

1310666 (Refugee) [2015] AATA 3524 (12 October 2015)

**DECISION RECORD**

**DIVISION:** Migration & Refugee Division  
**CASE NUMBER:** 1310666  
**COUNTRY OF REFERENCE:** Sri Lanka  
**MEMBER:** Susan Pinto  
**DATE:** 12 October 2015  
**PLACE OF DECISION:** Sydney  
**DECISION:** The Tribunal affirms the decision not to grant the applicant a Protection visa.

Statement made on 12 October 2015 at 2:42pm

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

## STATEMENT OF DECISION AND REASONS

### APPLICATION FOR REVIEW

1. The applicant is a citizen of Sri Lanka. He is aged in his early 30s. His ethnicity is Tamil and his religion is Hindu. The applicant was born in [his home town], [in his home district] in the Northern province of Sri Lanka where he resided until he left Sri Lanka in [year] at the age of [age] and travelled to India where he resided in a refugee camp in Tamil Nadu. The applicant resided in India until his departure by boat for Australia in June 2012. The applicant arrived in Australia as an Unauthorised Maritime Arrival [in] June 2012.
2. The applicant applied to the Department of Immigration for the Protection visa [in] November 2012. The applicant claimed that his father assisted the Liberation Tigers of Tamil Eelam (LTTE) during the civil war and was subsequently tortured by the Sri Lankan Army. The applicant claimed that his father committed suicide and his mother left Sri Lanka with himself and his sister for India and they have never returned. The applicant claims that due to his father's involvement with the LTTE, his lengthy absence from Sri Lanka and the fact that he has sought asylum in Australia, that he will be harmed upon his return to Sri Lanka.
3. The delegate of the Minister for Immigration refused to grant the visa [in] July 2013. The delegate accepted that the applicant's family fled to India in [year] because of the Sri Lankan civil war. The delegate also accepted that the applicant's father [performed specific tasks] for the LTTE and his father was tortured and as a result of the torture he later took his own life. The delegate considered the situation for returnees from India to Sri Lanka as well as those who had sought asylum in Western countries, but was not satisfied that there was a real chance or a real risk the applicant would suffer serious or significant harm. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the applicant a Protection visa under s.65 of the *Migration Act 1958* (the Act).
4. A summary of the relevant law is set out in an attachment to this decision. The issues for the Tribunal's consideration are whether the applicant has a well founded fear of persecution for one or more of the five reasons set out in the Refugees Convention. If the Tribunal is not satisfied that the applicant has a well founded fear of persecution for a Convention reason it must consider whether there are substantial grounds for believing that as a necessary and foreseeable consequence of the applicant being removed from Australia to Sri Lanka that there is a real risk that he will suffer significant harm.

### CLAIMS AND EVIDENCE

#### Initial entry

5. The applicant attended an Entry Interview for the purposes of initial entry processing [in] July 2012. [in] October 2012 he was granted a Bridging visa and released from detention.

#### Application to the Department

6. The applicant indicated on the application form that he speaks, reads and writes Tamil. The applicant stated that he is unmarried and has no children. The applicant indicated that his father is deceased and his mother and [sibling] reside in refugee camps in India. The applicant stated that he undertook a Bachelor degree and a Master degree in India. He indicated that he was employed for [an agency] prior to his departure from India.
7. In a statement provided with the application, dated [in] November 2012, the applicant stated that he is a citizen of Sri Lanka and does not have citizenship or the right to reside in any other country. The applicant states that in [year] it was very dangerous for Tamils in Sri

Lanka. The Sri Lankan Army (SLA) was taking many Tamil people away and there was a lot of fighting. The applicant's father died in [year] and his mother thought it was too dangerous to stay in [his home town] and she took the family to India. There were many Tamils leaving at that time because of the way they were treated. When they arrived in India they were sent to [a] refugee camp in Tamil Nadu. The applicant lived in that camp until he left India for Australia. His mother is still in that camp but his sister married and moved to [another] Camp which is about [distance] away. The applicant has been living as a refugee since he was [age] years of age. He has been able to work and study in India, but he cannot obtain residency or citizenship. He had no legal rights and did not know when he will be required to leave.

8. The applicant states that he fears returning to Sri Lanka. He left there as a child because of the persecution of Tamils by the Sri Lankan government and has not returned since that time. He has no place to go and no family. His accent is different because he has been living in India for so long and everyone will know he has been living away. The applicant is scared that the police will accuse him of helping the LTTE because he has been away. The applicant has heard from many people that if the army thinks someone has been helping the LTTE they will take them away and beat them and often people disappear forever. Because his family had to escape from the violence he does not know what will happen and he is scared of going back. The applicant has nowhere to go in Sri Lanka and because he is an outsider he is scared what the police and security forces will think he has been doing. The applicant does not know exactly why they left when he was a child but he does know it was because so many Tamils were taken away and killed. The applicant knows that his mother feared for their safety.
9. The applicant states that he fears being accused by the security forces of having helped the LTTE if he returns to Sri Lanka. Because he has no-one in Sri Lanka he fears that the authorities will believe he is an LTTE supporter and he does not know what will happen. The applicant believes that if he gets in trouble with the police or the army that there will be no-one to help him.
10. In a submission provided to the Department, dated [in] November 2012, the representative submits that the applicant has lived as a refugee since his childhood. His father was detained and tortured by the Sri Lankan security forces and this ultimately resulted in his death. The representative refers to relevant independent evidence in relation to the situation for Tamils in Sri Lanka, as well as those returning from Western countries after having sought asylum.
11. [Later in] November 2012, the applicant provided a further statement to the Department. The applicant states that this is a "supplementary statement" providing additional information in relation to his claims made in his statement, dated [earlier in] November 2012. The applicant states that when he made his previous statement he was unsure what had happened to his father. He telephoned his mother to ask her and she told him that his father was kidnapped and tortured when he was young. After he was released he was in such pain and was so distressed that he drank some poison and died. His mother was very scared about what would happen to them and she decided to leave Sri Lanka and flee to India and that is why they went to live in a refugee camp in India.
12. Documentation provided to the Department included identity cards; refugee cards for India; the applicant's [Bachelor] degree certificate obtained from [a] University in Tamil Nadu, India.
13. The applicant was interviewed by the delegate [in] May 2013. The Tribunal has listened to the CD Rom recording of the interview and is satisfied that the record as set out in the Department's decision record is accurate.

### **Application for review**

14. When lodging the application to the Tribunal, the applicant provided a copy of the delegate's decision record.
15. The applicant's representative provided a submission to the Tribunal on 26 November 2014.
16. The applicant appeared before the Tribunal on 1 December 2014 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Tamil (Sri Lankan) and English languages. The applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing.
17. At the Tribunal hearing, the applicant provided family photographs and photographs taken at the funeral of his father.
18. Following the Tribunal hearing, the representative provided a further submission to the Tribunal on 4 December 2014.
19. Following the reconstitution of the matter to a differently constituted Tribunal, the applicant appeared before the Tribunal on 23 September 2015 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Tamil (Sri Lankan) and English languages. The applicant was represented in relation to the review by his registered migration agent. At the hearing, the Tribunal explained that although the previously constituted Tribunal had been unable to complete the review, it had listened to the hearing recording and it intended to have regard to all of that evidence.

### **ASSESSMENT OF CLAIMS AND EVIDENCE**

#### **Does the applicant have a well founded fear of persecution for a Convention reason if he returns to Sri Lanka?**

20. The applicant has claimed that he has a well founded fear of being persecuted in Sri Lanka because of his ethnicity (Tamil); his imputed political opinion (against the government, or pro Tamil separatist due to his father's involvement with the LTTE in the 1980s); because he is from the North of Sri Lanka; has been absent for over 20 years; he left Sri Lanka illegally with his mother; and his membership of particular social groups of young Tamil men who have either been active in, or are suspected to have been active in the LTTE; and as a member of a particular social group of young Tamil men who, in addition to the grounds above, have escaped to and claimed asylum in a Western country. The Tribunal has considered, therefore, whether the applicant has a well founded fear of persecution for these reasons. In considering these issues, the Tribunal has had regard to the applicant's written claims and oral evidence to both the Department and the Tribunal. The Tribunal has also had regard to the submissions and independent evidence provided by the representative, as well as the independent evidence obtained through the Tribunal's own inquiries. The Tribunal has also had regard to the policy guidelines prepared by the Department of Immigration and the country information assessments prepared by the Department of Foreign Affairs and Trade.
21. The Tribunal firstly finds that the applicant is a citizen of Sri Lanka and no other country. The Tribunal accepts that the applicant's legal status as a refugee became void when he departed India.<sup>1</sup> The Tribunal accepts, therefore, that the applicant does not have a right to

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<sup>1</sup> CX21545 CIR 48/97. CIS Information Request IND 3848 – Status of Sri Lankans in Tamil Nadu, 13 February 1997.

enter and reside in India and there is no other evidence indicating he has a right to enter and reside in any other country. The Tribunal also accepts that the applicant was born in the Northern province of Sri Lanka where he resided until he was [age] years of age before seeking refuge in India with his mother and sister. The Tribunal accepts that the applicant's father assisted the LTTE during the civil war and he died in [year], possibly as a result of suicide. The Tribunal does not accept the applicant's other claims relating to the circumstances regarding his father's death or his claims that his family was specifically sought by the SLA and it was for that reason they left Sri Lanka. The Tribunal's consideration of the evidence and its reasons for reaching these conclusions follows.

*The applicant's departure from Sri Lanka*

22. The applicant confirmed at the hearings that he left Sri Lanka and went to India in [year]. He also told the Tribunal during the first hearing that the family had previously left for a short time, but they left Sri Lanka for India permanently in [year]. The applicant's relatives are mainly in India, but he has some relatives residing in Sri Lanka. The applicant confirmed that he completed a Bachelor of [subject] and a Master of [subject] in Tamil Nadu in India. He then undertook a Graduate Diploma in [other subjects]. The applicant left India because he was a refugee and was unable to obtain permanent status. The applicant's mother and sister continue to live in refugee camps in India. The applicant has [specific relatives] in [his home district] in Sri Lanka.
23. During the Department interview, the applicant confirmed that his father supported the LTTE and stated that his main involvement was in [performing specific tasks]. At the first hearing, the applicant initially stated that his father was a member of the LTTE, but when reminded that he had not previously claimed his father was a member of the LTTE, the applicant then stated that he was not a member but he did work for the LTTE and supported the LTTE. The applicant told the Tribunal that his mother told him about his father's LTTE involvement. The applicant told the Tribunal that his father was tortured by the LTTE. The applicant also claimed, towards the end of the first hearing, that his mother was also tortured by the armed forces. When asked why he had only just raised this issue relating to his mother, the applicant stated that he raised it during the Department interview.
24. Following the second hearing, the representative submitted that the Tribunal accepted during the hearing that the applicant is a credible witness and the information provided him was credible, namely that his father had voluntarily supported the LTTE and [performed specific tasks for them]. It was submitted that the applicant's father's involvement with the LTTE led to him being arbitrarily detained by the Sri Lankan authorities and tortured. It was submitted that after his parents experienced substantial persecution and harassment, the applicant's mother chose to flee the country and take both the applicant and his sister to India, where they resided for many years before he came to Australia.
25. At the second hearing, the applicant was asked about his father's death. The applicant confirmed that his father died in [year] when he committed suicide after ingesting poison. His father had been tortured by the SLA and could not cope with this. When asked how he found out about his father's death and how he died, the applicant stated that he found out when he was about [age] years of age. He confirmed that he knew from that time that his father had been tortured and later drank poison and died. The Tribunal advised the applicant that he had provided a statement to the Department where he did not mention how his father died, but in a further statement provided two weeks later he claimed that he had telephoned his mother who told him how his father died. When asked about the inconsistencies in his evidence the applicant stated that he gave some brief information in his first statement and then was asked for further details which he then provided. The Tribunal commented that it had serious doubts that all of his claims would not have been included in his first statement and he has altered his evidence as to when he found out about the circumstances of his

father's death. The applicant was advised that although these claims have previously been accepted it must consider whether he has been truthful about these issues.

26. The applicant confirmed at the second hearing that his father was a supporter of the LTTE but not a member. The applicant's father [performed specific tasks] and would help with what they asked. The applicant agreed that it was not unusual for people to support the LTTE in that way but stated that due to his involvement he was abducted and taken to the SLA camp where he was tortured. When reminded that these incidents occurred some 30 years ago, the applicant stated that if the family was not of any interest they would not have had to leave Sri Lanka for India. The Tribunal discussed the inconsistencies in the applicant's evidence in relation to why they had to leave India and commented that it appears he has altered his evidence since the initial application. The applicant stated that he was asked to give a brief account of his claims and then asked to elaborate and he told his more detailed claims to his migration agent. The applicant stated that there was no reason to remain in India and he and his family would have returned back had they been able to do so. The Tribunal commented that it appears that he and his family were given considerable assistance as refugees in India, enabling him to undertake studies he may not have been able to undertake in Sri Lanka. The applicant stated that his mother encouraged his studies until Year 12 and after that time he worked and had assistance. The applicant stated that he lived in India for [over twenty] years and he would have returned to Sri Lanka if he was not personally targeted. He does not have any evidence about his father's LTTE involvement because he had to flee to India with his family. The representative has submitted that the applicant did not leave India for economic reasons and his experiences in India do not affect his fear of returning to Sri Lanka.
27. As stated above, the Tribunal accepts that the applicant resided in an LTTE controlled area of Sri Lanka. The Tribunal accepts that it was inevitable in such a situation that his father assisted the LTTE. The Tribunal is prepared to accept that he did so because he supported the LTTE, and not because he was required to do so. However, the applicant's claims in his initial statement do not refer to his father assisting the LTTE and do not indicate he was assaulted or harmed by the SLA which then resulted in his suicide. Nor do the applicant's initial claims indicate that his mother was assaulted by the SLA or that the family left Sri Lanka because they were specifically targeted. His initial claims instead indicate that his mother considered it too dangerous to stay in Sri Lanka and she took her young children to India and "there were a lot of Tamils leaving at that time because of the way we were being treated". As indicated above, some two weeks after his initial statement he provided another statement indicating that when he made his first statement he "was not sure" of the circumstances of his mother's death so he telephoned his mother who told him his father had been kidnapped and tortured and was in such pain and distress that he drank poison and died. As indicated above, the applicant's explanation was accepted by the delegate. Although the representative has submitted that these claims were also accepted by the first Tribunal during the hearing, the Tribunal considers this submission puzzling as there is no indication from the hearing record that the claims had been accepted. In any event, it was during the second hearing that problems emerged with the applicant's claims regarding his father's death as it was at that time that he altered his evidence as to when he had found out about his father's death and the manner of his death and at that time claimed that he had known since he was about [age] years of age that his father had committed suicide after being tortured. The applicant appeared to have forgotten about the conversation with his mother whereby she purportedly told him the circumstances of his father's death relatively recently and claimed that the reason for the inconsistency was because he was initially required to provide details of his claims briefly. The Tribunal does not accept this explanation. The Tribunal considers that the discrepancy between when he found out about the circumstances of his father's death is significant. The Tribunal considers it evident that following the initial statement, the applicant sought to embellish his claims and at that time

added details which attempted to establish a connection with the LTTE which he had not previously claimed.

The Tribunal does not accept that the applicant's father died after being tortured by the SLA due to his involvement with the LTTE. Nor does the Tribunal accept that the applicant's mother was then assaulted by the SLA or that the family left Sri Lanka because of these factors. The Tribunal prefers the applicant's initial evidence in his statement which was that his father died in [year] and the family was left alone in an area which was wracked by civil war and, like many thousands of Tamils from the Northern and Eastern parts of Sri Lanka, sought refuge in India, where they received assistance from the Indian government. The Tribunal accepts that within the context of considerable atrocities committed against the Tamil population that several thousands fled to India for protection. The information cited by the delegate indicates that towards the end of the 1980s and at the beginning of the 1990s, the escalation of the armed conflict resulted in a massive displacement of Tamils especially those living in the north and east of the country. The Inter Press Service has reported that tens of thousands of Sri Lankans, almost all from the Tamil minority, fled to neighbouring India during the three decades of civil conflict. The UNHCR has reported that there are over 100,000 Sri Lankan refugees in India, out of which approximately 68,000 live in 112 camps in the southern Indian state of Tamil Nadu. The camps are not under the auspices of the United Nations and are operated by the Indian government who has provided amenities, food and shelter and allowed children access to education. The Tribunal considers that the applicant's family fled to India at a time when many thousands were doing so and his mother no doubt wished to protect her family by moving them from the unstable and violent situation in their home area and not because his father was tortured by the SLA or his mother later assaulted.

*The applicant's return to Sri Lanka*

28. As indicated above, the applicant has claimed that he fears returning to Sri Lanka because of his father's association with the LTTE, as well as for various other reasons. The applicant told the delegate that because his father was tortured by the LTTE and he has spent [over twenty] years in India he will be viewed with suspicion and treated like his father was during the war. The applicant was advised by the delegate that he left Sri Lanka at a time when the country situation was extremely unstable and the situation in the 1980s is incomparable with the situation today. When asked at the hearings about his reasons for fearing to return to Sri Lanka, the applicant confirmed that he believes the authorities will find out about his father's involvement with the LTTE. He also believes that the fact he will return after such a long time will raise questions as to why he is returning to Sri Lanka rather than India. The applicant referred to an UNHCR report and an ABC 7.30 Report program which discussed the situation for returnees and referred to one returnee being tortured. The Tribunal commented that the Sri Lankan authorities are well aware that numerous people have left for economic reasons and it is difficult to see why his absence and the fact that he went to Australia by boat rather than returning directly to Sri Lanka would result in him being viewed adversely.
29. At both hearings, the applicant was reminded that he has been away from Sri Lanka for many years and there have been many changes since he left, the most significant one being that the war ended in May 2009. When asked why he believes he will suffer harm upon his return, the applicant stated that although his father's involvement with LTTE was over 30 years ago, the Criminal Investigation Division (CID) has a record and he will be viewed with suspicion due to his lengthy absence. The applicant believes he will be tortured and he has read information supporting this. The independent information from UNHCR and other sources was discussed with the applicant and he was advised that many thousands of Tamils fled Sri Lanka during the civil war and as at 2012 in Tamil Nadu there continued to be about 68,000 S/Lankans living in refugee camps. The applicant was advised that many thousands of Tamils have returned after the end of the civil war in May 2009, some through

their own efforts and others were assisted by the UNHCR. The applicant was advised that the UNHCR maintains contact with those people and interviews them to determine their situation. The applicant was advised that very few have mentioned any problems with their personal security and have not claimed they are treated differently because they are returnees. The applicant was advised that most of these people have told the UNHCR that their problems are mainly in relation to obtaining housing, employment, and resettling after a lengthy period away. The applicant was told that many of these people are in a similar situation as he is in and very many people had relatives who were forced to do work for the LTTE. The applicant was told his situation is the same and there is limited evidence to indicate that he will suffer harm upon his return to Sri Lanka. The applicant responded that he has had experience of his father being tortured and he is fearful of returning to Sri Lanka. The applicant fears that informants will inform the authorities that father was in the LTTE and they will harass and torture him.

30. The applicant was advised that to be at risk of harm upon return he would need to have a profile which would attract the adverse attention of the authorities. This includes people who are seen by the Sri Lankan authorities as a threat to the unity of the Sri Lankan state. The applicant was advised that he does not have any past history and he left Sri Lanka when he was [age] years of age. The applicant stated that he did not ever think of returning to Sri Lanka and what happened to my father may happen to him. The applicant was also advised that his father's involvement with LTTE very minor and many people during civil war were obliged to assist and were harmed by army and authorities for having done so but his father's links are neither current or significant. The applicant was advised that although he will have to obtain employment and accommodation he is single with no dependents and is well educated and has previously been employed in India.
31. The applicant's representative has submitted that the independent evidence in relation to the situation in Sri Lanka supports the applicant's claims that he will suffer harm upon his return to Sri Lanka. It was submitted that the militarisation of parts of Sri Lanka is a factor which will affect the applicant upon his return. It is submitted that the military presence extends through all areas of civilian life in northern Sri Lanka and includes regular harassment of Tamils, particularly men such as the applicant. The representative refers to reports by the International Crisis Group in relation to registration of Tamils and a report by Freedom House which discusses the restriction of civil liberties for Tamils and a 2012 United States Department of State report which discusses arbitrary arrest and detention and reports that an estimated 5,000 to 6,000 LTTE suspects were in regular detention centres. It is submitted that the applicant fears torture upon his return to Sri Lanka and the Freedom House has document, using forensic medical analysis, the torture suffered by 24 Sri Lankans who were tortured. It is submitted that any affiliation or perceived affiliation with the LTTE was sufficient to result in torture. The representative states that the most recent case of documented torture was in January 2012 with 30 cases still in the process of investigation. It is further submitted that there is grave concern for the return of asylum seekers from the United Kingdom and Australia and reports on two stories dated 25 October 2012 detailing the return of asylum seekers from the UK and Australia who were subject torture upon their return. It is submitted that the applicant's "past experiences" and his future risk of suffering physical abuse, as a result of his identity as a Tamil, the actual or perceived political opinion that flows from his ethnic identity, and his membership of particular social groups identified previously, indicate he has a well founded fear of persecution. The representative concludes by submitting that the applicant has "experienced persecution at the hands of the Sri Lankan military on account of his ethnicity and the imputed political opinion that attaches to his racial identity. He has a well founded fear on a subjective and objective basis and such persecution will "recur and most likely increase should he be returned to Sri Lanka".
32. In the written submission provided prior to the first hearing, the representative refers to concerns regarding the independent evidence cited by the delegate and the findings that the



situation has “vastly improved from the situation in the 1980s”. The representative submits that the situation for the general public has improved but if an individual has been suspected of LTTE connections their situation is very different and can be dangerous. It is submitted that the situation for Tamils returning to Sri Lanka is dangerous and the applicant has “personal characteristics that cumulatively will bring him to the adverse attention of the authorities and set him apart from the general population, specifically that he is unmarried, young and had a father previously connected to the LTTE and would be a failed asylum seeker”. It is acknowledged that the security situation has vastly improved, but it is submitted that it is not difficult to a situation to improve from war conditions and “it would be folly to draw the conclusion that since people are no longer being subject to war and death they are now in a safe situation where they can return to their country of origin”. It is submitted that the reports show continuing violations against Tamils who are still at risk of arbitrary detention and torture. The representative refers to a report published in the *Guardian* which states that torture of Tamil political prisoners is “increasingly rife”. The representative also submits that the applicant will return to Sri Lanka as a failed asylum seeker and people such as him who departed illegally, are young and unmarried, had a parent who worked for the LTTE, combined with being a failed asylum seeker, will result in him being tortured. It is submitted that the delegate has failed to consider all of the relevant country information in relation to the situation for returnees and cites from a report by the Human Rights Law Centre which provides guidance on human rights situation and states that returning to Sri Lanka from Australia or elsewhere “involves grave risks to people suspected of having links to the LTTE”. The representative submits that the applicant has a profile which would result in him being harmed upon his return to Sri Lanka.

33. In the written submission following the first hearing, the representative submitted that the applicant was advised that many thousands of Tamils had been repatriated safely to Sri Lanka on their own volition or with the assistance of the UNHCR. The applicant was also advised by the Tribunal that only those with a profile of interest would be targeted, specifically those whilst living abroad who engaged in fundraising activities for the LTTE or were agitators, neither of which the applicant was. It was submitted that while agitators and those who conducted fundraising abroad for the LTTE would have profiles of interest, the UNHCR Eligibility Guidelines refer to persons who may be in need of protection and they include former LTTE supporters who may never have undergone military training but were involved in sheltering or transporting LTTE personnel or the supply and transport of goods for the LTTE; and persons with family links or who are dependent on or otherwise closely related to persons with such a profile. It is submitted that the applicant's father was involved with the LTTE in that he [performed specific tasks] for them. The level of involvement of his father could even have been higher due to his young age when his father supported the LTTE. The representative submitted that although the Tribunal had put to the applicant that his father was involved with the LTTE nearly 30 years ago and it unlikely that the Sri Lankan authorities would be interested in him due to the fact that his father's involvement was so minor and so long ago, it is submitted that the UNHCR Guidelines do not stipulate that the individual who has familial connections with the LTTE had to be recent. It is also submitted that a recent report published by Amnesty International continues to discuss the systematic abuse occurring towards Tamils suspected of LTTE links. It is submitted that although the Tribunal told the applicant that the UNHCR monitors individuals that it helps, there are most likely far more substantial problems that occur to returnees which are never reported on, out of fear of reprisal. For example, the most recent United States Department of State report states that it is impossible to obtain reliable statistics regarding individuals who have been subjected to torture due to suspected LTTE links, primarily out of fear of reprisals by the Sri Lankan government. It is submitted that whilst the UNHCR attempts to monitor the life of Tamils who have been repatriated to Sri Lanka it is unlikely that they are receiving reliable statistics.

34. The representative further submits that the Sri Lankan government has a fear of a LTTE resurgence and are “displaying an increasing paranoia regarding the possibility of pro-LTTE sentiments being reignited” and “it is reasonable to believe that the government would impute anti-government beliefs on the applicant as his father was tortured by the Sri Lankan authorities and later committed suicide as a result. Furthermore, the applicant has lived outside Sri Lanka for a considerable period of time and additionally would be viewed as a failed asylum seeker. All of these characteristics would combine to give the applicant a risk profile where he would come to the attention of the authorities. Additionally, an applicant with almost identical circumstances was found by the Refugee Review Tribunal (RRT) to be a refugee and whilst previous decisions of the RRT are not binding when the Tribunal deviates from previous decisions with almost identical factual circumstances and “environment of uncertainty is created where decisions seem to be arbitrarily made”. It is submitted that the applicant has a “cumulative profile” that will result in him being at a significant risk of harm upon his return to Sri Lanka. This includes his father’s previous association with the LTTE; the time he has spent abroad; combined with him being a failed asylum seeker, and these factors will bring him to the adverse attention of the authorities. It is submitted that the applicant will be in an “extremely vulnerable position should he be forced to return to Sri Lanka”.
35. When asked at the most recent hearing whether he is claiming that he will be charged under the Immigrants and Emigrants Act, the representative submitted that although it is unclear whether the provisions of the Act will apply to the applicant, he will return undocumented and there will be processes to verify his identity. The Tribunal commented that he will return with the assistance of DFAT or the Department of Immigration. The information in relation to returnees was discussed with the applicant who claimed that he has heard of people who were tortured whilst being detained in remand. He heard of a person taken to the tenth floor of the CID building and tortured. The applicant also stated that if someone has to bail him out it will have to be a relative and he does not want to get them into trouble by doing that. The applicant stated that he is fearful that he will be identified as the son of his father who was associated with the LTTE. The applicant was again advised that the persons who are at risk are generally those who are thought to be at risk of subverting the Sri Lankan State or involved in pro-independence. The applicant was advised that thousands of LTTE cadres and senior persons had been rehabilitated and released and those are people who were actually involved in the LTTE.
36. The representative submitted during the hearings that whilst the UNHCR has stated that Tamils as a “group” are no longer in need of international protection, this does not discount that the applicant is a subset of that group who will be imputed with a pro-LTTE opinion. The applicant is from the North of Sri Lanka where it is known that everyone had connections with the LTTE. The representative submitted that the applicant falls within the risk factors identified by the UNHCR and as a Tamil from the north he will be imputed with links to the LTTE. The applicant would also return to the highly militarised north and even if he escapes detection at the airport it is likely that when he returns to the north he will be subject to monitoring due to the high degree of sensitivity associated with anyone who has LTTE links. It will be known by the community through local knowledge and town groups that his father had a link and it cannot be dismissed as a minimal risk.
37. The Tribunal has considered the situation for the applicant upon his return to Sri Lanka. The Tribunal has not accepted the applicant’s claims regarding his father’s death after being tortured by the SLA and does not accept that the family fled Sri Lanka for India because they were specifically targeted. The Tribunal has accepted that the applicant, his mother and sister, fled to India due to the conflict in the northern part of Sri Lanka. The Tribunal has also accepted that the applicant’s father voluntarily assisted the LTTE, and that was the extent of his involvement with the LTTE. The Tribunal also accepts that the applicant is from the North of Sri Lanka, that he is relatively young, unmarried, and has sought asylum in Australia

where he has been residing for a few years. The Tribunal has considered whether these factors are such that they will result in a real chance that the applicant will suffer serious harm upon his return to Sri Lanka. Although the Tribunal considers it unclear whether the applicant will be prosecuted under the Immigrants and Emigrants Act for departing Sri Lanka illegally when he was [age] years of age, the Tribunal accepts that it is a possibility and has proceeded upon the basis that he will be considered to have departed illegally and will be subject to the provisions of the Act. The Tribunal has also considered, therefore, whether there is a real chance that the applicant will suffer serious harm on this basis. The Tribunal has also considered when these factors are considered cumulatively whether there is a real chance that the applicant will suffer serious harm upon his return to Sri Lanka.

38. The Tribunal accepts that the independent evidence indicates that Sri Lankan citizens of Tamil ethnicity suffered considerably at the hands of the Sri Lankan authorities during the civil war. The Tribunal has had regard to the evidence cited by the representative regarding the situation for Tamils in Sri Lanka. The Tribunal accepts there is evidence of continuing atrocities against some Tamils even since the end of the war as reported by Human Rights Watch which has reported on continuing assaults against some Tamils, particularly those who were members or supporters of the LTTE.<sup>2</sup> A November 2013 BBC report also refers to Human Rights Watch reports of cases of sexual violence involving the security forces following the end of the civil war and to allegations of rape and torture of Tamils suspected of links to the LTTE.<sup>3</sup> A July 2014 report also indicates that persistent surveillance, intimidation and monitoring of former LTTE members by the security forces continues to restrict their freedom of movement and association.<sup>4</sup> However, DFAT has also reported that since the civil war ended in May 2009 there has been considerable change in the security situation such that the risk of harm to Sri Lankan citizens on the basis only of their Tamil ethnicity has substantially reduced.<sup>5</sup> Additionally, the Tribunal considers that the evidence indicates there have been substantial changes in the country situation in relation to Sri Lanka in recent years, despite continuing human rights violations and considerable mistreatment of those suspected of LTTE links or those suspected at being at risk of involvement in any resurgence of Tamil independence movements. The Tribunal notes that in December 2012 the United Nations High Commission for Refugees<sup>6</sup> issued guidelines which stated that: "In light of the improved human rights and security situation in Sri Lanka there is no longer a need for group-based protection mechanisms or for a presumption of eligibility for Sri Lankans of Tamil ethnicity originating from the north of the country."<sup>7</sup>
39. The Tribunal also considers that the Upper Tribunal on Immigration and Asylum<sup>8</sup> report is consistent with the DFAT report and UNHCR reports which indicate that the Sri Lankan government's objective is to identify Tamil activists in the diaspora who are working for Tamil separatism and to destabilise the unitary Sri Lankan State. Its focus is on preventing both the resurgence of the LTTE or any similar Tamil separatist group and the revival of the civil

<sup>2</sup> See Human Rights Watch 2014, World Report 2014 – Sri Lanka, 21 January 2013. (Harrison F.2013, 'Tamils still being raped and tortured in Sri Lanka, British Broadcasting Corporation, 9 November.

<sup>3</sup> Harrison F. 2013, 'Tamils still being raped and tortured in Sri Lanka, British Broadcasting Corporation, 9 November.

<sup>4</sup> Amnesty International 2014, *Ensuring Justice: Protecting Human Rights for Sri Lanka's future*, ASA 37/011/2014, September, p. 11.

<sup>5</sup> DFAT Thematic Report, *People with Links to the Liberation Tigers of Tamil Eelam*, 3 October 2014; DFAT 3 October, *Country Report on Sri Lanka*, 2014 and DFAT Country Report – Sri Lanka, 16 February 2015.

<sup>6</sup> UNHCR *Eligibility Guidelines* Sri Lanka, 2012.

<sup>7</sup> United Nations High Commission for Refugees *Eligibility Guidelines*, Sri Lanka 2012.

<sup>8</sup> Upper Tribunal (Immigration and Asylum Chamber) United Kingdom Country Guidance Decision in *GJ v Secretary of State for the Home Department (post-civil war: returnees) Sri Lanka* CG [2013] UKUT 319 (IAC).

war in Sri Lanka. The Upper Tribunal identifies persons at risk to be those who are perceived to be a threat to the integrity of Sri Lanka as a single state because they are, or are perceived to have significant role in relation to post conflict Tamil separatism. Such persons will be handed over to the appropriate Sri Lankan authorities. The decision of the Upper Tribunal also indicates that the Sri Lankan authorities are aware that many Sri Lankan Tamils travelled abroad as economic migrants and everyone in LTTE dominated areas had some level of involvement with the LTTE during the civil war. The UNHCR Guidelines indicate that certain persons have “risk profiles” which generally refer to those who have reasonably substantial LTTE links.<sup>9</sup> Similarly, DFAT refers to high risks for high profile former members of the LTTE who may be detained, arrested and prosecuted, and rehabilitated and intensely monitored after their release.<sup>10</sup>

40. The Tribunal does not accept that the evidence establishes that Tamils are at risk of serious harm on the basis of their ethnicity alone or because they are from a particular part of Sri Lanka which was an LTTE occupied area, such as the Northern and Eastern parts of Sri Lanka where there continues to be a military presence. The Tribunal considers that the reports overwhelmingly refer to problems for those with actual or suspected LTTE links. Whilst accepting evidence of continuing difficulties for Tamils in the Northern and Eastern parts of Sri Lanka, the civil war has now been over for some six years. The Tribunal accepts that the considerable conflict between Tamils and Sinhalese during the war would inevitably have resulted in continuing distrust and levels of animosity between the majority Sinhalese and the minority Tamil populations. The Tribunal accepts that the applicant’s province in the Northern part of Sri Lanka continues to have a significant military presence. However, the Tribunal does not accept that the applicant has any particular “risk profile” or personal circumstances which will result in him being viewed as of any interest to the authorities. The applicant left Sri Lanka when he was [age] years of age and was not, therefore, ever involved in any pro-LTTE activities whilst in Sri Lanka that could in any way be perceived as him having supported the LTTE at that time. The Tribunal does not accept that the applicant has any background or there is any evidence to suggest he was politically active in India or since his arrival in Australia or that he will be viewed as being someone who was politically active because he has spent a considerable period of time away from Sri Lanka. The Tribunal considers that the applicant will, upon his return to Sri Lanka, be viewed as one of the many thousands of Tamils from the LTTE occupied areas of Sri Lanka who sought and were given refuge and assistance in Tamil Nadu by the Indian government, including with food, accommodation and education. The applicant’s evidence also indicates that he was assisted by other Tamil groups whilst in India. The Tribunal has not accepted that the family

<sup>9</sup> Those persons include persons suspected of certain links with the LTTE, including persons who held senior positions with considerable authority in the LTTE civilian administration, when the LTTE was in control of large parts of the northern and eastern provinces of Sri Lanka; former LTTE combatants or cadres; former LTTE supporters who may have never undergone military training who were involved in sheltering or transporting LTTE personnel, or the supply and transport of goods for the LTTE; LTTE fundraisers and propaganda activists and those with, or perceived as having had links to the Sri Lankan diaspora that provided funding and other support to the LTTE; Persons with family or who are dependent on or otherwise closely related to persons with those profiles. The UNHCR Guidelines also indicate that other persons who may be at risk include certain opposition politicians and political activists; certain journalists and other media professionals; certain human rights activists; certain witnesses of human rights violations; women in certain circumstances; lesbian; gay, bisexual, transgender individuals.

<sup>10</sup> DFAT Thematic Report, 2014, *People with Links to the Liberation Tigers of Tamil Eelam*, 3 October. Lower risks are associated with former low profile LTTE members or former LTTE members living outside of Sri Lanka whom the Sri Lankan authorities may monitor depending on their risk profile; close relatives of the LTTE who are wanted by the Sri Lankan authorities may be subject to monitoring. DFAT also indicates that people with “conflict related scarring” are more likely to be the subject of adverse attention by the Sri Lankan authorities, but the cases raised from the end of the war until October 2014 do not indicate that people have been detained due to conflict related scarring.

fled due to specific targeting and does not accept that this is the reason they have remained in India and have not sought to return to Sri Lanka. As indicated above, although many Tamils have willingly returned to Sri Lanka, others continue to express concern for their safety and ability to resettle. The Tribunal accepts that the applicant and his had concerns for their safety, but considers that they are clearly well settled in India, as was the applicant, and this was no doubt another reason for their continued residence in India.

41. The Tribunal has considered the applicant's claims that as a person who has spent [over 20] years in a refugee camp in India that he will be suspected of supporting the LTTE. The Tribunal does not accept this claim. To the contrary, the independent evidence indicates that the Sri Lankan and Indian governments are working co-operatively to encourage Sri Lanka citizens who travelled to India as a result of the civil war to return to Sri Lanka. The evidence cited by the delegate indicates that when the civil war ended in May 2009, many Tamil refugees living in India returned to Sri Lanka. The UNHCR led this process and it was reported that they had assisted over 4,500 returnees by the end of 2011. A further 1,300 refugees were assisted to return in 2012. The reports indicate that the Sri Lankan government has expressed a commitment to assist the refugees to be repatriated to India although some refugees remain reluctant to return, citing possible economic hardship and the uncertainty of the human rights situation.<sup>11</sup> UNHCR reported that upon return to Sri Lanka many were questioned for a number of hours and most were later contacted in their villages by either the local police or the military for registration purposes. The UNCHR has a returnee monitoring program and in 2012 the UNCHR reported that "in general most refugee returnees of 2011 found repatriation and re-integration to be a positive experience". It further states that "few expressed concerns regarding the military presence" and "virtually all returnees stated that they are not treated differently by their community because they are refugee returnees".<sup>12</sup> The Tribunal does not accept that the applicant will be treated differently or otherwise subject to harm because he has an accent which differs from other Tamils or due to his status as an "outsider".
42. The Tribunal accepts that the applicant's father's involvement with the LTTE will be known. However, the applicant's evidence does not indicate his father was a member of the LTTE or that his role was anything other than in assisting the LTTE in providing food and other services, as many thousands of Tamils living in LTTE occupied areas did. The Tribunal accepts his father may have been involved in other activities not known by the applicant, but the Tribunal is not satisfied that the applicant attracted the adverse attention of the Sri Lankan authorities due to his father's involvement with the LTTE when he was a young child or that there is a real chance that the applicant will attract the adverse attention of the Sri Lankan authorities due to his father's involvement with the LTTE some 30 years ago or because of any political opinion that may be imputed to him on the basis of that relationship. The Tribunal accepts that the applicant may be questioned upon his return, as reported by UNHCR, but does not accept that there is evidence of persons such as the applicant returning from India after having lived there for several years, having been mistreated upon their return. The Tribunal is not satisfied that the applicant has a profile or any particular characteristics that will attract the adverse attention of the authorities upon his return. The Tribunal does not accept the submission that the applicant is a "subset" of a group of people who are in need of protection or that the applicant will be viewed as being associated with the LTTE because he left India for Australia by boat and sought asylum overseas and has been away from Sri Lanka for a considerable period of time. As indicated above, the Sri Lankan authorities are well aware that numerous people have sought asylum in Western countries and have done so not only because they genuinely fear harm in Sri Lanka but also for economic reasons. The Tribunal does not accept that the applicant will come to the

<sup>11</sup> CX284464, Tamil Refugees Slowly Return from India, Integrated Regional Information Network, 11 January 2012.

<sup>12</sup> UK Home Office, Sri Lanka Bulletin: Treatment of Returnees, December 2012.

adverse attention of the authorities upon his return to his former area of Sri Lanka or that during or following any questioning about his circumstances that he will be viewed as having an LTTE profile or to have been supportive of the LTTE. Although the Tribunal has accepted that his father assisted the LTTE, the Tribunal does not accept that this assistance, which was prior to [year], will result in the applicant being viewed as having an adverse political profile as supporting the LTTE or any pro-Tamil independence organisations.

43. The Tribunal has also had regard to information from DFAT which indicates that official laws or policies in Sri Lanka do not discriminate against Tamils and the government does not discriminate against Tamils in the way it in the way it applies the laws.<sup>13</sup> The applicant is young, well educated and has previously been employed. Although the Tribunal accepts that it will be difficult for him to re-establish himself in Sri Lanka where he has only a few relatives and where he has not resided for numerous years, the applicant has shown himself to be resourceful by embarking on a boat journey to Australia. He has also successfully resettled in Australia. The Tribunal is not satisfied that he will be unable to resettle in Sri Lanka. Accordingly, the Tribunal is not satisfied that his evidence establishes that he will be unable to earn a livelihood upon his return to Sri Lanka or that he will be unable to subsist in Sri Lanka. DFAT has assessed that there is no law or Government policy which hinders access to state protection on the basis of religion or race and it is not aware of any cases where people have been denied access to legal remedies based on race or religion, although there can be a lack of effective protection and redress for victims of crimes in Sri Lanka.<sup>14</sup>
44. The Tribunal has also considered the submission that the applicant will suffer serious harm due to his status as an asylum seeker who unsuccessfully sought Australia's protection. The Tribunal accepts that it will be known upon his return that he has unsuccessfully sought asylum in a Western country. The Tribunal accepts there are reports that Sri Lankan Tamils have suffered abuse on their return to Sri Lanka. However, the Tribunal has also found that the applicant did not have any actual involvement with the LTTE. The Tribunal is not satisfied that the applicant was suspected of any involvement with the LTTE or that any links with his father resulted in him being viewed as someone with LTTE links or involvement prior to his departure from Sri Lanka in [year] or [year] when he was a child. The Tribunal also considers, as discussed above, that the independent evidence in relation to returnees who have been harmed overwhelmingly involve persons who have had connections with the LTTE or who are suspected of such connections, or persons who have criminal connections. The information from DFAT indicates that allegations of mistreatment of returnees without LTTE links have not been substantiated.<sup>15</sup> The Tribunal acknowledges that DFAT does not routinely monitor the situation for returnees and UNHCR may not have all information on persons returning from India or elsewhere, but there is also information from the Canadian Immigration and Refugee Board in January 2013 that the treatment of people at the airport did not depend on their ethnicity but on their political activities.<sup>16</sup> The Upper Tribunal also concluded that reports by Amnesty International claiming that failed Sri Lankan asylum seekers faced harm upon their return "lacked substance," and an April 2012 press report from the UNHCR noted that it carries out regular monitoring and it has assisted the voluntary return of 1,728 Tamils in 2011 and 408 in the first quarter of 2012.<sup>17</sup>

<sup>13</sup> DFAT Country Report, Sri Lanka, 16 February 2015.

<sup>14</sup> DFAT Country Report – Sri Lanka, 16 February 2015, paragraphs 5.2 and 5.12.

<sup>15</sup> DFAT 2013 *Country Information Report Sri Lanka*, 31 July paragraphs 3.4, 3.64. See also Freedom from Torture, Submission to the Committee against Torture for its examination of Sri Lanka in November 2011.

<sup>16</sup> Immigration and Refugee Board of Canada, 'Sri Lanka: Treatment of Tamil returnees to Sri Lanka, including failed refugee applicants, 12 February, LKA104245.E.

<sup>17</sup> UK Home Office 2012, Country Policy Bulletin – Sri Lanka, October, pp.1-8.

45. The information before the Tribunal, including from DFAT, the Upper Tribunal and UNHCR also indicates that standardised procedures apply to all cases, regardless of a person's ethnicity or the circumstances in which they left the country. As a result of tightened procedures adopted in late 2012, returnees who are believed to have left the country in breach of immigration laws are arrested at the airport, brought before a court and charged under the *Immigrants and Emigrants Act* (the I&E Act). Under s.45(1)(b) of the Act, it is an offence to depart other than via an official port of entry or exit such as a seaport or airport. The information indicates that returnees are routinely interviewed at the airport on arrival by the Immigration and Emigration Department, the State Intelligence Service and the airport Criminal Investigation Department (CID). These processes involve police and security clearances, including checks with the person's local police station and may take some hours. If they reveal outstanding arrest warrants for prior criminal offences, or if there are alerts against the person's name on immigration watch-lists, they may be subject to further questioning. Additional questioning would also be involved if the person was of security interest or if there were evidence of involvement in people smuggling. Persons suspected of illegal departure are taken to a court to apply for bail. Bail is routinely given on the person's recognisance, although a family member is also required to provide surety. If the arrival occurs over a weekend or on a public holiday, the returnee is placed in the remand section of Negombo prison until a bail hearing is available. The evidence before the Tribunal also indicates that the penalties imposed on returnees by the courts for illegal departure may take the form of fines or a custodial sentence.
46. The Tribunal accepts on the basis of the above that the applicant will be questioned at the airport and bailed upon a hearing with a magistrate. The Tribunal does not accept that the applicant will not seek the services of a relative in terms of bail or that he believes by doing so will result in him suffering serious harm. The Tribunal also accepts that there is a possibility he will be held for a limited period in remand whilst waiting bail, but DFAT has reported that returnees are transported by police to the Magistrates Court in Negombo at the "first available opportunity" and it is only if a magistrate is not available because of a weekend or a public holiday that those persons who are charged are taken to the nearby Negombo prison.<sup>18</sup> The Tribunal accepts that conditions in remand have been described in media reports as overcrowded and unsanitary, with a lack of access to adequate food, water and a lack of access to assistance. However, the evidence indicates that returnees will most likely be held for only a short period in remand and will then be bailed. The Tribunal is also not satisfied the weight of the evidence establishes that Tamil returnees held in remand whilst awaiting bail hearings have been subject to torture or other forms of deliberate mistreatment.<sup>19</sup> DFAT was informed in March 2014 that no returnee who was just a passenger on a people smuggling venture had been given a custodial sentence for departing Sri Lanka illegally.<sup>20</sup> The evidence indicates, therefore, that the most likely penalty for leaving Sri Lanka illegally would be a fine, unless the person is considered to be an organiser of people smuggling.<sup>21</sup> The Tribunal does not accept there is any evidence that the applicant will be suspected of people smuggling or there is any evidence of outstanding criminal matters or that he would be on a watch list.
47. The Tribunal considers, therefore, that the independent evidence indicates that the applicant will not be subject to a custodial sentence and the prospect of him being detained for a prolonged period of time as a penalty for illegal departure is remote. The Tribunal accepts

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<sup>18</sup> DFAT, Sri Lanka: Country Report, 3 October 2014, p.23.

<sup>19</sup> DFAT 2014, Sri Lanka: Country Report, 3 October 2014.

<sup>20</sup> DFAT Country Report – Sri Lanka, 16 February 2015, 5.24-5.26.

<sup>21</sup> DFAT Sri Lanka: RRT Country Information Request – LKA40999, 19 October 2012, CX29741; DFAT Country Information Report NO.12/67, dated 29 November 2012, CX299951; DFAT Report 1478, dated 28 February 2013, DFAT Report 1479, dated 4 March 2013, DFAT Country Information Report, Sri Lanka, 31 July 2013, paragraphs 3.73, 3.75, 3.77, 3.79.

that there is some evidence of a magistrate levying a fine of 50,000 *rupees*. However, according to DFAT, the fines levied by the Magistrates Court in Colombo are typically about 5,000 *rupees* (around AUD 40).<sup>22</sup> The applicant has not claimed that he will be unable to pay a fine, and the Tribunal is not satisfied that the scale of the fine is such that it amounts to serious harm. Further, the Tribunal considers that the evidence indicates that anyone who has left Sri Lanka illegally may be subject to a fine for doing so and there is also no evidence of differential treatment in the application of the fine.

48. The Tribunal is not satisfied that the evidence in relation to returnees establishes that the applicant will be singled out or treated any differently because he is a Tamil and considers that questioning at the airport, being placed in a remand for a short period in what may be poor conditions and charged for illegal departure is not because he is a Tamil, but because he left Sri Lanka illegally. The evidence indicates that this situation applies to all persons, regardless of whether they are Tamil, Sinhalese or otherwise. The Tribunal considers that factors in relation to returnees apply to anyone who has left illegally and not specifically to Tamils. The Tribunal is not satisfied, therefore, that questioning, arrest, and the poor conditions in remand amount to systematic and discriminatory conduct as required by s.91R(1)(c). The Tribunal considers that the elements of the processing of returnees, and any penalties to which the applicant may be subjected, will be applied on a non discriminatory basis under a law of general application.
49. The Tribunal is not satisfied, when the applicant's claims and circumstances are considered both individually and cumulatively, there is a real chance that on return to Sri Lanka he would suffer serious harm amounting to persecution for the Convention reasons of his Tamil ethnicity/race; his imputed political opinion on the basis of his race; his membership of a particular social group of Tamil men who have either been active in, or suspected to have been active in the LTTE, his membership of a particular social group of young Tamil men who in addition to the above have escaped to and claimed asylum in a western country; and his race and ethnicity as a Tamil who has returned to Sri Lanka as a failed asylum seeker. Nor is the Tribunal satisfied that the applicant will suffer serious harm for any other Convention reason. The Tribunal has had regard to the submissions about an applicant with similar claims being accepted as a refugee by a differently constituted Tribunal. As correctly noted by the representative, the Tribunal is not bound by decisions of differently constituted Tribunals. Accordingly, the Tribunal is not satisfied that the applicant has a well founded fear of persecution for a Convention reason should he return to Sri Lanka now or in the reasonably foreseeable future

**Are there substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Sri Lanka, there is a real risk that he will suffer significant harm?**

50. The Tribunal has also considered the applicant's claims, having regard to the Complementary Protection provisions. The representative has submitted that there are substantial grounds for believing that as a necessary and foreseeable consequence of the applicant being removed from Australia to Sri Lanka that there is a real risk he will be subjected to torture; cruel or inhuman treatment or punishment, or degrading treatment or punishment or that he will be arbitrarily deprived of his life. The representative has submitted the applicant's fear and concerns will place him in a permanent state of "psychological torture" due to what happened to his father and his concerns that it will happen to him.

<sup>22</sup> DFAT 2014, *Country Report Sri Lanka*, 3 October at 5.28 to 5.29. DFAT reports, however, that one magistrate in Negombo typically levied fines of around 50,000 Sri Lankan Rupees (around AUD 400) to act as a deterrent.



51. As indicated above, the Tribunal has not accepted that the applicant and his family fled Sri Lanka due to any specific targeting or that they had any particular profile at the time they left, apart from the fact that they were Tamils from the northern part of Sri Lanka. The Tribunal has also accepted that the applicant's father assisted the LTTE in a voluntary capacity and it may be known that he did so. The Tribunal also accepts that the applicant is young and unmarried and has lived away from Sri Lanka for an extended period of time and it will be known he has unsuccessfully sought asylum in Australia. The Tribunal has not accepted that the applicant has any personal "characteristics" or any profile that will result in him being targeted either upon his arrival or upon his return to his home region. The Tribunal has found, when the applicant's circumstances are considered both individually and cumulatively that there is not a real chance that he will suffer serious harm upon his return to Sri Lanka. The Tribunal considers, for the same reasons, that there is not a real risk that the applicant will suffer significant harm due to these reasons. Although the Tribunal accepts that the applicant would no doubt be anxious and worried about returning to a country where he has not lived for more than 20 years, the Tribunal is also not satisfied that the applicant will be in a "permanent state of psychological torture" upon his return to Sri Lanka. As stated above, the Tribunal is satisfied that the applicant has some family members and is young, educated, without the commitments of a wife and children and has previously obtained employment and shown an ability to resettle in two other countries.
52. The Tribunal has accepted that the applicant may be subject to the provisions of the Immigrants and Emigrants Act. The Tribunal has, therefore, accepted that it is likely that he would face questioning at the airport, arrest on charges of illegal departure, that there is a possibility he could be placed in remand for a relatively brief period while awaiting a bail hearing, and he would later be fined if found guilty. The Tribunal has also accepted there is some possibility that the applicant may be remanded for a short period whilst waiting to be brought before a magistrate in conditions which are cramped, uncomfortable and unsanitary. The Tribunal has not accepted that the weight of the evidence indicates that Tamil returnees are being harmed if remanded for a brief period.
53. In considering the situation for the applicant upon his return, having regard to the fact that the applicant is likely to be questioned at the airport, possibly detained for a brief period in a remand centre and fined, the Tribunal has had regard to the five 'limbs' of the definition of 'significant harm' in s.36(2A). These require that there is a real risk the applicant will suffer arbitrary deprivation of life, the death penalty, torture, cruel or inhuman treatment or punishment or degrading treatment or punishment. The definition of 'cruel or inhuman treatment or punishment' in s.5(1) of the Act requires that the pain or suffering be 'intentionally inflicted' on a person. Similarly, 'degrading treatment or punishment' is defined to mean an act or omission that causes and is intended to cause extreme humiliation. The definition of 'torture' also requires that there is an act or omission by which severe pain or suffering is intentionally inflicted on the person.
54. The Tribunal considers that the weight of that evidence indicates that despite large numbers of reported involuntary returnees to Sri Lanka, including Tamil males from Australia and those who departed Sri Lanka illegally by boat, and high level media interest in such persons, there has been no reporting of persons suffering significant harm as contemplated by s.36(2A). The Tribunal is not satisfied that during any questioning at the airport there is a real risk that the applicant will suffer arbitrary deprivation of life, the death penalty, torture, cruel or inhuman treatment or punishment or degrading treatment or punishment.
55. The Tribunal has accepted that there is a possibility that the applicant may have to spend a brief period of time in a prison or remand. When considering whether this amounts to cruel or inhuman treatment or punishment or degrading treatment or punishment, the Tribunal has had regard to the PAM3: Refugee and Humanitarian Complementary Protection Guidelines which state that in certain circumstances it may be appropriate to infer an intention to inflict

pain or suffering or to cause extreme humiliation if it is evident that pain or suffering or extreme humiliation was or may be knowingly inflicted. The Tribunal does not accept that such an inference can be drawn having regard to the applicant's circumstances. Nor is the Tribunal satisfied that the fact that the applicant may spend up to a fortnight in remand/jail on his return to Sri Lanka establishes that the pain or suffering caused by severe overcrowding and poor and insanitary conditions is intentionally inflicted on detainees as required by the definition of cruel or inhuman treatment or punishment. Nor does the Tribunal accept that the severe overcrowding and poor conditions are intended to cause extreme humiliation as required by the definition of 'degrading treatment or punishment'.<sup>23</sup> The Tribunal is also not satisfied that the evidence indicates that during a period in remand there is a real risk that the applicant will suffer intentionally inflicted torture, the death penalty or arbitrary deprivation of life.

56. Accordingly, the Tribunal is not satisfied that there are substantial grounds for believing that as a necessary and foreseeable consequence of the applicant being removed from Australia to Sri Lanka there is a real risk he will suffer significant harm when he is questioned at the airport or during any period which he may spend in jail on remand. Nor is the Tribunal satisfied that there are substantial grounds for believing that there is a real risk that he will be subject to an abduction, death or any other form of significant harm following his return to Sri Lanka or a real risk that he will be subject to significant harm upon his return to his village, or indeed, elsewhere in Sri Lanka.
57. The applicant has not claimed that he will be unable to pay the fine and the Tribunal is also not satisfied that the scale of the fine, which is the most likely penalty, amounts to significant harm. Nor is the Tribunal satisfied that the applicant would be exposed to significant harm for any other reason.
58. The Tribunal finds, therefore, that there are not substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Sri Lanka, there is a real risk that he would suffer significant harm in terms of s.36(2)(aa) of the Act, specifically that there is a real risk that he would be arbitrarily deprived of his life, that the death penalty will be carried out on him, that he will be subjected to torture, that he will be subject to cruel or inhuman treatment or punishment or to degrading treatment or punishment.

## CONCLUSIONS

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

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<sup>23</sup> See *SZTKF v MIBP* [2014] FCCA 282, 4 December 2014, in which Manousaridis J found that the intentionally placing the applicant, a Tamil citizen in remand whilst awaiting sentence did not establish that the harm was intentional such that it was significant harm. In an earlier decision, the Federal Circuit Court found that mere negligence without more, was not capable of amounting to intentional infliction of pain or suffering – see *SZSPE v MIBP* [2013] FCCA 1989.

**DECISION**

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

Susan Pinto  
Member

## ATTACHMENT - RELEVANT LAW

1. In accordance with section 65 of the *Migration Act 1958* (the Act), the Minister may only grant a visa if the Minister is satisfied that the criteria prescribed for that visa by the Act and the Migration Regulations 1994 (the Regulations) have been satisfied. The criteria for the grant of a Protection visa are set out in section 36 of the Act and Part 866 of Schedule 2 to the Regulations. Subsection 36(2) of the Act provides that:

'(2) A criterion for a protection visa is that the applicant for the visa is:

- (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or
- (aa) a non citizen in Australia (other than a non citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non citizen being removed from Australia to a receiving country, there is a real risk that the non citizen will suffer significant harm; or
- (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
  - (i) is mentioned in paragraph (a); and
  - (ii) holds a protection visa of the same class as that applied for by the applicant; or
- (c) a non citizen in Australia who is a member of the same family unit as a non citizen who:
  - (i) is mentioned in paragraph (aa); and
  - (ii) holds a protection visa of the same class as that applied for by the applicant.

### Refugee criterion

2. Subsection 5(1) of the Act defines the 'Refugees Convention' for the purposes of the Act as 'the Convention relating to the Status of Refugees done at Geneva on 28 July 1951' and the 'Refugees Protocol' as 'the Protocol relating to the Status of Refugees done at New York on 31 January 1967'. Australia is a party to the Convention and the Protocol and therefore generally speaking has protection obligations to persons defined as refugees for the purposes of those international instruments.

3. Article 1A(2) of the Convention as amended by the Protocol relevantly defines a 'refugee' as a person who:

'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.'

4. The definition contains four key elements. First, the applicant must be outside his or her country of nationality. Secondly, the applicant must fear 'persecution'. Subsection 91R(1) of the Act states that, in order to come within the definition in Article 1A(2), the persecution which a person fears must involve 'serious harm' to the person and 'systematic and discriminatory conduct'. Subsection 91R(2) states that 'serious harm' includes a reference to any of the following:
- (a) a threat to the person's life or liberty;
  - (b) significant physical harassment of the person;
  - (c) significant physical ill-treatment of the person;
  - (d) significant economic hardship that threatens the person's capacity to subsist;
  - (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
  - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.

#### **Complementary protection criterion**

5. An applicant for a protection visa who does not meet the refugee criterion in paragraph 36(2)(a) of the Act may nevertheless meet the complementary protection criterion in paragraph 36(2)(aa) of the Act, set out above. A person will suffer 'significant harm' if they will be arbitrarily deprived of their life, if the death penalty will be carried out on them or if they will be subjected to 'torture' or to 'cruel or inhuman treatment or punishment' or to 'degrading treatment or punishment'. The expressions 'torture', 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' are further defined in subsection 5(1) of the Act.

#### **Ministerial direction**

In accordance with Ministerial Direction No. 56, made under section 499 of the Act, the Tribunal is required to take account of policy guidelines prepared by the Department of Immigration and Citizenship - 'PAM3: Refugee and humanitarian - Complementary Protection Guidelines' and 'PAM3: Refugee and humanitarian - Refugee Law Guidelines' - and any country information assessment prepared by the Department of Foreign Affairs and Trade expressly for protection status determination purposes, to the extent that they are relevant to the decision under consideration.