

1408481 (Refugee) [2015] AATA 3465 (30 September 2015)

DECISION RECORD

DIVISION:	Migration & Refugee Division
CASE NUMBER:	1408481
COUNTRY OF REFERENCE:	Sri Lanka
MEMBER:	Nicole Burns
DATE:	30 September 2015
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decision not to grant the applicant a Protection visa.

Statement made on 30 September 2015 at 3:05pm

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

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the applicant a Protection visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of Sri Lanka, applied for the visa [in] December 2012 and the delegate refused to grant the visa [in] May 2014.
3. The applicant appeared before the Tribunal on 13 August 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.
4. The issues in this review are whether the applicant will face a real chance of persecution or a real risk of significant harm on return to Sri Lanka on account of his Tamil ethnicity, his imputed (pro-LTTE) political opinion, membership of a particular social group ('Three Wheel drivers in Northern Sri Lanka'), illegal departure, and/or as a failed asylum seeker. A summary of the relevant law is attached.
5. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

6. It is not in dispute that the applicant is a Sri Lankan national and the delegate's decision records that he has provided to the Department copies of his birth certificate, school results schedule, family ration card, driver's licence and National Identity Card (NIC). The Tribunal is satisfied that the applicant is a national of Sri Lanka and has assessed his claims accordingly.
7. According to information on the Departmental file and confirmed at the Tribunal hearing, the applicant is a [age] year old man from [Town 1] in Sri Lanka's Northern Province. He is a Tamil of the Hindu faith. He was born in Kilinochchi district, lived for the first few years of his life in [Town 1] (Jaffna district), moved to India around 1990 and returned to Sri Lanka in 1995, living in [a] district in the Vanni region for a year before returning to [Town 1]. In 1997 he and his family moved again to India until 2003 when they returned to [Town 1], where he stayed until departing Sri Lanka in June 2012.
8. The applicant's wife and [child] currently reside in [Town 1], as does his mother and one of his [siblings].

Refugee assessment

9. The applicant's written claims for protection are set out in a statutory declaration submitted to the Department¹ and a written submission² from the applicant's then representative contained on the Departmental file. In that submission the representative draws on country information from various sources about Sri Lanka in general and the situation in northern Sri Lanka in particular to support his contention that the applicant's fears of persecution are well founded in post-conflict Sri Lanka. Australian case law is also referenced where relevant.

¹ Dated [in] December 2012

² Dated 15 November 2013

10. It is submitted that the applicant fears persecution at the hands of the Sri Lankan authorities including the Criminal Investigation Department (CID) and Sri Lankan army (SLA) owing to his background and past experiences in Sri Lanka. In particular because of his:
- Tamil ethnicity;
 - Actual/imputed political opinion (including of being a perceived sympathiser/s supporter of the Liberation Tigers of Tamil Eelam (LTTE), or as someone perceived as holding views in opposition to the current Sri Lankan government); and
 - Membership of a particular social group of 'Three-wheel drivers in Northern Sri Lanka' and of 'failed asylum seekers'

Claimed past experiences

11. It is submitted that the applicant would be imputed with a pro-LTTE political opinion and harmed by the Sri Lankan authorities on return to Sri Lanka for a number of reasons including his past experiences in Sri Lanka, discussed below.
12. The Tribunal has first considered the applicant's claims to have been questioned on a number of occasions by the SLA whilst working as a three-wheel driver in [Town 1] around 2006/2007.
13. In his oral evidence the applicant told the Tribunal that after he returned to [Town 1] (from the Vanni and prior to that from India) in 2006 until his departure from Sri Lanka in mid-2012 he worked as [occupation] and as a three-wheel driver. Initially he drove a three-wheeler owned by a relative, which he purchased after his marriage (in 2009). The applicant said he used to wait for passenger hires at a place called [name], with a number of other three-wheel drivers. An army post was located nearby. One day he discovered that a bomb had exploded near the area whilst he had been away (taking passengers to their destination), which injured some army personnel. The following day the applicant did not go to work, because he was scared and his mother did not want him to. Due to his absence other three-wheel drivers were asked by the SLA where the applicant was. The day after that when the applicant returned to work at [the location] he noticed a large number of army personnel there, including high ranking officers – around 30 – patrolling the area and questioning people. When he arrived he noticed one army personnel in particular give him a strange look. A higher officer told all the drivers to gather round. The army person who had looked at the applicant strangely when he arrived said something to the army officer, who then started to question the applicant. Specifically he was asked his name, why he did not turn up to work the day before, and where he was when the bomb exploded. The army person who had looked at him strangely said he was lying, when the applicant explained that he had a hire at the time of the blast and was unwell the following day. The army officer then told the applicant that they could not have an auto-stand at that place anymore and if they continued to do so and there is another bomb, he would be shot. The applicant did not return to that area after that day and drove his three-wheeler in another part of town.
14. The applicant said a month later another bomb exploded about 15 metres from the previous bomb site, 'somebody' died, and after that all the auto drivers were 'hit' by the army.
15. The Tribunal accepts the applicant's claims to have been questioned by the SLA after a bomb blast in [Town 1], despite some inconsistencies between his oral and written claims in this respect. For example, in his written claims to the Department he states that the incident took place in 2007 however at the hearing he said it took place in 2006. His evidence about this matter was otherwise reasonably consistent. The Tribunal also accepts that the applicant was told that he could no longer have an auto-stand at the place where the bomb

went off and if he returned he would be shot. However, the Tribunal notes that on the applicant's own evidence he was not physically harmed by the SLA following the bombing and was not questioned further. For these reasons the Tribunal does not consider that the applicant would be of particular interest to the authorities in relation to this incident and finds that there is not a real chance of the applicant facing serious harm as a result of this incident on return to Sri Lanka in the foreseeable future.

16. In his written claims to the Department the applicant claims that after the second bomb blast he was beaten and questioned by soldiers. The Tribunal does not, however, accept his claims in this regard because of inconsistencies between his written evidence to the Departmental and oral evidence before the Tribunal in this respect. For instance in his written claims the applicant states that the second bomb blast took place two or three days after the first bomb blast however at the hearing he said it occurred a month later. As well, the applicant states in his written claims that he was beaten by soldiers following the second bomb blast however at the hearing when asked if the SLA harmed him physically in relation to either bomb blasts, he replied that they did not. Given these inconsistencies the Tribunal does not accept the applicant's written claims to have been questioned and beaten by the SLA following the second bomb blast and the Tribunal finds that there is not a real chance of the applicant facing serious harm as a result on return to Sri Lanka.
17. Taking into account these considerations, the Tribunal is of the view that whilst the applicant may have been suspected of having LTTE links along with thousands of other young Tamil males from the north during the final phases of the war following the first bomb blast, he was not considered a serious LTTE suspect, or of having more elaborate links with the LTTE by the authorities.
18. The Tribunal has gone on to consider the applicant's claims to have left Sri Lanka in June 2012 purportedly because members of the army intelligence had started to look for him.
19. In his oral evidence the applicant told the Tribunal that around February 2012 he was at an auto stand when a member of the "CID" asked him to come to their army camp. (He clarified that he means the army intelligence wing, not the police CID.) He did not go initially, only after a relative (whom he referred to as his "[relatives]" brother), also a three wheeler driver, was asked the applicant's whereabouts by a CID member who told him to tell the applicant to go to their camp immediately. When the applicant arrived at the CID army office in [Town 1] he was placed in a room, asked by an army "higher" officer if he was a "thug", and threatened with death if he left [Town 1]. After that the applicant did not drive his three-wheeler, did not return to the auto-stand, and after speaking to his mother made arrangements to leave Sri Lanka.
20. The delegate did not accept the applicant's claims in relation to being questioned and threatened by army intelligence in 2012, noting that they were additional claims made at interview, but not in the applicant's statutory declaration accompanying the visa application. The applicant told the Tribunal that he failed to mention this incident in his written claims because he did not know the rules and regulations and he was also worried that the Australian authorities would think he did something wrong if the CID were searching for him. He did note that, after raising the matter with his then lawyer, he told the delegate about the incident at the Departmental interview. The Tribunal also notes that the claims in this respect are included in the applicant's then representative's submission to the Department. Given this the Tribunal does not draw an adverse inference from the fact the applicant failed to mention this incident in his written claims.
21. Nonetheless, the Tribunal has other concerns about the applicant's claims to have been questioned and threatened by the CID in early 2012 as follows. First, it is [relative]ar why the CID was interested in him in the first place, why they thought he was a thug, and why

they threatened him. At the hearing the applicant speculated that it may have something to do with a family dispute between his [relative]'s [sibling] – who purportedly had CID connections and owned a shop near his auto stand – and his [relative]. He was unable to provide details and said he still does not know what their problem was. Second, whilst the applicant's then representative states in his submission to the Department that the CID member – [name] – in addition to accusing the applicant of being a 'thug' questioned whether he was assisting the LTTE by acting as a courier on his three-wheeler, the applicant did not indicate when asked that the CID questioned him about any LTTE links. Further, the Tribunal notes that the applicant said not long after this incident he moved to [Town 2] for about a month (staying with a relative), before returning to [Town 1] where he stayed until his departure from Sri Lanka, in July 2012, purportedly at friends' houses, as well as at his own home. Asked why he returned to [Town 1] from [Town 2] at that time if he was concerned about the CID's purported interest in him, the applicant said because he wanted to see his wife and [child] before leaving Sri Lanka. The Tribunal is of the view that if the applicant genuinely feared the CID at that time, he would not have returned to [Town 1], even to see his wife and [child], who could have visited [Town 2].

22. Taking into account these considerations the Tribunal does not accept the applicant's claims to have been questioned and threatened by the CID in 2012. It follows that the Tribunal also does not accept the applicant's oral claims that when he was in [Town 2] the CID asked other drivers at the auto stand his whereabouts, more than 10 times. Nor does it accept his claims that in September 2012, after the applicant had left Sri Lanka, the CID purportedly asked his [relative] his whereabouts and his [relative] told them he was in Australia. The Tribunal does not accept the applicant was of any interest to the CID at that time and finds it therefore remote the chance that he would be of any interest to the CID on return to Sri Lanka now or in the reasonably foreseeable future. His fears of persecution in this regard are not well founded.

Membership of a particular social group of 'three wheel drivers'

23. It has been submitted on the applicant's behalf that he faces a real chance of persecution on return to Sri Lanka on account of his membership of a particular social group of three-wheel motorbike drivers because they have long been suspected by the authorities as acting as couriers for the LTTE.
24. In his written claims to the Department the applicant states that the authorities suspect all three wheeler drivers have some contact with the LTTE and constantly harass them. He states that he was often stopped by them, slapped around and let go. At the Tribunal hearing the applicant said he would be suspected of supporting the LTTE as a three-wheeler driver in the past because all drivers had mandatory three months LTTE training (even though he told the Tribunal that he did not undertake the training, because his mother told him not to).
25. The Tribunal accepts that the applicant worked as a three-wheeler driver in [Town 1] from around 2006 to 2012, before he left the country, and that he was one of many three-wheel drivers questioned in the aftermath of a bomb because it took place near their auto stand around late 2006/early 2007. However, for reasons set out above the Tribunal does not accept that he was of any particular interest to the authorities as an LTTE suspect following the bomb blast or any other time and Tribunal is not satisfied that the applicant would be suspected of being an LTTE member and seriously harmed on return to Sri Lanka simply because he drove a three wheeler in the past. The Tribunal notes the list of those still at risk in Sri Lanka in UNHCR's 2012 eligibility guidelines³ does not include three wheel

³ UNHCR 2012 *Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka*, 21 December

drivers. The Tribunal also notes Australia's Department of Foreign Affairs and Trade's (DFAT) latest advice that although the military and security forces maintain a significant presence in Sri Lanka's Northern Province, the situation in the north and east has greatly improved since the end of the war.⁴

26. For these reasons the Tribunal does not find the applicant faces a real chance of serious harm on return to Sri Lanka on account of his past work as a three wheeler driver, as a member of a particular social group of 'three wheel drivers' or on the basis of being imputed with a pro-LTTE political opinion because of his past employment. His fear of persecution on this basis is therefore not well founded.

Imputed (pro-LTTE) political opinion

27. In his oral evidence to the Tribunal the applicant said [some] of his [brothers] were LTTE members and the Tribunal has considered whether the applicant faces a real chance of persecution on return to Sri Lanka by the authorities through the imputation of a pro-LTTE political opinion on this basis.
28. The applicant told the Tribunal that his [brother], [Mr A], joined the LTTE in 2002. He had stayed in Sri Lanka ([Town 1]) when the rest of his family moved to India, to finish [school]. The applicant is not sure why his brother joined the LTTE, or the exact circumstances, but noted that around that time his studies were not going too well, he had money problems, and was alone. [Mr A] was based with the LTTE in the Vanni up until 2004 when he moved to an LTTE camp in [Jaffna]. He managed to escape from [the camp] and returned home, initially at his mother's house and then in hiding (from the LTTE) at his [relative]'s house. Members of the LTTE's political wing visited the applicant's house four or five times searching for his brother; however they did not locate him at his [relative]'s house.
29. The applicant said [Mr A] died around 2005 due to some sort of [medical condition]. He does not know if it was caused by something that may have happened to him during his time with the LTTE or not. His brother never spoke to him about his experience with the LTTE, or his specific role.
30. The Tribunal notes that the applicant's claims about [Mr A] being a former LTTE member were raised for the first time at the Tribunal hearing. The applicant said initially he was not asked any details, only how many brothers he had, and that at the (Departmental) interview he talked about his other brother who had gone missing, but was not asked questions about [Mr A]. Despite the concern this omission raises, the Tribunal found the applicant's oral evidence about [Mr A] was credible. It notes also that it was not uncommon for at least one and sometimes more family members from the north (and east) to join the LTTE during this period, whether voluntarily or not. The Tribunal therefore accepts that the applicant's brother ([Mr A]) was a member of the LTTE from 2002 to 2004. It also accepts that he died of natural causes around 2005.
31. The applicant also claims that his [brother], [Mr B], joined the LTTE around 2004. At that time after he did not return home from work (as a three-wheeler driver) over a period of a week, his mother travelled to the Vanni to look for him. There, she spoke to a member of the LTTE's political wing [who] confirmed that her son had joined the movement, but they did not allow her to see him. In 2006 the applicant and his family moved to [Town 2] for eight months, due to the war. His mother travelled to [a certain town] during this time and stayed with her [relative] and her husband, who were also LTTE members, for a week. [Mr B] visited his mother during that week, told her the LTTE group he belonged to ([name]) and

⁴ Department of Foreign Affairs and Trade 2015 *DFAT Country Report Sri Lanka* 16 February 2015 at 2.37 to 2.40

took her phone number and address. That was the last time his mother saw [Mr B]. He last communicated with her by telephone at the end of 2006 or 2007. The applicant's mother tried to find her son after the war ended (in May 2009) by asking people originating from that area if they know what happened to him and by visiting and writing letters to government officials (including the army), but to no avail. At the hearing the applicant produced a typed letter, purportedly from his mother addressed to [an official] seeking information about her son. In that letter, dated [in] February 2015, the applicant's mother states, among other things, that when her [relative] came out of the Vanni when the war ended she said that [Mr B] was injured in the war and admitted to the [town] Hospital.

32. The Tribunal accepts that the applicant's brother, [Mr B] was a member of the LTTE in the past in Sri Lanka, and that he is missing since the end of the war. It notes that although the applicant did not specify that he was an LTTE member in his statutory declaration to the Department, he did mention that his brother had moved to the Vanni and was missing. However for the following reasons the Tribunal does not find that the applicant faces a real chance of serious harm from the authorities on account of being imputed with a pro-LTTE political opinion on account of his brothers' LTTE membership in the past. First, when asked at the hearing the applicant said that he did not experience any problems from the authorities when in Sri Lanka on account of his brothers' LTTE membership and specifically when questioned following the bombs in 2006/2007 and by the CID in 2012 he said he was not questioned about his brothers. The applicant told the Tribunal that even though they did not question him specifically about his brothers, the army knew that his brothers were LTTE members, given that all the people in his area knew. The Tribunal does not find this explanation plausible, noting that it would be odd for the army to omit to mention the applicant's brothers' LTTE membership if they were aware of it at the time they questioned or interacted with the applicant. Second, the applicant has not indicated that his family members who remain in Sri Lanka – including his [other sibling] – have experienced any problems from the Sri Lankan authorities on account of his brothers' involvement with the LTTE.
33. The Tribunal notes that when asked at the hearing what, if any, specific problems he experienced from the SLA because of his brothers LTTE membership, the applicant recounted an incident in 2006 after he returned from [Town 2] when 12 to 13 army personnel entered his home, asked for his NIC and demanded he recite the number on the card. When he got the number wrong he was slapped twice by one of the army personnel, taken to a camp about 100 to 150 metres from his house and again asked to recount his identity card number. Again he told them the wrong number and was hit. The army told him they knew that the LTTE had come to his house and he had cooked for them. The applicant told the Tribunal that people around knew that his brothers were LTTE members. However when asked if the SLA specifically said anything about his brothers during this incident, the applicant replied "no". After 15 or 20 minutes and following the arrival of some people from his village, the SLA let the applicant go. In his statutory declaration provided to the Department the applicant mentions this incident, however he states it was around two or three days after the first bomb blast. The Tribunal is willing to accept that the applicant was questioned by the SLA in the past and slapped when he forgot his NIC number. However, on his own evidence he was not questioned specifically in relation to his brother's involvement with the LTTE and given the army let him go after around twenty minutes and there was no further follow up, the Tribunal does not consider the applicant was of any adverse interest to the authorities as a LTTE suspect in relation to his brothers or for any other reason at that time.
34. The Tribunal notes that the applicant produced two letters in support of his review application which specifically mention the applicant's brother, [Mr B]. That is a letter from [a certain person from a location] dated [in] June 2015 and a letter from [a] retired district judge, [Town 1] dated [in] June 2015. The contents of both letters is similar and includes assertions

that the applicant was subject to threats and torture from the “intelligence group” of the SLA when visiting his house and questioning him about [Mr B]’s whereabouts. It is stated that the intelligence men suspected [Mr B] was involved with the “Tamil Extremist Movement”. The Tribunal notes that this information contained in these letters is at odds with the applicant’s oral evidence to the Tribunal that he was never questioned by the army about [Mr B] (or [Mr A]) and also that he was never physically harmed by the SLA – apart from being slapped - during any questioning he may have experienced. When this discrepancy was pointed out to the applicant at the hearing, he said that many tortures happen in his country, he cannot recall all of them, and it hurts if he thinks about it. He also submitted that he was verbally tortured (by the SLA). When asked how the authors of the letters knew about his specific situation, he said it is because they are from his village. His mother obtained the letters last month. The Tribunal accepts the manner in which the letters were obtained as claimed, however given the inconsistencies, which the Tribunal considers are significant, the Tribunal gives these letters no weight.

35. For these reasons the Tribunal finds the chance the applicant would be perceived to be pro-LTTE and be seriously harmed by the authorities on account of his brothers’ LTTE membership on return to Sri Lanka in the reasonably foreseeable future to be remote.
36. The applicant has claimed that his father was killed in Government-LTTE cross fire in [year], a few months after the applicant was born. He said his mother was harassed by the army after his father’s death on her way to market sometimes, and had no one to support her and her [children], which is why she moved the family to India in 1990. Based on the applicant’s credible evidence in this regard and provision of a death certificate, the Tribunal accepts that was the case. However the applicant does not claim nor is it evident that the applicant’s father was specifically targeted by the SLA or anyone else in this incident, which occurred over [number] years ago and the applicant has not indicated that he was of interest to the authorities because of his father’s death. For these reasons the Tribunal finds the chance the applicant would be seriously harmed on return to Sri Lanka because of his father’s death in [year], or on the basis of being imputed with a pro-LTTE political opinion or for any other reason to be remote.
37. The Tribunal notes that the applicant said at the hearing that his mother’s [relatives] who lived in the Vanni were LTTE members. The Tribunal accepts that was the case. However the applicant has not claimed nor is it evident that he was of any interest to the authorities on this basis in the past in Sri Lanka and therefore the Tribunal finds the chance that he would be seriously harmed on return because of his mother’s [relative]’s LTTE membership on political opinion or any other grounds is remote.
38. It has been submitted that the applicant is of particular risk because he is a young Tamil male from the north of Sri Lanka. The Tribunal accepts that the applicant originates from Northern Sri Lanka, including living for a few years in Kilinochchi which used to be controlled by the LTTE until the end of the war in May 2009. However, the Tribunal notes UNHCR (2012) Guidelines state that originating from an area that was previously controlled by the LTTE does not in itself result in a need for protection:

At the height of its influence in Sri Lanka in 2000-2001, the LTTE controlled and administered 76% of what are now the northern and eastern provinces of Sri Lanka. Therefore, all persons living in those areas, and at the outer fringes of the areas under LTTE control, necessarily had contact with the LTTE and its civilian administration in their daily lives. Originating from an area that was previously

controlled by the LTTE does not in itself result in a need for international refugee protection in the sense of the 1951 Convention and its 1967 Protocol.⁵

39. Further, the Tribunal notes DFAT's assessment in its October 2014 Thematic report is that because of the pervasiveness of LTTE control in the north and east during the civil conflict, most Tamils from these areas are likely to have paid taxes to or provided a low-level of material support to the LTTE. However, DFAT assess that those Tamil civilians who were not members of the LTTE, including those who may have provided a low-level of support to the LTTE, may be monitored by Sri Lankan authorities, but are at low risk of being detained or prosecuted.⁶ The applicant told the Tribunal that he was not an LTTE member and for reasons set out above the Tribunal is not satisfied that the applicant was of particular interest to the authorities in the past over the general interest they had in young Tamil males during the lead up to the end of the war. The Tribunal is not satisfied that the applicant's profile and circumstances are such as to result in a real chance of being persecuted because of his imputed political opinion on account of being a young Tamil male from the north if he were to return to Sri Lanka, now or in the reasonably foreseeable future.

Tamil ethnicity

40. It is submitted that the applicant fears returning to Sri Lanka because of his Tamil ethnicity, particularly as he originates from Kilinochchi district that had been a strong hold of the LTTE and heavily militarised, and as a young Tamil male whose occupation was a three-wheel driver.
41. In his written submission provided to the Department the applicant's former representative refers to country information from a variety of sources to support his contention that Tamils continue to be disproportionately targeted through current security measures; that discrimination against Tamils by state and non-state agents continues to exist; there is ongoing heavy militarisation throughout parts of the Northern Province, especially in the Vanni; and there is a disproportionate targeting of young Tamil men from the north by security forces. The representative submits further that if the applicant returned to the north, particular his area of origin in Kilinochchi, it would see him exposed to members of the security forces while travelling around heavily militarised area, which would heighten his vulnerability to face harm at hands of state agents. He also submits that there is widespread targeting of persons on the basis of their suspected LTTE links.
42. The Tribunal has had regard to these submissions and acknowledges the representative's concerns about lack of progress towards meaningful reconciliation for Tamils in post-war Sri Lanka, including in the north, and an ongoing military presence. However, for the following reasons, the Tribunal finds the applicant's claim to fear harm on return to Sri Lanka because of his Tamil ethnicity is not well-founded.
43. The Tribunal accepts that Tamils in the past have experienced widespread discrimination and harm, particularly during the conflict between the LTTE and Sri Lankan government. However, the Tribunal does not accept that simply being a Tamil, or a young Tamil male from the north gives a rise to a well-founded fear of persecution from the authorities in Sri Lanka. The Tribunal makes this finding on the basis of independent sources indicating that it

⁵ UNHCR 2012 *Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka*, 21 December

⁶ 2014 DFAT *Thematic Report: People with Links to the Liberation Tigers of Tamil Eelam* 3 October at 2.27

would no longer be assumed that all Tamils face a real chance of suffering serious or significant harm solely on account of their Tamil ethnicity.⁷

44. The Tribunal also notes – as mentioned - that the independent sources indicated that the absence of any anti-government activity before or after leaving Sri Lanka will mean that any enquiries made by the Sri Lankan authorities upon a person's return is not likely to result in a concern that person will be a security risk,⁸ as discussed with the applicant at the hearing. The applicant stated that the situation is very different on the ground and that ten per cent of what is being said would not happen in Sri Lanka. He referred to an article (in Tamil) by Yasmin Sooka, a Human rights activist, which he showed the interpreter on his device. She said the article, about unfinished war and sexual violence in Sri Lanka, reports among other things about a number of torture cases and sexual violence cases after the war finished (from 2009 to 2015), as well as victims giving statements who escaped white van kidnappings.
45. The Tribunal also discussed with the applicant DFAT's latest advice that although the military and security forces maintain a significant presence in Sri Lanka's Northern Province, the situation in the north and east has greatly improved since the end of the war. Further, within days of assuming office, in January 2015 the new government led by President Sirisena appointed two retired senior civil servants as Governors in the Northern and Eastern provinces, with a view to initiating measures to strengthen civil administration (posts previously held by retired military personnel). The Sirisena government has also commenced discussions on progressively reducing high security zones in the Northern Province⁹.
46. Having regard to the evidence before it, the Tribunal accepts that Tamils in Sri Lanka faced a degree of harassment, discrimination and in some cases persecution during the time of conflict between the LTTE and the Sri Lankan authorities on account of their ethnicity. However, in light of the end of the war in May 2009 and the country information cited above that assess that being of Tamil ethnicity does not on its own warrant international protection, the Tribunal finds that the applicant does not face a real chance of suffering serious harm solely on account of his Tamil ethnicity.

Membership of a particular social group of 'failed asylum seekers'

47. It is submitted that there is a real chance the applicant would be seriously harmed on return to Sri Lanka on account of his status as a failed asylum seeker.
48. The representative in his written submission to the Department argues that seeking asylum in a western country and/or returning to Sri Lanka as a failed asylum seeker poses a risk, particularly for young Tamil men, of serious harm or significant harm on return. He refers to country information from various sources as well as case law to support his contentions in this regard.

⁷ Department of Foreign Affairs and Trade 2014 *DFAT Thematic Report: People with Links to the Liberation Tigers of Tamil Eelam* 3 October; Department of Foreign Affairs and Trade 2015 *DFAT Country Report Sri Lanka* 16 February 2015; UK Home Office Operation 2014 *Country Information and Guidance about Tamil Separatism in Sri Lanka* dated 28 August; UNHCR 2012 *Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka*, 21 December

⁸ UK Home Office Operation 2014 *Country Information and Guidance about Tamil Separatism in Sri Lanka* dated 28 August

⁹ Department of Foreign Affairs and Trade 2015 *DFAT Country Report Sri Lanka* 16 February 2015 at 2.37 to 2.40

49. The Tribunal has had regard to these submissions and relevant country information and acknowledges the concerns articulated about what might happen to returnees, including Tamil failed asylum seekers, if detained.
50. The Tribunal accepts that the applicant entered Australia in mid-2012 without a visa and by boat and that as such he may be identified as a person who has unsuccessfully sought asylum in Australia if he is returned to Sri Lanka.
51. The UK Home Office reports that Sri Lanka has an extensive intelligence system shared by the security forces and immigration officials and that its security policy has become increasingly sophisticated since 2009 and is based on intelligence and the comprehensive surveillance of its Tamil citizens as well as monitoring of the Tamil diaspora.¹⁰ As already mentioned, that Guidance notes that the absence of any anti-government activity pre and post departure from Sri Lanka will mean that any enquiry made by the Sri Lankan authorities on a person's return is not reasonably likely to crystallise into concern about the person being a security risk.¹¹
52. The Tribunal accepts that upon return to Sri Lanka, the applicant is likely to face questioning at the airport as to his activities during the time he has been abroad and that given he is a Tamil speaker, he may also face questioning about any links he may have with the LTTE. However, for the reasons set out above, the Tribunal has found that the applicant does not have an actual or perceived association with the LTTE which would cause him to be targeted by the authorities on return as an LTTE suspect of serious concern. Whilst the Tribunal has accepted the applicant had two brothers who were LTTE members for the reasons already provided above the Tribunal considers that such questioning at the airport, in conjunction with intelligence, will quickly establish that the applicant was not a member or supporter of the LTTE nor suspected of such. It is not suggested that the applicant has engaged in political or separatist activities of any kind since his departure from Sri Lanka or that he will do so if he returns to Sri Lanka in the foreseeable future.
53. The Tribunal accepts that when the applicant returns to his home in [Town 1], his arrival will be noted and he may be questioned by the Sri Lankan authorities. However given the Tribunal's findings above, it does not accept there to be a real chance that he will be targeted for harm by the Sri Lankan authorities or anyone else in his home area on the basis of that he is a Tamil who has sought asylum in Australia.

Illegal departure

54. It is submitted that the applicant also fears harm on return to Sri Lanka because he departed the country illegally.
55. The Tribunal accepts that the applicant, who departed Sri Lanka illegally, is likely to be questioned on return and possibly charged under the *Immigrants and Emigrants Act* for doing so. However, for reasons above, the Tribunal has found that the applicant does not have a perceived association with the LTTE which would cause him to be targeted by the authorities on return as an LTTE suspect. DFAT indicates in its report that the applicant therefore would be subject to the same penalties as other Sri Lankan citizens who have departed illegally.

¹⁰ UK Home Office Operation 2014 *Country Information and Guidance about Tamil Separatism in Sri Lanka* dated 28 August at 2.2

¹¹ UK Home Office Operation 2014 *Country Information and Guidance about Tamil Separatism in Sri Lanka* dated 28 August at 1.3.5

56. At the hearing the Tribunal discussed with the applicant DFAT's advice that persons charged with such offences are transported to the Magistrate's Court in Negombo at the first available opportunity. The Tribunal noted DFAT's advice that it had been informed by the Sri Lankan Attorney General's office that no person who was just a passenger on a people smuggling boat has been jailed for departing Sri Lanka illegally and that in most cases they have been granted bail immediately and later fined between LKR 5,000 and 50,000. The applicant did not indicate that he or his family would not have the means to pay the fine.
57. The applicant stated at the hearing that the Tribunal does not know anything about the situation because the Sri Lankan government tells the situation one way but it is different when one goes there. He said that the LTTE who surrendered are kept in a secret place and even the president does not know their location; the army and government are separate so no one knows what happens; and there are no rules and regulations like Australia. He reiterated that foreigners think the situation is good and everything is going smoothly but it is not like that. He added that the president cannot make a decision on his own and the army will not listen.
58. The Tribunal acknowledges the applicant's concerns about the uncertain situation in Sri Lanka. However, as discussed with the applicant at the hearing, DFAT advises that Sri Lanka's departure laws apply to all Sri Lankans, regardless of ethnicity and religion and may therefore constitute laws of general application.¹² The Tribunal is satisfied that the *I&E Act* is applied to all persons who have departed or attempted to depart Sri Lanka illegally, regardless of ethnicity. The Tribunal is satisfied that the terms of the law do not have a discriminatory intent or impact. The evidence before the Tribunal does not indicate that the law is being applied selectively or in a discriminatory manner for a Convention reason, rather the DFAT advice referred to above indicates that all returnees are being treated the same way. The Tribunal is satisfied any questioning, charge, conviction or penalty to which he may be exposed on conviction would arise under a law of general application, and that the application of that law would not be applied to the applicant in a discriminatory way that was different to how it would be applied to any other Sri Lankan citizen, regardless of ethnicity. As such the Tribunal is satisfied that any brief period the applicant may be required to spend in jail or any fine he may incur or any such prosecution or penalty on conviction for an offence will be the result of non-discriminatory enforcement of a law of general application and does not give rise to persecution under the Refugees Convention because it does not involve systematic and persecutory conduct pursuant to s.91R(1)(c).
59. The information suggests that in most cases returnees have been granted bail, based on personal recognisance, with the requirement for a family member to stand guarantor. The Tribunal notes that the applicant has his wife, mother and brother in Sri Lanka and there is nothing to suggest that they cannot stand as guarantor for him. The Tribunal therefore does not accept that the treatment the applicant may face on his return to Sri Lanka as a result of his illegal departure from the country, either on arrival at the airport, whilst on remand awaiting a bail hearing or when he appears later before the court, constitutes serious harm amounting to persecution.
60. On the evidence before it, the Tribunal finds that the applicant will be questioned at the airport upon his return to Sri Lanka, that he will likely be charged with departing Sri Lanka illegally and that he may be held on remand for a period up to several days while awaiting a bail hearing. The Tribunal notes DFAT's advice that it is aware of a small number of allegations of torture or mistreatment raised by asylum seekers who have returned to Sri Lanka, many of which have been made anonymously by third parties making verification difficult. In making this assessment DFAT notes the thousands of asylum seekers returned to Sri Lanka since 2009 including from Australia, the US, Canada, UK and other European

¹² DFAT 2015 *Country Information Report for Sri Lanka* 16 February at 5.22 – 5.33

countries and assesses that the risk of torture or mistreatment for the great majority of returnees is low, including for those suspected of offences under the *I&E Act*.¹³ The Tribunal does not accept there to be a real chance that the applicant will face serious harm during the questioning or any period he is held on remand awaiting a bail hearing.

61. The Tribunal accepts that prison conditions in Sri Lanka are generally poor and notes reports of mistreatment of both Tamil and Sinhalese prisoners in Sri Lanka's prison system.¹⁴ However in this case the Tribunal has found, for the reasons set out above, that the applicant does not have an actual or perceived association with the LTTE which would cause him to be targeted in the prison system. The Tribunal finds the chances remote the applicant will be targeted and harmed for any reason advanced in the context of a very brief stay in remand pending bail. The Tribunal does not accept that the applicant will be personally targeted for harm in the prison. As discussed, the Tribunal considers that the applicant will be remanded for a short period as part of a lawful process applied consistently and without discrimination to those who breach a particular law. The Tribunal does not consider that all prisoners, or prisoners in all the accepted circumstances similar or the same as the applicant, will be subjected to harm by the authorities during a brief period of remand. The Tribunal finds it speculative and the chances remote that he will face serious harm in this context.
62. For these reasons, the Tribunal is not satisfied that the treatment faced by Sri Lankan returnees who have departed Sri Lanka unlawfully, either at the airport on arrival, on remand awaiting a bail hearing or when they are later dealt with by the courts, amounts to persecution involving serious harm or gives rise to a real chance of such harm in the reasonably foreseeable future, even when assessed cumulatively with what is accepted of the applicant's personal profile and circumstances in Sri Lanka. Nor is the Tribunal satisfied that the process involves or gives rise to differential treatment for a Convention reason.

Conclusion – Refugee grounds

63. Having considered the applicant's claims individually and cumulatively (that is as a young, Tamil male from the north who drove a three wheeler and had two brothers in the LTTE as well as other extended family), for reasons set out above, the Tribunal finds that the applicant does not face a real chance of persecution on return to Sri Lanka for any Convention reason in the reasonably foreseeable future and that his fear of persecution is not well-founded.
64. 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).

Complementary protection assessment

65. In considering whether the applicant meets the complementary protection criterion under s.36(2)(aa), the Tribunal has considered whether it has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm. In this case, the Tribunal has found that the applicant is a national of Sri Lanka and

¹³ DFAT 2015 *Country Information Report for Sri Lanka* 16 February at 4.20-4.21

¹⁴ Freedom from Torture, 2012, 'Sri Lankan Tamils tortured on return from UK', 13 September. That report records on a number of claims of torture in 2012 and identified that "those at particular risk included Tamils with an actual or perceived association with the LTTE including those returning from abroad".

the Tribunal therefore finds that Sri Lanka is the 'receiving country' for the purposes of s.5(1).

66. For reasons set out above, the Tribunal has not accepted there to be a real chance that the applicant will suffer serious harm if he returns to Sri Lanka now or in the foreseeable future on the basis of his Tamil ethnicity, his actual or imputed political opinion, his membership of a particular social group of 'three wheeler drivers' or 'failed asylum seekers', or the fact that he departed Sri Lanka illegally or any combination of the above. In *MIAC v SZQRB*, the Full Federal Court held that the 'real risk' test imposes the same standard as the 'real chance' test applicable to the assessment of 'well-founded fear' in the Refugee Convention definition.¹⁵ For the same reasons the Tribunal does not accept that there is a real risk the applicant will suffer significant harm for any of those reasons as a necessary and foreseeable consequence of the applicant being removed from Australia to Sri Lanka.
67. In the written submission to the Department the applicant's then representative submits that the applicant faces a real risk of significant harm due to his illegal departure from Sri Lanka and refers to various reports of Tamils arrested and detained in Sri Lanka on this basis. He submits that the applicant is at risk of significant harm during the period of incarceration, irrespective of how long this period of detention may be and that the applicant would be at risk because of his particular circumstances. He also refers to reports of about the conduct of police and other security authorities, accounts of sexual violence carried out on detainees, and about deplorable prison and detention centre conditions, so that the applicant would be exposed to a real risk of facing 'degrading treatment or punishment' during any period of incarceration either as a remanded or convicted prisoner. It is submitted that the types of significant harm the applicant would face a real risk of is torture and degrading treatment or punishment.
68. The Tribunal has had careful regard to these submissions as well as the applicant's evidence about his concerns in this respect. For the reasons set out above, the Tribunal has accepted that the applicant will be questioned at the airport upon his return to Sri Lanka, that he will likely be charged with departing Sri Lanka illegally and that he could be held on remand for a brief period usually being less than 24 hours but possibly as long as several days while awaiting a bail hearing. In view of the DFAT advice cited above, the Tribunal does not accept on the information before it there to be a real risk that the applicant will face torture, or other instances of significant harm, either during his questioning at the airport or during any period he spends on remand or any time after that. The Tribunal has found that the applicant will be granted bail on his own recognisance and that if convicted of charges under Sri Lanka's I&E Act, he will likely face a fine of between LKR 5,000 and 50,000. The Tribunal does not accept that the applicant will be unable to pay such a fine if it is imposed upon him. Nor does it accept on the evidence before it that there is a real risk the applicant would be subjected to treatment constituting significant harm as that term is exhaustively defined in section 36(2A), either during his questioning at the airport or during the short period that he would spend on remand awaiting a bail hearing. The Tribunal has accepted that prison conditions in Sri Lanka are generally poor, but it does not accept that there is a real risk that the applicant would be subject to particularly harsh prison conditions to constitute significant harm (such as a violation of Article 7 of the ICCPR as set out in PAM3 Refugee and humanitarian – Refugee Law Guidelines) while on remand for a short period of time as a result of those conditions.
69. For these reasons, having considered the applicant's claims individually and cumulatively (as described), the Tribunal is not satisfied that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant's removal from Australia

¹⁵ *MIAC v SZQRB* [2013] FCAFC 33 (Lander, Besanko, Gordon, Flick and Jagot JJ, 20 March 2013) per Lander and Gordon JJ at [246], Besanko and Jagot JJ at [297], Flick J at [342].

to Sri Lanka, there is a real risk that he will suffer significant harm. Therefore the applicant does not satisfy the criterion set out in s.36(2)(aa).

CONCLUSION

70. 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).
71. 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).
72. There is no suggestion that the applicant satisfies s.36(2) on the basis of being a member of the same family unit as a person who satisfies s.36(2)(a) or (aa) and who holds a protection visa. Accordingly, the applicant does not satisfy the criterion in s.36(2).

DECISION

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

Nicole Burns
Member

Attachment – Summary of Relevant Law

The criteria for a protection visa are set out in s.36 of the Act and Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom Australia has protection obligations under the 'refugee' criterion, or on other 'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa of the same class.

Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (together, the Refugees Convention, or the Convention).

Australia is a party to the Refugees Convention and generally speaking, has protection obligations in respect of people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:

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

If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').

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