo], which have been under close surveillance by the security agencies for years" and that controls and checkpoints directed at Tamils were increasing. Dr Foster had noted also: "Every Tamil is a suspect" and "If a person has been outside [Sri Lanka] and the police check his documents he will automatically come under suspicion for supporting the Tamil cause".

175. On the issue of risks from previous records as a suspected or actual LTTE member or supporter it was submitted that such a record would lead to serious risk of persecution or serious harm. Dr Smith at paragraph 121 and Dr Gunaratna had both noted this. This risk was heightened at the present moment, the civil war effectively having re-started. Thus it would be extraordinary if persons known or suspected to have connections with the LTTE were not of the utmost interest to the authorities. This was particularly so given the increase in LTTE attacks or planned attacks. In respect of previous criminal records or outstanding arrest warrants, Mr MacKenzie submitted that all parties appeared to agree that an outstanding arrest warrant was an extremely significant factor. Turning to the issue of bail-jumping, and/or escaping from custody, he submitted that all available records concurred and showed that those who jumped bail would be at risk. He submitted that it was common sense that a person who had disappeared while facing a trial would be at a grave risk of being re-detained and tortured. There was no basis for assuming that release on bail by the courts signalled the end of official interest, indeed such an assumption would be entirely illogical. Professor Goode noted this point as did Dr Smith at paragraph 121. Professor Goode noted at paragraph 43 "During round-ups the police and army look particularly for persons who have been detained earlier but released by the court".

176. The issue of having signed a previous confession was accepted in *Selvaratnam* as a serious risk factor. Mr MacKenzie also noted that there was a common use of confession evidence as recorded by Professor Goode at paragraph 47 and also noted by Dr Foster. For those who have agreed with the security forces in the past to be informers, he submitted it was common sense that their refusal to co-operate would show an assumption that they collaborated with the LTTE.

177. On the issue of scarring Professor Goode had provided ample evidence that individuals with scars were taken to be ex-combatants. This was also noted by Dr Smith at paragraph 80 in his recording of comments made to him by the Inspector General of Police. This was further noted at paragraph 83 of the report. The BHC letter of 24 August 2006 accepted that there was evidence that individuals may fall under suspicion if they have scars, however they stated that this appeared to be happening less frequently. Mr MacKenzie suggested that the two examples provided did not prove the risk had evaporated given the other clear evidence of the practice and that it was illogical to assume that what had been seen as a reliable way of

identifying LTTE suspects would be abandoned at a time when the risk from the LTTE is increasing every day.

178. It was submitted that returning from London or other centres where LTTE activity or fund-raising took place was a significant issue. Whilst he acknowledged that not every person returning from the UK would be at risk on this ground, because it was a known fact that London was a major centre for Tamil fund-raising, and the Sri Lankan High Commission in London are under instructions to pass details of all deportees to the security forces in Colombo, (according to Dr Smith at paragraph 124), he submitted that this must be seen as a significant additional factor.

179. Illegal departure from Sri Lanka again was not necessarily a basis for a fear of persecution, or really serious harm, itself but an additional factor giving rise to the necessity for questioning.

180. The lack of an ID card or other documentation, as noted by Dr Smith (at paragraphs 124 and 136) showed a difficulty for a returnee, as had been noted by Professor Goode:

> "Carrying a national identity card has become a must".

In this appellant's case the original reason for his arrest had been his failure to have an ID card and this indicated that it was one of the factors that authorities would assume thereby that he was with the LTTE.

181. Returning as a failed asylum seeker he submitted also had relevance, Dr Smith at paragraph 135 noted there was evidence that former asylum seekers were singled out for particular attention. The BHC letter of 24 August 2006 accepted that lists of failed asylum seekers could form part of such operations directed at Tamil areas of Colombo. Those having relatives in the LTTE had long been noted as likely to be at risk on the basis that the individual would either be an LTTE supporter as well or would be likely to give information useful to the security forces.

182. Finally on the issue of internal relocation Mr MacKenzie submitted that it was widely accepted that individuals could not seek safety in the LTTE-controlled area if they had left the LTTE (this was acknowledged by both Dr Smith and Dr Foster). Thus, even if the appellant avoided arrest on return or shortly thereafter, there would be nowhere in Sri Lanka where he could safely return. State protection was virtually non-existent for those in fear of the security forces and there was virtually no investigation of human rights abuses carried out by State officials.

183. In his further skeleton argument of 30 March 2007 Mr McKenzie gave his submissions on the current situation. He submitted that the prognosis put forward by his submissions, and in particular the views expressed by Dr Smith, that the situation would continue to get worse, have sadly been amplified. This was reflected in the BBC report of 21 February 2007 (bundle D, 126) which reported a number of bomb blasts apparently committed by the LTTE during January 2007. On 26 March 2007 there had then been the unprecedented air attack on the airforce base adjacent to Bandaranaike Airport. The deepening "civil war" situation did not of itself justify a grant of asylum, however, the more audacious the LTTE attacks became, the graver

the human rights situation was likely to be. This was confirmed by the Department of State report which stated:

> "The government's respect for the human rights of its citizens declined due in part to the breakdown of the CFA".

184. He submitted that the evidence of record keeping at the airport had been now further confirmed by the Hotham Mission report. This Australian NGO concluded that:

> "In relation to returning asylum seekers the [Sri Lankan monitoring mission] stated, 'if a person has had any affiliation in the past and returns they will face danger'. This was mentioned in relation to both perceived connections with the LTTE, thus concerns about being targeted by the police and armed forces, and also affiliations to certain parties or individuals which may make a person a target of the LTTE."
>
> "The team were told by multiple sources that the National Intelligence Bureau has records dating back ten years and earlier with a national computer database being used for the past two years. People with previous incidents of arrest or questioning are likely to [be] arrested and under the state of emergency and level of conflict may face further human rights violations such as torture. One group stated: 'They will know people's history'. Another stated, 'the NIB will have a record of past interrogations, and can cause further charges if [a person is] returned.'"

185. He noted that the Hotham report was cited in the COIR of February 2007 and thus presumably was accepted as being a reliable source by the respondent (see the preface to the COIR report paragraph vi). The Hotham report also noted that the IOM had stated that they were aware of returnees "not assisted by their programme" being arrested and harassed on or soon after arrival, particularly in cases where the returnee no longer holds a national ID card." He submitted this was particularly significant because paragraph 32.10 of the COIR quotes the IOM as saying: "to their knowledge most returns are detained briefly and then released to their families". Thus, he submitted it seems that the information relates only to those returned under the auspices of the IOM (and indeed the IOM could not necessarily be expected to know what happens to those not so returned), but the COIR fails to make this clear.

186. He submitted that the security situation has been stepped up significantly and this is reflected in the UNHCR Position Paper and the Hotham Mission report which states that in Colombo it is at its highest level of civil restriction since the late 80s including checkpoints not only in the outer suburbs but throughout the city, manned by both "STF, police, army, navy and airforce".

187. In respect of the Canadian IRB report of February 2007, noted in the COIR at paragraph 32.13, there is a suggestion that the SIS in Sri Lanka documents and interviews returnees and also a suggestion that those not subject to an outstanding arrest warrant are not detained. He submitted that this information which appeared to come from the Canadian High Commission did not make it clear the basis upon which the High Commission reached its view and thus the Tribunal should not give this information much weight as it stands except insofar as it coincides with other sources of information.

188. The Hotham Mission Report, and the US Department of State report of 2006, in his submission, confirmed the continuing use of torture with impunity. Turning to the categories of risk that he identified, and we noted above, he submitted that recent information such as that from Tamil Net (March 2007, bundle D, 133) showed ample evidence of round-ups and arrests of Tamils who were "unable to explain their presence" in Colombo or other major towns. The Tamil Net report stated that 600 civilians had been detained, allegedly for failing to prove their identity and reasons for their stay in Colombo. Although there was said to be evidence of terrorist activity held against some of them, and none seem to have been charged, the courts allowed the police to move them all to a detention camp in the south. The COIS report also notes several incidents of arrests of Tamils, particularly those from the north and the east or those without identity cards.

189. Significantly he submitted that the Tamil Net report of 13 March 2007 stated that the lodges (cheap hotels run by the Tamil community) in Colombo were subject to a scheme by the Sri Lankan Defence Ministry whereby they were monitored to strengthen security in Colombo. The report stated that there were plans to order the closure of lodges which failed to provide basic facilities and to identify those lodges which were suspected of having close links with undesirable persons. Under the second phase of the scheme, lodges assisting terrorist activities would be acquired by the government and the persons running the lodges would be prosecuted under the Prevention of Terrorism Act for harbouring terrorists:

> "All lodges and boarding houses will be routinely monitored and checked by special police teams once a week, according to the new security plan."

190. In this situation Tamil ethnicity was seen as an increasingly important factor in his view, especially Tamils from the north and the east who were unable to explain their presence in a certain area.

191. The Hotham report, and the UNHCR Position Paper of December 2006, also gave further confirmation of the risks to those with a previous record as a suspected or actual LTTE member or supporter.

192. We were asked to note the contents of the new Emergency Regulations. Although these are widely drawn and purportedly based on a need to fight international terrorism, in his submission, they are clearly aimed at the LTTE, as can be seen from the Sri Lankan Government press release of 6 December 2006 (bundle D, page 102). The definition at Regulation 20 is a very wide one "with the object of threatening or endangering the sovereignty or territorial integrity of the Democratic Socialist Republic of Sri Lanka". This he submitted was a clear reference to the aims of the LTTE. Importantly, he submitted the actions which constitute an offence are extremely widely drawn in Regulations 6 and 7, covering a wide range of non-violent activities and expressions of opinion such as wearing a uniform, emblem or symbol of a banned group, harbouring or assisting any member of such a group or to "promote, encourage, support, advise, assist, act on behalf of" such a group. Under Regulation 8 it is an offence to offer material or financial support or assistance of any type. The appellant therefore submits that this indicates the extent of the authorities' interest in potential LTTE suspects and the argument by the respondent that only a narrow group of people are at risk is untenable.

193. Mr MacKenzie stated that for the avoidance of doubt it was not being submitted that those suspected of carrying out LTTE activities or supporting the LTTE are necessarily at risk of being pursued through the courts, although this is a possibility, but that, on the evidence, anyone so suspected is at risk of serious human rights abuses, including illegitimate detention, torture or even death. The Emergency Regulations contain a statement of official intent and act as a green light for the security forces to behave as they will providing a veneer of legality for brutal treatment of people against whom there is no proof of having done anything wrong. As an example he quoted the COIR of February 2007, paragraph 8.38, which states that there is evidence of persons being abducted and tortured by armed groups linked to the security forces.

194. The Hotham report also comments, on risks to persons who have signed a confession or similar document. It notes (bundle D, 57) the use of enforced confessions in Sinhalese, regardless of whether they are Tamil-speaking or understand Sinhalese. Such persons are "forced to sign the statement". The Hotham report also (bundle D, 83) reports a fresh area of risk by quoting one group it interviewed as stating:

> "How a person has left Sri Lanka will impact on their return experience – they could be charged under immigration law … if he is a Tamil chances are he will be immediately detained, suspected – (particularly) if he used fake documents or bribed – in Sri Lanka you can be charged for leaving the country on a fake passport."

The Tamil Net reports and Hotham report also noted an apparent increase in the detention of persons who were unable to produce ID cards or prove their identity and, he said, a disturbing issue was the recently introduced requirement of the Residence Permit list. These newly introduced registration requirements state that each member of a household must be registered with the police. "Originally this was introduced and implemented for Tamils only but has now been made the householders registration requirement for all citizens. After speaking to many groups and individuals about this requirement, it would seem that only Tamils and some Muslims are being forced to comply."

195. The Hotham report also noted risks arising from persons having claimed asylum abroad.

196. We were also asked us to note that in December 2006 the Home Office had decided, in the light of the deterioration in the situation in Sri Lanka, to remove Sri Lanka from the list of designated countries where there would be non-suspensive asylum appeals. The note of 6 December 2006, stated that: "Each asylum and human rights claim made by Sri Lankans will, as now, continue to be considered on its merits."

## 9. Conclusions on the Background Evidence, and Expert Reports When Set Against the Issues Identified

197. In the assessment of country of origin information made available including expert reports in the asylum context it is self-evident that we should apply the maximum of

objectivity to our deliberations and conclusions. The expert reports, the information from the BHC, and much of the information contained in the country of origin information we have considered, is, largely based on the analysis of well informed opinions, personal observations, and deductions often reached after extensive trawling of all of the available information. The conclusions and deductions in such situations therefore have a strong element of subjectivity to them. For this reason we have tried to look, where possible, at the objective figures that arise from the totality of the information before us. In the assessment of risk, which is the ultimate task before us, the analysis of the figures will act as a starting point give us the most objective result. Against the objectivity of those figures, if reliable, we can then go on to assess the many expert and other reports we were presented with. These figures show:

(a) There are approximately 250,000 Sri Lankan Tamils in the Colombo district out of a total population of 2.25 million approximately. Thus Sri Lankan Tamils make up over 10% of the population.

(b) 200,000 Tamils are stated to have sought refuge in the West.

(c) From the respondent we were advised that some 750 (presumably predominantly Sri Lankan Tamils) Sri Lankans have made enforced or voluntary returns to Sri Lanka over the period 1 April 2005 – 30 June 2006.

(d) There were reports of two returnees having been killed. (The situation regarding the circumstances of these are opaque at best from the evidence that came before us).

(e) BHC in its letter of 10 April 2007 speaks of a report of 84 disappearances in Colombo, 80 of these being Tamil.

We realise that ascertaining an accurate mathematical percentage of risk of detention against the other figures is simply not possible. However, what these figures do demonstrate is that even if the whole 750 persons returned from UK are added to the Tamil population in Colombo, or are considered as part of the approximate 10% population of Sri Lankan Tamils, the number of disappearances or abductions in Colombo (80) is a very small percentage. We realise there may be differences in timing and that there may be some unreported disappearances, abductions or detentions. Even so, these figures do show that in analysing the reports from the experts a strong note of caution must be injected, as the best figures available show insignificant, or remote risk, percentages when set against the Tamil population of Colombo. The figures certainly do not indicate a picture of anything beyond a small or remote level of detention and/or maltreatment, risks for the generality of Sri Lankan Tamils in Colombo. We consider that this must be the starting point of our consideration against which we can set the opinions of the expert and other reports." The statistics and the totality of the evidence we considered all serve to emphasise that the specific profiles of individual claimant's need to be considered and there is not a situation of real risk to large swathes of the Tamil population in Colombo or to returning failed asylum seekers.

198. We found Dr Smith's reports and evidence to us were valuable in giving a background on virtually all of the issues we were required to cover, in particular setting the historical perspectives. However, on the core issues of risks on return of persecution and/or serious maltreatment and whether such risks would rise to the level of being real as opposed to remote, this report is merely part of the totality of the evidence we have taken into account. In some respects we consider Dr Smith has made overstatements in his conclusions based on the background evidence that was before him. Conclusions that in his view were "axiomatic" sometimes appeared to us to be primarily speculative. In other areas he appeared to rely on selective pieces of evidence to reach his conclusions. Apart from these flaws however, which clearly do have a tendency to taint other parts of the report, we found his written and oral evidence useful.

199. Dr Smith and Professor Goode are of course not charged, as we are, with the task of reaching determinations in respect of refugee, "humanitarian (or subsidiary) protection" and human rights claims where this country is, subject to our conclusions, bound to give surrogate protection. Our conclusions must be reached on well established principles of international, regional (EU and ECHR) and domestic asylum and protection law. Conclusions, opinions or implications reached by such experts must of course come from a different perspective and whilst they are useful and extremely informative in many situations, they must all come together and pass through the assessment filter which it is one of the tasks of this Tribunal to apply. Thus, terms "real risk", "real chance", "reasonable likelihood", effectively connote the same level of risk , or standard of proof and thus have a specific and recognised legal meaning which may differ when the same terms are used by lay persons or expert witnesses. Expert witnesses in such situations should not, if we do not reach conclusions they consider are in accordance with their reports, feel slighted or diminished, as our assessments are of necessity made through the application of established legal principles in this jurisdiction. Additionally, it goes without saying that no expert has any particular interest in the success or failure of any individual's claim or appeal.

200. Thus, Dr Smith's report whilst often good on factual analysis was at times not of such great assistance where opinions were ventured. With limited exceptions, his report did reflect a situation of a well-informed and reasonably balanced commentator who was able to filter out immaterial information.

201. Professor Goode's report was of a similar nature. We did however, note that in respect of the security at the airport there was a variance of opinion between the evidence of Professor Goode and that of Dr Smith. Whilst the variation is not a significantly serious one, it does reflect that when experts tend to rely on more subjective analysis (and their own brief experiences, as was the case here) then inconsistent conclusions can be reached on what, in a case such as this, are important aspects of the assessment process.

202. Professor Goode's fact-finding report of the visits 10 – 20 February 2006 was again useful from a factual perspective but suffered from the problems we have identified above in relation to the assessment of real risk and his reliance at times on opinions that were perhaps too subjective and not balanced. The second report/opinion of Dr Smith made on 5 October 2006 was of assistance in giving us a fairly up to date

assessment. The Hotham report we found of some use to us however, it did suffer from a significant flaw in our view (as was submitted by Ms Richards), namely that there had been a failure to interview the failed asylum seekers who had returned to Sri Lanka. It notes that there were fourteen such persons found by them but there is no reference to their plight or predicament in the report. The reports from the IRB, reporting the Canadian High Commission comments, also suffered from the same deficiency.

203. The UNHCR report was very topical and up to date. We agree with the general submission made by Ms Richards that the protection agenda of the UNHCR is a wider one than the mere assessment of refugee or subsidiary protection status. However, these reports are prepared by persons with direct experience of the core issues involved and thus we accord them substantive weight in this case.

204. The letters provided by the BHC from Colombo, in this case, appear to be an innovation on the part of the respondent for such country guidance cases. Whilst on the odd occasion there are reports provided by High Commissions and diplomatic representatives in many of the countries where we have to assess risks for applicants on return, this is perhaps one of the first times where a series of letters on topical issues have been provided. We note however, that in other countries and for other situations, much of this material may in fact be passed to the COIR and is sourced and attributed. However, we did find this new practice to be of particular use in the careful balancing task we have to undertake. We would strongly endorse the comments made by Buxton LJ in *AH, IG & NM (Sudan) v SSHD [2007] EWCA Civ 297,* at paragraph 55, that while the onus of proof is clearly on the applicant "it does mean that the content of primary evidence going towards the wider situation in the country in question depends on what experts are known to and ready to give evidence on behalf of, the applicants." He then rightly states:

> "But it is the Secretary of State who is likely to have the most comprehensive knowledge of the conditions in foreign countries, not least through diplomatic and consular channels, and if decisions with enhanced status of country guidance cases are to be made about those countries it might seem appropriate for the Secretary of State directly to contribute that knowledge."

205. Mr MacKenzie challenged the weight that should be given to BHC or like information if is not sourced in a similar manner to that expected from expert witnesses and other reporting authorities. Whilst this on the face of it has some obvious validity, we consider that the advice and information provided in such letters must be given significant weight as it is compiled by professional diplomats who we consider are skilled and trained in the observation and acquisition of knowledge in the countries where they are based. Unless there are significant reasons why such evidence is to be treated as biased or unreliable, as appears to be the case with some of Dr Smith's evidence, we do not consider that omissions from sourcing should of necessity negate the value of such reports. Often they may arise from sources that cannot be disclosed and also often they will be well informed opinion based on lengthy experience and observation by the diplomatic post. It should also be noted that these are reports from a permanent diplomatic post and thus must be compared with the temporary or occasional procedure of a researcher. Their opinions should be given equal value to that of a well-informed, balanced country expert who provides

sources and evidence of his or her expertise. Such BHC/diplomatic post reports or information, in the interests of balanced determinations, should therefore, in our view, be encouraged as much as the information coming from expert witnesses, with the objective of obtaining the highest quality of country guidance determinations.

206. We turn now to our conclusions on the various potential risk factors which have been helpfully identified by Mr MacKenzie and extensively commented upon by Ms Richards.

Tamil Ethnicity

207. This is clearly a relevant starting point in any Sri Lankan case at the current time. We remind ourselves of the objective figures we have noted above, and the need for caution when assessing risk in Sri Lanka, especially Colombo. Coupled with that must be the knowledge of where applicants come from in Sri Lanka, where they have grown up, and their involvement (or lack of) with Tamil organisations whether voluntary, involuntary or otherwise. In addition it is also necessary to distinguish what are known as "Sri Lankan Tamils", that is those who predominantly come from the areas in the north and the east, and "Indian" or "Plantation" or "Hill" Tamils, who are more widely spread but were more recent immigrants to Sri Lanka from Tamil Nadu and southern India and originally were primarily involved as workers on tea plantations. The background evidence shows different risk profiles for sub-groups of those with Tamil ethnicity. We have also noted that considerations of age and perhaps gender should be taken into account. The background evidence reflects that young male Tamils in Sri Lanka, particularly in Colombo, are at a relatively higher level of risk. This is unsurprising given that whilst there are considerable numbers of female operatives in the LTTE, the Sri Lankan authorities would be looking for young males as being the most likely group who would undertake terrorist activities, or would have recently been fighting on behalf of the LTTE.

208. We find from the totality of the evidence presented to us that in Colombo the risks to young male Tamils have increased over the past twelve to eighteen months and previous country guidance in this regard is now outdated. We accept the background evidence that the cordon and search operations have increased and that in them young Tamil males are targeted, particularly if they do not have ID cards or other methods of identification. While for forced returns of failed asylum seekers from UK there logically would be a presumption they will return without an ID card, we were not given evidence on this point in this case. Nor did we have evidence of difficulties in obtaining replacements if the returnee's family is not able to supply the original. There now appears to be more specific evidence of the "lodges" used by Tamils in Colombo being targeted for adverse interest by the authorities and as places where searches are conducted. Beyond this we would agree that there is a reasonable likelihood that such lodges would be infiltrated by LTTE members, such that those with a significant profile, for perhaps abandoning or escaping from the LTTE, may be at risk, not only from the Sri Lankan authorities, but also from the LTTE, when staying in such lodges. Having said that, we have no evidence as to the actual proportion of the 250,000 Tamils in Colombo who live, or stay temporarily, in the lodges. They are cheap hotels and it is reasonable to suppose that a substantial proportion of the 250,000 do not live in lodges. If so, returnees may have contacts with more permanent addresses. Nor do we have any evidence as to the number of active (or

'sleeping') LTTE members in Colombo. In addition to the comments in Dr Smith's report, we noted the BHC letter of 13 February 2006, which stated that round-ups had contributed to stereotyping Tamils as suspects and the report of Dr Foster which stated that the round-ups were extensive in poor and Tamil areas of Colombo. The UNHCR report of December 2006 (paragraph 18) reports that young Tamil men and women continue to be at risk of forced recruitment by the LTTE, but notably, in the north and east of the country. Clearly however with this knowledge readily available, there is a higher propensity on the part of the Sri Lankan authorities to target young men and women from the north and the east in a period of virtual civil war.

Previous Record as a Suspected or Actual LTTE Member or Supporter

209. Dr Smith, at paragraph 121 of his second report, identified this as a risk element noting that the appellant in this case had been detained on suspicion of being an LTTE member and then released on bail. Dr Gunaratna went further to state that (at paragraph 5.2) it was very likely the Sri Lankan Government would have a record of the appellant, firstly because he had been arrested and jumped bail, and secondly because Sri Lankan Government records would state he was a member or supporter of the LTTE.

210. From our assessment of the background evidence, we find that it is of vital importance, in the assessment of each Sri Lankan Tamil case, to establish an applicant's profile, and the credibility of his background, in some depth. For example if the appellant was not credible as to his background from the north or the east, which left a situation where he could be a Tamil from Colombo who had little or no involvement with the LTTE, there could be, based on the reality of the assessment of his predicament, little risk (or almost certainly not risk at the level of engaging either Convention).

Previous Criminal Record and/or Arrest Warrant

211. Both parties appear to agree that returning a young Tamil with an outstanding arrest warrant, validly found in the facts, will be a significant factor. This does not alter the previous country guidance determinations in cases such as *Jeyachandran* or the Court of Appeal case of *Selvaratanam*. Again the issue will be to establish the credibility of the criminal record, or an arrest warrant, and decide is it reasonably likely to exist in respect of the applicant. An outstanding arrest warrant, or previous criminal record, is thus, in our view, a significant factor that needs to be taken into account in the assessment of the totality of the risk. However it does not mean, of itself, that the applicant has a well founded fear of persecution (or other serious harm) on return to Sri Lanka for that reason alone.

Bail Jumping and/or Escape from Custody

212. The background information provided to us here indicated that those who had jumped bail would be at a real risk of being detained either at the airport or if they later come in contact with the Sri Lankan authorities. In Professor Goode's specific report on the appellant, at paragraph 106 and following, he deals with this issue. He noted in this case that the appellant was taken (in Colombo) and subsequently released on formal bail. He notes this as a "relatively unusual aspect" of the

appellant's account. (We agree for reasons we set out below.) He stated that it appears to be far more common practice, especially outside Colombo, to release a detainee without the requirement of a bail bond although generally through the payment of a bribe, not least because it is only in very rare cases the detainee will ever have been produced in court. He states that in any case the available evidence does not support the contention that the detainee's release of itself indicates the authorities have no continuing interest in him. He considers that it cannot be concluded that release without charge or without the payment of a bribe precludes subsequent detention and notes a report from the Swiss Refugee Council in that regard. He submits that the issue is one of logic that having detained persons in Sri Lanka there is a practice of routinely re-arresting and re-detaining people on the basis of obtaining confession evidence by torture. This evidence appears to be supported by Dr Smith at paragraph 121 and Dr Gunaratna.

213. We noted in particular the comments made by Professor Goode that the appellant's account here is an unusual one. It is unusual in that it has been shown that the appellant was granted bail by a court in Colombo. We agree with the logic that those who have been released after going to court and released from custody on formal bail are reasonably likely, on the evidence, to be not only recorded on the police records as bail jumpers but obviously on the court records as well. Thus we would identify those in the situation such as this appellant who have been found to have been to court in Colombo, and subsequently released on formal bail, as having a profile that could place them at a higher level of risk of being identified from police computers at the airport. Their treatment thereafter will of course depend upon the basis that they were detained in the first place. It is important to note that we did not have before us any information as to the treatment of bail jumpers from the ordinary criminal justice system, and there may be many of them, when they again come to the attention of the authorities, be they Tamil or Singhalese. We had no evidence that Tamil bail jumpers are treated differently from Singhalese ones. Clearly punishment for jumping bail will not make someone a refugee. As we have said, the risk of detention and maltreatment will depend on the profile of the individual applicant.

214. The situation however, in respect of those who have not been to court and may have been released after the payment of a bribe we do not consider falls into the same category. Much will depend on the evidence relating to the formality of the detention (or lack of it) and the manner in which the bribe was taken and the credibility of the total story. If the detention is an informal one, or it is highly unlikely that the bribe or "bail" has been officially recorded, then the risk level to the applicant is likely to be below that of a real risk. The respondent contends that a detention by the authorities, when there is a suspicion of bail jumping or escape from detention, would lead to harassment only, and not maltreatment rising to the level of persecution, or a breach of the humanitarian protection or Article 3 thresholds. While we would agree that there may well be situations where Tamils, with little or no profile related to the LTTE, or other "terrorist" groups, could be briefly detained and harassed, as no doubt happens in round ups in Colombo and elsewhere, we consider it illogical to assume that an escapee, from Sri Lankan government detention, or a bail jumper from the Sri Lankan court system, would be merely "harassed" given the climate of torture with impunity that is repeatedly confirmed as existent in the background material from all sources. We consider, (as we think it does in the appellant's particular case), that

the totality of the evidence may point to a real risk, in some cases, of persecution or really serious harm when a recorded escapee or bail jumper is discovered, on return to Sri Lanka.

Signing a Confession or Similar Document

215. We see no reason to depart from the established guidance set out in *Selvaratnam* that this can be a significant risk factor. Confession evidence, credibly deduced, was noted by Professor Goode at paragraph 47 of his specific report and indeed we note the relevant and significant comments of Dr Foster that many Tamils are released after signing statements made in Sinhala that they often do not understand. It is again a factor that must be considered in the totality of the risk.

Refusing requests by Security Force to Become an Informer

216. We agree with the submissions of Mr MacKenzie in this regard that if a person has been credibly found to have refused to co-operate with the security forces, after being detained for membership, or perceived support of the LTTE, there is a higher risk that they will be assumed to be collaborators with the LTTE. In this regard we consider that such evidence needs to be taken into account along with the totality of the evidence and it will not, in every case, be a situation where merely establishing that they have refused to be an informer, will be the basis for a valid claim for asylum on its own.

Presence of Scarring

217. The background evidence on the issue of scarring has fluctuated. Up until the time of the ceasefire it was generally accepted as something which the Sri Lankan authorities noted and took into account both at the airport and on detention and in strip searches of suspected Tamil LTTE supporters. Their perception that it may indicate training by the LTTE, or participation in active warfare, was self-evident, and simply was "good" policing, as appeared to be suggested by the Inspector General of Police in his discussions with Dr Smith. On the same logic it was also valid to conclude that the impact of scarring was of far less interest during the period 2002 – late 2005 while the ceasefire agreement was having some effective impact. The evidence that was provided in this case, including that from Dr Smith following his discussions with the Inspector General of Police (paragraph 80 of his report), the BHC letter of 24 August 2006, and the COIR all indicate that scarring may again be relevant. We agree with the comments in Dr Smith's report, that the issue of scarring was considered by the police to be a very serious indicator of whether a Tamil might have been involved in the LTTE. However, on the evidence now before us we consider that the scarring issue should be one that only has significance when there are other factors that would bring an applicant to the attention of the authorities, either at the airport or subsequently in Colombo, such as being wanted on an outstanding arrest warrant or a lack of identity. We therefore agree with the COIR remarks that it may be a relevant, but not an overriding, factor. Thus, whilst the presence of scarring may promote interest in a young Tamil under investigation by the Sri Lankan authorities, we do not consider that, merely because a young Tamil has scars, he will automatically be ill-treated in detention.

Return from London or Other Centre of LTTE Activity or Fund-Raising

218. We consider that this is a factor that will be highly case-specific. While it is valid to take into account that Dr Smith and Detective Inspector Hibberd assert that London is a centre for Tamil fund-raising, (indeed it is now alleged/rumoured that the LTTE may be involved in a "skimming" operation with credit cards in a number of petrol stations in the UK), we consider that this would be a factor that would have to be credibly established, by reference to an appellant's evidence or perhaps that of a close associate. He would need to show the extent to which the Sri Lankan Embassy in the UK was aware of his activities and was thus likely to have passed the information on to Colombo when the applicant was being deported or removed.

Illegal Departure from Sri Lanka

219. We agree that illegal departure does not of necessity establish a well founded fear of persecution or serious harm on its own. However, it does appear that there is some evidence in the Hotham report, in the evidence of Dr Smith, and the IRB that it may now, in the heightened level of insecurity in Sri Lanka, add to the profile. Again, it is a factor that will be very much case-specific and is likely to become relevant as one factor in a plethora of possible factors leading to real risk of serious harm.

Lack of ID Card or Other Documentation

220. The evidence of Professor Goode was that carrying a national identity card has become a must. It would appear a reasonable inference that in the current situation, where a number of cordon and search activities take place in Colombo and elsewhere, that the lack of valid identity could lead to a higher risk. Obviously it would need to be coupled with other risk factors for those of Tamil ethnicity, but we view it as being a contributing factor. An appellant would need to show why he would be at continuing risk, and that he cannot reasonably be expected, or able, to acquire a new identity card.

Having Made an Asylum Claim Abroad

221. Again there was accepted evidence, including that from the BHC, that there are lists of failed asylum seekers which could form part of search operations in Tamil areas of Colombo. It is again a reasonable inference that the application forms for replacement passports and travel documents may alert the Sri Lankan High Commission in London and that that information could be passed on. We do not consider this to be an issue that alone would place any returning failed asylum seeker at a real risk of persecution or serious harm on return. Again, it would make but a contributing factor that would need other, perhaps more compelling, factors added to it before a real risk of persecution or serious harm could be established.

Having Relatives in the LTTE

222. This factor we consider is again a highly logical one but again needs to be taken into account along with the totality of other evidence and the profile of the other family members. On its own, without established and credible evidence of the details of the

other family members and their known role or involvement with the LTTE, it will be of limited weight.

Internal Flight and State Protection

223. The first question is any case in which the appellant relies upon asylum grounds is whether he (or she) has established a well-founded fear of persecution in his (or her) own home area. If he (or she) is able to do so, the second question will be whether he (or she) will be provided with a "sufficiency of protection" against that risk. If not, the third question will apply, namely whether internal relocation is possible to another part of the individual's country.

224. Consequently, assuming that a Tamil from the north or east can establish that he has a well-founded fear of persecution, we agree as is the case with this appellant, that in the current "half war", or "virtual" civil war, it would not be possible for Tamils from the north or the east, who come from LTTE-controlled areas, to obtain any form of meaningful protection in their home areas from the Sri Lankan Government. This was conceded by the Respondent in this case. Thus applicants from LTTE controlled areas are placed in the situation where, if they can establish a well founded fear of persecution (or real risk of serious harm) from the LTTE in the controlled areas, they must then be assessed to ascertain if they can seek internal relocation to Colombo, or thereabouts. Their cases must be assessed in accordance with the accepted internal relocation guidelines as now set out in cases such as *Januzi* and *AH (Sudan)* and paragraph 339D of the amended Immigration Rules.

225. If the individual has not established a well-founded fear of persecution in his own area, he is not a refugee. He is able (notionally) to live in his own area, even if he cannot get there. He is not entitled to the surrogate protection of the international community because at home he would be safe.

226. Suppose, however, that his return to that area involves him in a risk of harm at the airport or other on the way? That does not, as we have said, make him a refugee. But it may make his removal illegal, either because it would breach Article 3 or because he is entitled under paragraph 339C to humanitarian protection in the UK.

Risk Profiles for Tamils

227. Our assessment of the various risk factors above has highlighted that each case must be determined on its own facts. It may be that in some credible cases one of these individual risk factors on its own will establish a real risk of persecution or serious harm on return by the Sri Lankan authorities for Sri Lankan Tamils who are failed asylum seekers from the United Kingdom. For those with a lower profile, assessed on one or a combination of the risk factors we have noted however, such as this appellant, their specific profiles must be assessed in each situation and set against the above non-exhaustive and non-conclusive, set of risk factors and the volatile country situation. As can be noted, several factors, such as being subject to

an outstanding arrest warrant, or a proven bail jumper from a formal bail hearing may establish a much higher level of propensity to risk than various other factors. In this situation therefore, the assessment exercise is a much larger and more detailed one than may have been the situation up to 2002 and certainly during the period of the cease fire agreement ("CFA"). The current worsening situation in Sri Lanka requires serious consideration of all of the above factors, a review of up to date country of origin information set against the very carefully assessed profile of the appellant.

## 10. Application of the Objective Findings to the Appellant's case and Decision

228. The appellant's credibility has been accepted. In our assessment of the above risk factors, particularly noting the fact that he has been accepted as a bail-jumper from court-directed bail in Colombo and that his failure to report has been followed up with his uncle (as surety), we consider that on return to Colombo Airport he is at a real risk of being investigated. That investigation by the Sri Lankan authorities, we consider, based on the objective information we have analysed above, will lead on his particular circumstances, to the real risk of him being seriously maltreated while in detention to the level that reaches persecution or really serious harm. It is for this reason that, on reconsideration after finding the material error of law in the determination of the Immigration Judge, we substitute our own decision and allow the appellant's appeal. We do not allow it on refugee grounds because he has not established that he is at risk in his home area. (See paragraph 223 ante). We consider that there is a reasonable likelihood that records relating to him will be held either on computer or other records at the airport because of the acceptance that his case has been before the courts and he was released on formal bail. We consider that his situation may have been very different if he had not been released from a formal court bail and then absconded but had been a mere escapee from some form of informal detention who had been released after the payment of a bribe. Detailed findings on the full profile of the appellant concerned were essential in the assessment of the risk on return. Because we consider, in the particular circumstances of the appellant's case, he is reasonably likely to be detained at the airport and then at a real risk of serious harm thereafter whilst in detention it is not necessary for us to go on and consider whether there would be a real risk if he were somehow able to pass through the airport and remain in Colombo.

His fear of the LTTE was only in respect of being forcibly recruited whilst he was living in the north of the country. In the circumstances we have not gone on to assess that risk. We find however, that given his profile, as regards the LTTE, then if he were able to locate himself in Colombo there is nothing in that profile that would suggest a real risk to him of serious harm at the hands of the LTTE.

## 11. Conclusions on the continuing applicability of Sri Lankan CG Cases

229. Country Guidance Cases that are No Longer to be Treated as Country Guidance but Which Remain as Reported Cases

YP (Maintenance – detention records) Sri Lanka CG [2003] UKIAT 00145.

JP (Maintenance – detention records) Sri Lanka CG [2003] UKIAT 00145.

JP (Maintenance – detention records) Sri Lanka CG [2003] UKIAT 00142.

SV (Passport renewal) Sri Lanka CG [2003] UKIAT 00125.

VK (Risk – release – escapes – LTTE) Sri Lanka CG [2003] UKIAT 00096,

TK (Ceasefire – negotiations) Sri Lanka CG [2003] UKIAT 00026.

VS (Risk – LTTE – escape) Sri Lanka CG [2003] UKIAT 00003.

AE FE (PTSD – Internal relocation) Sri Lanka CG [2002] UKIAT 05237.

DA (Risk – return – reporting restrictions) Sri Lanka CG [2002] UKIAT 04729,

PR IS (Risk – conviction – fine paid – release) Sri Lanka CG [2002] UKIAT 04230.

TJ (Risk – returns) Sri Lanka CG [2002] UKIAT 01869.

B (Detailed appraisal) Sri Lanka CG [2002] UKIAT 01547.

PT (Medical report – analysis) Sri Lanka CG [2002] UKIAT 01336.

230. The following will retain country guidance status but, as always, should be looked at in the context of the developing situation and in the light of any more up-to-date evidence.

PT (Risk – bribery – release) Sri Lanka CG [2002] UKIAT 03444. Although this case concerned the position in mid-2002, paragraphs 28 and 29 of the determination (which deal with scarring) are not inconsistent with the evidence that was before us and paragraphs 19 to 27 (which deal with the issue of bribery) remain consistent with the evidence we have heard, the submissions made and contains what continues to be a common sense approach to the issue of bribery-related releases.

PS (LTTE – Internal flight – sufficiency of protection) Sri Lanka CG [2004] UKIAT 00297. This case dealt with the risk from the LTTE in Colombo. This is not an issue with which we have been engaged, except in passing, and the issue will be reconsidered shortly. The decision contains some useful observations about risk from the LTTE in Colombo which must, of course, be considered in the light of current evidence and developing conditions, until such time as a replacement country guidance case is published.

## 12. Summary of Conclusions

231. The country guidance available in this determination relates only to the risk to returning Tamils and problems which they may experience with the Sri Lankan authorities. It deals only with the risks in Colombo where they will be returned and does not, for the most part, deal with risks from the LTTE and the question of protection by the authorities from such risks. In section 11 we have listed the Country Guidance cases that should no longer be followed as country guidance.

None of the cases were wrongly decided but have been overtaken by events on the ground. They remain as reported cases because in some cases they have continuing relevance in a general way. For example SM contains observations, in paragraphs 31 and 36, about bribery-related releases that are consistent with available evidence and continue to reflect common sense.

232. It has been accepted during the course of this determination that the general security situation in Sri Lanka has deteriorated following the effective breakdown of the ceasefire and the increase in terrorist activity by the LTTE. That has resulted in increased vigilance on the part of the Sri Lankan authorities and with it a greater scope for human rights abuses and persecution.

233. When assessing the risk to an individual it should be borne in mind that much of the background material about Sri Lanka, and the increase in violent activity, relates to the north and east. There are particular problems in the east because of the defection of the Karuna faction from LTTE ranks. This determination does not suggest that it would in every case be unsafe to expect a returning Tamil to return to his or her home area in the north or the east. Rather it looks at the position in Colombo whether that be for a Tamil who was from Colombo in the first place, or a person who could relocate there.

234. Tamils make up over 10% of the population of Colombo. Despite evidence of some forms of discrimination, the evidence does not show they face serious hardships merely because they are Tamils. As a result, other considerations apart and subject to individual assessment of each applicant's specific case, it cannot be argued that, even if he faces serious harm in his home area, as a general presumption it is unduly harsh to expect a Tamil to relocate to Colombo, or that it would be a breach of Article 3 to expect him or her to do so, or that doing so would put him or her at real risk of serious harm entitling them to humanitarian protection.

235. As in most asylum cases the first, and most important task is the assessment of the credibility of the appellant's claim. In the course of that assessment the Tribunal will have regard to the history of the appellant including the part of Sri Lanka from which he comes and his actual involvement, if any, with the LTTE. Such involvement can vary between being a full-time fighting member to the informal periodic supply of food. Issues of exclusion may arise. The extent to which their involvement may be known by the Sri Lankan authorities (or the extent to which they perceive there to be an involvement) will be relevant.

236. Other issues which require careful evaluation involve the previous attention paid to the appellant by the Sri Lankan authorities. Questions of whether the appellant has been previously detained and for how long will be significant, as will the reasons for the detention. A short detention following a round-up may be of little significance; a longer detention as a result of a targeted operation will be much more significant. The question of release and how that came about may be important. It should be recognised that the procurement of bribes is a common occurrence in Sri Lanka and that the release following payment of a bribe is not necessarily evidence of any continuing interest. Care should be taken to distinguish between release following the payment of a bribe and release following the grant of bail. Care should be taken in the use of language here. Release on payment of a bribe, and release on bail with

a surety could be confused. Both forms of release follow discussions about, and possibly payment of, money. The evidence is that the police in Sri Lanka do, in appropriate circumstances, grant bail. In this particular case bail was granted by a court. If the Tribunal is satisfied that the appellant has jumped bail (and that would include failing to report under a reporting condition), it is necessary to assess the reason for which bail was granted in the first place. Not every young, male Tamil who is arrested will have been so arrested because of sectarian activity. As in any other society a proportion will have committed, or been suspected of committing more mundane criminal, and often minor, offences.

237. When assessing those who have relatives who are members of the LTTE, it is not only important to consider the relationship, and the involvement of the relative but whether, and to what extent, knowledge of the relative's activities are likely to have been known to the security forces. This will vary depending on the relative's profile and whether or not he or she has been previously detained. The question of how the authorities would know that an individual was so related may also be of concern.

238. During the course of the determination we have considered a list of factors which may make a person's return to Sri Lanka a matter which would cause the United Kingdom to be in breach of the Conventions. As in previous country guidance cases, this list is not a checklist nor is it intended to be exhaustive. The factors should be considered both individually and cumulatively. Reference should be made to the earlier parts of this determination where the factors are considered in more detail but for ease of reference they are set out here. There are twelve and they are not in any order of priority:-

"(i) Tamil ethnicity.

(ii) Previous record as a suspected or actual LTTE member or supporter.

(iii) Previous criminal record and/or outstanding arrest warrant.

(iv) Bail jumping and/or escaping from custody.

(v) Having signed a confession or similar document.

(vi) Having been asked by the security forces to become an informer.

(vii) The presence of scarring.

(viii) Returned from London or other centre of LTTE activity or fund-raising.

(ix) Illegal departure from Sri Lanka.

(x) Lack of ID card or other documentation.

(xi) Having made an asylum claim abroad.

(xii) Having relatives in the LTTE."

239. When examining the risk factors it is of course necessary to also consider the likelihood of an appellant being either apprehended at the airport or subsequently

within Colombo. We have referred earlier to the Wanted and Watched lists held at the airport and concluded that those who are actively wanted by the police or who are on a watch list for a significant offence may be at risk of being detained at the airport. Otherwise the strong preponderance of the evidence is that the majority of returning failed asylum seekers are processed relatively quickly and with no difficulty beyond some possible harassment.

240. Within Colombo there is no doubt that Tamils are at greater risk of being stopped at a checkpoint or detained in a cordon and search operation or being the subject of a raid on the lodges by the authorities. Those activities do not of themselves mean that a Tamil, without more, would be at risk, but it does mean that on each occasion there is an opportunity for his or her presence to be checked and then one or more of the risk factors could come into play. The evidence seems to be that much of the difficulty for Tamils who are caught in those operations arises from the fact they do not have any identity documents. If an appellant asserts that he would be at risk for that reason, then he or she will need to show why it is he or she cannot obtain an identity document within a reasonable time of returning to Sri Lanka. They would not be expected to be carrying an identity card at the airport if they are being returned on temporary documentation obtained in the United Kingdom. For a short time, while new documents are obtained a returnee should be able to establish the fact of his recent return, with little difficulty.

**Conclusion**

241. The Immigration Judge having made an error of law in the original determination of the appellant's appeal, and this Tribunal having reconsidered the appeal, the following decision is substituted:-

> The appellant's appeal is dismissed on asylum grounds.
> The appeal is allowed on human rights grounds.
> The appellant is entitled to humanitarian protection as a person in need of international protection.

Signed Date:
Senior Immigration Judge Mather

**Documents considered**

**Submitted by the Appellant**

**Expert reports:**
Dr Smith's Report: 22 September 2005
Dr Smith's Supplementary Report: 5 October 2006
Professor A Good's Report: 3 October 2006
Dr Gunaratna – expert witness report: 6 October 2006
Report by Dr Yolande Foster: 8 October 2006
Dr Smith & Detective Inspector Hibberd's report on Tamil Organised Crime in London: June 2004

**Other materials:**
UNHCR Position Paper (excerpts only): April 2004
UNHCR Position Paper: December 2006
Hotham Mission Field Trip Report: October 2006
Canadian Immigration and Refugee Board Report: 22 December 2006
Tamilnet web page 05 February 2007
Tamilnet web page 09 March 2007
Tamilnet web page 18 March 2007
Tamilnet web page 21 March 2007
Tamilnet web page 26 March 2007
Tamilnet web page 13 March 2007
BBC News web report 27 November 2006 "Tamil Statehood is only option"
Amnesty International Public Statement 1 December 2006
BBC News web Report: 6 December 2006
Sri Lankan Government Website article: 6 December 2006
Asian Human Rights Commission statement 2 February 2007
Yahoo News Canada web article: 6 March 2007
South Asia Intelligence Review web article:12 March 2007
Human Rights Watch Information Bulletin 13 March 2007
Christian Today web article: 22 March 2007
BBC News web report: 26 March 2007
US State Department Report: March 2007
Human Rights Watch Article: 29 March 2007

**Submitted by the Respondent**

Canadian Immigration and Refugee Board Report: 5 August 2003
Respondent's Figures on Removals & Returns to Sri Lanka: 2005 & 2006
Letter from the Minister of State to Harry Cohen MP:17 November 2006
COI Report on Sri Lanka: October 2006
COI Report Sri Lanka: February 2007
Operational Guidance Note Sri Lanka 9th March 2007
British High Commission Letter 26 September 2005
British High Commission Letter 13 Feb 2006
British High Commission Letter 4 April 2006
British High Commission Letter 24 August 2006
British High Commission Letter 22 November 2006 with Sri Lanka Bail Act 1997
British High Commission letter on emergency regulations: 10 April 2007