

# FEDERAL CIRCUIT COURT OF AUSTRALIA

*SZSZR v MINISTER FOR IMMIGRATION & ANOR*

[2014] FCCA 904

Catchwords:

MIGRATION – Application for review of decision of Refugee Review Tribunal – whether Tribunal failed to consider the process of investigation or interrogation upon arrival at the airport if the applicant was returned to Sri Lanka legal error – no arguable case raised – application dismissed.

Legislation:

*Migration Act 1958* (Cth), ss.36, 46A, 476

*Federal Circuit Court Rules 2001* (Cth), r.44.12

Cases cited:

*Minister for Immigration & Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; (1996) 185 CLR 259

*SZQPA v Minister for Immigration & Anor* [2012] FMCA 123

*Minister for Immigration and Citizenship v SZQPA* [2012] FCA 1025

Applicant:	SZSZR
First Respondent:	MINISTER FOR IMMIGRATION & BORDER PROTECTION
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 1435 of 2013
Judgment of:	Judge Nicholls
Hearing date:	11 April 2014
Date of Last Submission:	11 April 2014
Delivered at:	Sydney
Delivered on:	11 April 2014

## **REPRESENTATION**

Applicant: In person

Appearing for the Respondents: Ms S Burnett

Solicitors for the Respondents: Clayton Utz

## **ORDERS**

- (1) The title of the first respondent is amended to read “Minister for Immigration and Border Protection”.
- (2) The application made on 26 June 2013 and amended on 7 November 2013 is dismissed pursuant to Rule 44.12(1)(a) of the *Federal Circuit Court Rules 2001* (Cth).
- (3) The applicant pay the first respondent’s costs set in the amount of \$3,326.00.

**FEDERAL CIRCUIT COURT  
OF AUSTRALIA  
AT SYDNEY**

**SYG 1435 of 2013**

**SZSZR**  
Applicant

And

**MINISTER FOR IMMIGRATION & BORDER PROTECTION**  
First Respondent

**REFUGEE REVIEW TRIBUNAL**  
Second Respondent

**REASONS FOR JUDGMENT**

**(Ex tempore; Revised from Transcript)**

1. I have before me today an application made pursuant to s.476 of the *Migration Act 1958* (Cth) (“the Act”) on 26 June 2013, and amended on 7 November 2013, seeking review of the decision of the Refugee Review Tribunal (“the Tribunal”) made on 24 May 2013 which affirmed the decision of the delegate of the first respondent, the Minister, to refuse a protection visa to the applicant.

**Background**

2. The Court Book (“CB”) in these proceedings filed by the Minister and in evidence before the Court, provides the following relevant background.
3. The applicant is a Sri Lankan national who arrived in Australia by boat on 18 May 2012 without a visa (CB 15). Following the exercise of the Minister’s power pursuant to s.46A(2) of the Act on 24 August 2012,

the applicant applied for a protection visa on 25 August 2012 (CB 2 to CB 53). He was assisted in this application by a registered migration agent (CB 54 to CB 56)

4. The delegate refused to grant the protection visa on 9 October 2012 (CB 61 to CB 86). The applicant applied for review to the Tribunal on 15 October 2012 (CB 87 to CB 92). He was again assisted by a registered migration agent (CB 89).
5. Ultimately, before the Tribunal the applicant claimed to fear harm from the Sri Lankan authorities for a number of reasons. These were his Tamil ethnicity, his Hindu religion and his occupation as a fisherman who worked in areas previously dominated by the Liberation Tigers of Tamil Eelam (“LTTE”) ([24] – [25] at CB 149). Further, that on return to Sri Lanka he would be imputed with an adverse political opinion because of his “irregular” departure from Sri Lanka, his claims for protection in Australia, his association with his brother-in-law’s brother who was a known LTTE member, and his support for a particular political party in 2010 ([20] – [23] at CB 148 and [26] at CB 149 to [32] at CB 151).
6. The applicant made a number of factual assertions to support these claims. These included:
  - 1) The Sri Lankan police came to the applicant’s house in 2005 searching for him. They told his family that he should report to the police station. He did not do so. The applicant claimed that the police interest was prompted either because he had given a lift on his motorbike to his brother-in-law’s brother who was a known LTTE member, or because he had just returned from three months of fishing in an LTTE controlled area ([20] at CB 148).
  - 2) In 2006 he was detained by police in a general “round up”. He was released after three hours without further incident ([38] at CB 152).
  - 3) His fishing business has been affected since the end of the civil war in Sri Lanka because of the increase in Sri Lankan soldiers and personnel in his fishing area, and restrictions imposed on Tamil fisherman ([24] at CB 149).

- 4) A local politician had threatened Hindus in his home area ([25] at CB 149).
7. Given the sole ground of the amended application, it is of assistance to note the various occasions when the applicant departed and re-entered Sri Lanka before coming to Australia (see [40] at CB 153 to CB 154):
- 1) Some time prior to 2002, he attempted to leave Sri Lanka “illegally” for Italy by boat because of serious harm directed to Tamil fisherman by the Sri Lanka authorities. The boat was intercepted by Saudi Arabian officials. He was detained by them for about 40 days. He was then “deported” to Sri Lanka. The applicant said he was interrogated on return.
  - 2) In 2005, he flew to India on a three month tourist visa. He returned after 10 to 15 days and ultimately, on his own evidence as reported by the Tribunal, nothing adverse occurred on his return.
  - 3) In 2005 he flew to Thailand on a “three month” visa. He stayed for about 40 days. He was arrested with a group of other Sri Lankans who had no visas. He was detained for two weeks and flown back to Sri Lanka. The applicant initially claimed, when interviewed in relation to the Minister’s consideration pursuant to s.46A(2) of the Act, that nothing happened to him on return. However, in his protection visa application he said he had been interrogated and assaulted by Sri Lankan officials. At an interview with the delegate he said he was treated “like a tourist” returning through the airport and encountered no problems.

### **The Tribunal**

8. In light of the sole ground of the application to the Court, as amended (see [11] below), and the applicant’s submissions to the Court, it is not necessary to go into great detail as to how the Tribunal dealt with all of the applicant’s claims.
9. It is sufficient to note that the Tribunal dealt with each of the separate claims, making findings of fact reasonably open to it on what was before it. It is also of note, particularly arising from the applicant’s submissions to the Court today, that the Tribunal approached the task

on the basis that while there were some concerns with the applicant's evidence, "...[o]verall, [it] found the applicant to be a mostly credible and reliable witness" ([36] at CB 151).

10. The Minister's written submissions make detailed reference to each of the applicant's claims and their disposition by the Tribunal. Having regard to the material that is in the Court Book I agree with the Minister's written submissions and find that they are an accurate reflection of what was before the Tribunal and the Tribunal's relevant findings. On that basis, I adopt the Minister's submissions relating to the background of these proceedings for the purposes of this judgment (see Minister's written submissions [5] - [6]):

*"[5] The applicant fears persecution on the basis of actual and/or imputed political and/or religious opinion, and membership of a particular social group. His claims are detailed and lengthy, and can be summarised as follows:*

*(a) in 2006 he was detained by the police in a general 'round-up' in Udappu and held for three hours and questioned without incident;*

*(b) in his written statement, the applicant noted that on one occasion, when he was re-entering Sri Lanka from Thailand, he had been assaulted by officials of the Government of Sri Lanka (GoSL). However in his oral evidence to the Delegate and at the Tribunal hearing he claimed to have experienced no harm on his return;*

*(c) at some unknown time in 2005 the police came to his house and were searching for him. They informed the applicant's family that he should report to the police station. He did not. The applicant advanced two possible reasons for their interest in him:*

*(i) they wanted to talk to him because he had given a lift on his motorbike to his brother-in-law's brother... who was a cadre of the Liberation Tigers of Tamil Eelam (LTTE); and/or*

*(ii) because he had recently returned from three months of fishing in the LTTE controlled area of Mullaitivu;*

*(d) the applicant claimed that since the end of the war his fishing business had been adversely affected because:*

*(i) of the increased presence of the Sri Lankan Army (SLA) soldiers and Navy officers in Udappu, and*

*(ii) certain areas were restricted to Tamil fisherman who were required to obtain passes to fish in the sea, which was not required of Sinhalese fishermen.*

*(e) with regard to his religious practice as a Hindu, the applicant claimed that there had been some problems because of a local politician who threatened Hindu residents. The applicant also provided the Tribunal with a copy of a press report which related to an incident in which local Buddhists had stopped a Hindu festival at the temple; and*

*(f) more generally, the applicant claimed he would encounter harm upon returning to Sri Lanka because he is Tamil; is Hindu; is a fisherman who worked in the LTTE-held regions; supported the UNP in 2010; was associated with ... his brother-in-law's brother; applied for protection in Australia; and departed Sri Lanka unlawfully.*

*[6] The Tribunal's decision record was correspondingly lengthy. The Tribunal found the applicant to be credible and accepted most aspects of his account [Court Book (CB) 151 at [36]]. However, for the reasons set out below, the Tribunal ultimately found that the applicant's particular circumstances did not amount to serious harm for the purposes of s.91R(2) of the Migration Act 1958 (Act). The Tribunal made the following comments and findings in relation to each of the claims set out above.*

*(a) Claim 5(a): the Tribunal accepted that being questioned and searched by soldiers at checkpoints was disruptive and inconvenient but noted that it did not involve the infliction of physical harm or intimidation. Further, as the incident occurred during a period of conflict and the applicant was entering and exiting from an area controlled by the LTTE, it found that the conduct of the SLA soldiers constituted a legitimate search exercise by a state authority involved in a conflict with an insurgent group. Nor was there any evidence to indicate that the soldiers at the checkpoints ever seriously considered the applicant to be associated with the LTTE. Accordingly, it found that the GoSL authorities did*



*not ever seriously suspect that the applicant had any involvement with the LTTE. [CB 153 at [39]]*

*(b) Claim 5(b): the Tribunal dismissed the claim given the applicant's admission during the hearing before it that he experienced no harassment or harm on returning to Sri Lanka. [CB 153 at [40]]*

*(c) Claim 5(c): the Tribunal noted that the applicant's evidence was of a general nature. It considered that this claim was more about what the applicant believes or infers as opposed to what actually occurred. The Tribunal also found that, even if it accepted that the police were interested in him due to either of the reasons he advanced, this did not amount to serious harm. The evidence before the Tribunal indicated that the police made no attempt to contact or locate the applicant after their single visit and that the applicant went about town doing his regular work. [CB 154 - 156 at [42]-[49]]*

*(d) Claim 5(d): the Tribunal noted that the applicant had not encountered any physical harm or threats by SLA soldiers and Navy officers whilst fishing. Nor did he claim to have been denied a fishing pass, to have been prevented from fishing or to have been denied entry to areas of the Vanni after the end of the conflict in May 2009. Based on the evidence before it, the Tribunal found that, whilst the applicant's economic opportunities may have decreased since 2009 due to the increased competition from the arrival of Sinhalese fishermen, the applicant adapted to this by entering into a new line of business with his brother. The applicant did not claim he was not able to earn a livelihood or support himself or his family. [CB 156 at [50]].*

*(e) Claim 5(e): on the evidence before it, the Tribunal accepted that:*

*(i) in the recent past there had been incidents in which Hindu celebrations were disrupted by Buddhist monks in Puttalam;*

*(ii) a local Sinhalese politician had made threatening statements about Hindu celebrations; and*

*(iii) the applicant was in attendance at these particular celebrations and that they were cancelled.*

*However, the applicant made no claim to have suffered any harm during these incidents and his evidence was that he was otherwise able to peacefully observe his religious practice. [CB 157 [51]]*

*(f) Claims 5(f):*

*(i) The independent information before the Tribunal indicated that Tamils with an actual or perceived association with the LTTE are at particular risk of adverse attention by the Sri Lankan authorities. However, the evidence before the Tribunal did not indicate that the applicant or any member of his immediate family or any of his close friends ever had any involvement or association with the LTTE or were ever seriously suspected of having had such an involvement or association. The Tribunal found, based on the applicant's own evidence, that generations of his family have lived and worked in Udappu without suffering harm, including during the most volatile years of the civil conflict. Nor did the applicant's evidence support his claims to face future harm on account of his Tamil ethnicity or for being a Tamil male from Udappu who worked in areas formerly controlled by the LTTE. Having carefully considered the information and evidence before it, the Tribunal did not accept that there was a real chance that any discrimination the applicant might experience as a Tamil, or as a Tamil male from Udappu, or as a Tamil who had worked in Mullaitivu, would give rise to serious harm [CB158 [55] - CB160 [62] and CB161 [64].*

*(ii) The Tribunal did not accept that the applicant suffered harm in the past for reasons of his religious practice or beliefs but acknowledged his concerns about recent issues at the temple in Puttalam. On the country information before it, the Tribunal did not accept that the applicant would be denied the ability to practice his Hindu faith in the reasonably foreseeable future in Sri Lanka or that he faces any harm from the GoSL or any other group in the reasonably foreseeable future if he continues to practice his Hindu faith. Nor did the Tribunal accept that his Hindu faith would cause him to be imputed with a political opinion linked to the LTTE or against the GoSL or that it gave rise to*

*a profile which would attract adverse attention and serious harm. [CB162 [65]]*

*(iii) The Tribunal did not accept that in the past the applicant had suffered serious harm while travelling to or from work in LTTE-held regions. Nor, did it accept that the applicant would suffer serious harm in Udappu in relation to his fishing business that would amount to serious harm. The evidence before the Tribunal did not indicate that the situation in Udappu had changed since his departure in a way that would seriously impact on the applicant's capacity to earn a livelihood or access services that would threaten his capacity to subsist. [CB161 [63]]*

*(iv) The Tribunal did not accept that the applicant suffered harm in the past because of his low-level support for the UNP in the 2010 elections. The evidence before the Tribunal did not indicate that the applicant had a role with the UNP or that he performed particular activities for the UNP that would bring him to the adverse attention of the GoSL or any other group. The independent information before the Tribunal did not demonstrate or suggest that low-level supporters of the UNP, such as the applicant, have in the recent past been subjected to mistreatment which could amount to serious harm because of their support of the UNP. [CB163 [66]]*

*(v) The Tribunal found that the evidence before it did not indicate that [his brother-in-law's brother] was in fact in the LTTE, nor, if he was, what was the nature of his role nor whether his association with the LTTE had ever come to the attention of the GoSL authorities. The evidence before the Tribunal was that the applicant met [his brother-in-law's brother] on one occasion at his relative's home in Udappu and then on one other occasion when he gave him a lift on his motorbike. At the second hearing the applicant confirmed that he did not know what happened to [his brother-in-law's brother] after the end of the war, and his evidence was that he had never heard of him after giving him a lift in 2005. The Tribunal did not accept that the applicant's distant relationship to [his brother-in-law's brother] had come to the attention of the GoSL in the past or that it had since come to the attention of the GoSL or*

would be likely to come to its attention in the reasonably foreseeable future. [CB159 [58]]

(vi) The Tribunal acknowledged that the applicant could be questioned by various authorities upon his return. However it noted that country information did not refer to any recent reports of persons in his circumstances being harmed during their interviews or through the process of returning. The Tribunal did not accept that the GoSL would impute an adverse profile to a person because he is a returned failed Tamil asylum seeker. [CB163 [67] - CB165 [71]]

(vii) The Tribunal acknowledged that independent information indicated that the applicant might be prosecuted in Sri Lanka for his irregular departure under the Immigrants and Emigrants Act of 2006 (**Immigrants Act**). The Tribunal noted that the Immigrants Act is a law that, on its face, applies equally to all persons and the information before the Tribunal indicated that it is not being selectively enforced or applied. Accordingly, the Tribunal found, on the basis of the information before it, that the law the applicant would be prosecuted under is not discriminatory in its terms and applies to all people who depart Sri Lanka from an unofficial port and without a valid travel document. As the law is not being selectively enforced or applied by the GoSL, there is not a real chance that the applicant would suffer persecution. [CB165 [72] - CB166 [76]]”

[Emphasis in the Original.]

## **Application Before the Court**

11. The application, as amended on 7 November 2013, contains one ground in the following terms:

*“1. The RRT found that whilst returnees are interrogated may be kept in detention in harsh conditions for a few days whilst identity and background checks were being undertaken, and that follow up enquiries may be made. The RRT did not apply the correct test on this finding, the correct test as required by the Migration Act.”*

## **Before the Court**

12. At the first Court date in this matter, on 17 July 2013, the application was set down for a hearing pursuant to r.44.12 of the *Federal Circuit Court Rules 2001* (Cth) given the general and unparticularised complaints raised at that time. A number of orders were made on that occasion for the progress of the applicant's case before the Court. The applicant was referred for legal advice under the then Refugee Review Tribunal Legal Advice Scheme. I note a Certificate on the Court file, signed by counsel who often appears for applicants in matters of this type before this Court, that the applicant was given advice on 10 September 2013. Both parties have filed written submissions.
13. Today the applicant appeared in person. He was assisted by an interpreter in the Tamil language. Ms S Burnett appeared for the Minister. The question for the Court today was whether the application before the Court, as amended, raises an arguable case for the relief the applicant seeks.
14. When given the opportunity to explain the ground of the application, the applicant explained that if he were to return to Sri Lanka he would be detained, tortured and mistreated on arrival by the Sri Lankan authorities. Initially, I understood the applicant to say that the Tribunal did not consider that aspect of his claims. He then subsequently explained that although the Tribunal agreed that he would be detained on arrival it did not, notwithstanding that finding, "pay much attention to", nor consider, his claim in detail.

## **Consideration**

15. The applicant's submissions to the Court, and the ground of the application, indicate that he seeks to pursue one complaint before the Court. It is directed to the treatment of returnees, presumably with the applicant's profile, on return to Sri Lanka.
16. The immediate difficulty however, that arises from the applicant's ground and his written submissions, is that the exact focus, in a legal context, of the complaint is not made clear. Nor, importantly, the jurisdictional error said to arise from the complaint.

17. However, based on the applicant's explanation before the Court today, it is at least clear that the applicant acknowledges that the Tribunal did turn its mind to the treatment of returnees, immediately on arrival and beyond, in Sri Lanka. However, the complaint is that, notwithstanding this, the Tribunal still found that he would not suffer either significant or serious harm for that reason if he were to return to Sri Lanka.
18. In light of what is set out in the Tribunal's decision record, and as reported and addressed in those aspects of the Minister's written submissions focussed on the question of returnees which I have adopted for the purposes of this judgment, the applicant's ground is simply a complaint about the factual findings, and conclusion, made by the Tribunal. Findings which, in relation to returnees to Sri Lanka were reasonably open to the Tribunal to make, and for which it gave reasons.
19. In these circumstances, the applicant's complaint before the Court does not rise above a request for this Court to engage in impermissible merits review (*Minister for Immigration & Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; (1996) 185 CLR 259). I note here that during the hearing today I sought to explain to the applicant the difference in the power and the role of the Tribunal and that of the Court. In particular, that given the applicable law, access to this Court did not provide him with an opportunity to press his claims to protection in Australia.
20. Notwithstanding that the applicant's explanation today, of itself, raises no arguable case, I nonetheless did consider whether any other relevant matters could arise from the complaint that he makes given that he is unrepresented before the Court today.
21. I should note that the Tribunal conducted a hearing with the applicant on two separate occasions. On the second occasion, on 14 May 2013, the Tribunal stated, at [29] of its decision record, that the purpose of the second hearing was to give the applicant the opportunity to give evidence and present arguments in relation to material regarding the likelihood of him being "prosecuted" on return for having left Sri Lanka through irregular channels ([29] at CB 149 to CB 150):

*"... and recent independent information relating to his claims. At the outset, the Tribunal asked the applicant if he had any new or additional evidence. In response he said that there was nothing*

*new and that until now he has not faced any problems but he is afraid of going back.”*

22. The following paragraphs reveal what was discussed (there was no complaint from the applicant before the Court that the Tribunal misrepresented what it said had occurred at the hearing) ([30] at CB 150 to [33] at CB 151):

*“[30] The Tribunal put to the applicant that information before it from credible sources including DFAT and UNHCR indicated that if he was returned it is likely he would be interviewed at the airport in Colombo by GoSL immigration authorities and the CID, and that it is likely they would determine that he had left the country by boat through irregular methods; the information from DFAT indicated that since late 2012 the GoSL is prosecuting people under the emigration laws for having left by boat through irregular methods, and it is likely he would be taken into custody and charged and brought before a magistrate; there were no reports before the Tribunal of people being harmed during that process. The applicant confirmed that he understood that this would occur. The Tribunal informed him that information from DFAT indicated that the offence he would be charged with is a bail-able offence and that sources indicate that bail is routinely granted but he might be held on remand for a few days at most. Sources also indicated that the conditions of remand cells are crowded and dirty and generally very poor. He confirmed that he understood this information. The Tribunal informed him that DFAT had advised that while a prison sentence is a possibility it is more likely that a fine of between 10,000 and 100,000 SLR would be ordered. The Tribunal noted that the emigration laws applied equally to everyone and the information before it did not indicate that the laws were being selectively enforced or that people were being dealt with or punished in a discriminatory manner for any reason through the operation of those laws. The Tribunal also informed him that information from UNHCR indicated that there might be follow-up questioning on his return to his village. When asked to comment on this information, the applicant said he had been questioned at the airport when he was returned from Saudi Arabia and they had hit him. The Tribunal noted that there were no recent reports of returnees or Tamil failed asylum seekers being mistreated at the airport during the questioning, and that what had happened to him occurred in 2002. He said that as a Tamil he would be treated differently. There is no freedom in Sri Lanka for Tamils and they would mistreat him because of his association with [his brother-in-law’s brother].*

[31] *The Tribunal noted that he had not previously been charged with an offence for having left illegally in 2002, nor had he been charged or convicted of any other criminal offence, and that if he was charged on return it would be his first offence, and that, according to his evidence to date, he had not had any involvement with people smuggling. The applicant confirmed that this was true. The Tribunal noted that these factors might have caused him to be given a harsher sentence and that in his circumstances it is likely he would be given a fine of between 10,000 and 100,000 SLR and not a custodial sentence. He said he would be treated harshly because he is Tamil, had claimed protection in Australia and was associated with [his brother-in-law's brother]*

[32] *The Tribunal also asked the applicant to comment on information from the December 2012 UNHCR Guidelines with regard to the categories and profiles of people and groups considered by UNHCR to be at risk of harm and potentially in need of protection; they include people with suspected LTTE links, and critics of the GoSL, including journalists, human rights defenders and activists, and opposition politicians. The Tribunal noted that recent reports from other sources including Human Rights Watch and Amnesty International confirmed that these particular groups of people were potentially at risk if returned, but that neither of those sources or the UNHCR reported that simply being Tamil, or a Tamil from an area formerly controlled by the LTTE, or a Tamil fisherman, or a Tamil returning from the west as a failed asylum seeker, were reasons why the GoSL would perceive a person to be associated with the LTTE or impute an adverse profile to that person. The Tribunal noted that there were reports that some returnees who were failed Tamil asylum seekers had been harmed on return in recent years, but those reports indicated that the returnees had the additional attributes and features referred to above which was what put them at risk and the information did not indicate that they harmed just because they were failed Tamil asylum seekers. The Tribunal put to the applicant that his particular circumstances did not appear to indicate that he came within any of the groups considered to be at risk, and that being Tamil in itself did not appear to be a reason why people were targeted or suffered serious harm. In response the applicant said that Tamils suffer discrimination and problems everywhere in Sri Lanka. There is no freedom. The Sinhalese people in his area receive advantages that Tamils do not receive and there are political problems for Tamils. He had spent the off-seasons fishing in Mullaitivu and those areas had now been 'Sinhalesed'. There was no solution for Tamils. He had been living in hiding for his last six years because he was in fear of the*



*CID. He kept a low profile and the police were looking for him in secret and had been keeping an eye on him. He is not sure what happened to [his brother-in-law's brother] after the end of the war.*

*[33] The Tribunal invited the applicant's agent to make submissions and to suggest any questions she considered the Tribunal should ask the applicant. She submitted that the applicant had been a credible witness and that the recent UNHCR guidelines indicated that persons with familial links to the LTTE were considered to be in need of international protection."*

23. It must be said that the applicant's submissions to the Court were, essentially, unhelpful. The ground of the amended application states that the Tribunal accepted that returnees are interrogated and may be kept in detention in harsh conditions on return for some days. The written submissions repeat this assertion. The written submissions also appear to give some limited, although ultimately unhelpful, explanation as to the applicant's complaint. That is, that in making this finding the Tribunal did not apply the "correct test" as required by the Act. However, the submissions did not explain what the "correct test" should be.
24. I note also that, in his written submissions, the applicant states that he has country information that failed asylum seekers were detained and abused by Sri Lankan authorities. Contrary to the impression that the applicant gave in Court today in his oral submissions, the written submissions also, in part, appear to understand that this Court is unable to consider such information for the purpose of substituting its own findings for those of the Tribunal.
25. However, in written submissions the applicant asserts that if the Court were to return his case to the Tribunal a "new member" would "freshly" look at his case. In my view, that latter statement confirms the import of what the applicant said to the Court today. That is, that the thrust of the applicant's complaint is with the factual findings made by the Tribunal member who did look at his case.
26. In any event, at best, I understood the complaint to be that although the Tribunal made findings that he would likely be detained on return and kept in a harsh environment, it did not find that this would amount to serious or significant harm. In this sense, the complaint may be

understood that the Tribunal failed to properly apply the “tests” relevant to these concepts as they are embodied in the criteria for a protection visa under the Act. That is, ss.36(2)(a) and (aa) of the Act.

27. As the Minister submitted today, the Tribunal set out its understanding of the relevant law in orthodox terms in its decision record. In its “Findings and Reasons”, the Tribunal considered, relevant to the applicant’s complaint now, matters under two headings: “Failed asylum seeker claims”, and “Prosecution for unlawful departure” ([67] at CB 163 to [76] at CB 166).
28. It is important to note, that the Tribunal found it plausible that the Sri Lankan officials would “deduce or infer that he had made a claim for protection which had been refused” ([68] at CB 163). Further, that he would be questioned on return ([69] at CB 163).
29. The Tribunal, however, found that there were a number of reasons as to why the applicant would not be subjected to or suffer serious or significant harm, notwithstanding these circumstances. These included that the applicant was not a person who was of past interest to the Sri Lankan authorities, or that he would be perceived to be associated, or connected, with the LTTE. Further, that there was country information that just being a failed asylum seeker, in itself, was not a reason for being harmed, or targeted, on return. Even further, he had not been harmed on return to Sri Lanka after 2002 (see [7] above).
30. The Tribunal also specifically considered the matter of the applicant’s unlawful departure from Sri Lanka and possible prosecution for this under the relevant Sri Lankan law. It found this to be a law of general application. Therefore, there was not a real chance that the applicant would suffer persecution, in the Convention sense even if he were to be prosecuted. The Tribunal similarly considered these factual circumstances under the complementary protection criterion. In this regard, I note the Tribunal’s decision record at [72] – [75] (at CB 165) and [87] (at CB 168), containing the Tribunal’s findings relevant to the complaint as “presented” by the applicant to the Court.
31. In particular, noting the assertion in the ground of the application to the Court that the Tribunal did not apply the “correct test”, as I have said, the Tribunal’s understanding and application of the relevant tests under

ss.36(2)(a) and (aa) of the Act was entirely orthodox. Its application of its consideration of the facts as presented, and found, in that context is also without legal error. In particular, it is not such as can be said to give rise to any legally arguable case for today's purposes. What remains is that the applicant is aggrieved by the Tribunal's findings and conclusions. Such grievance, without more, does not reveal jurisdictional error nor raise an arguable case for the relief sought.

32. Given the lack of particularity of the ground of the amended application and given that the applicant is not represented before the Court, even in circumstances where he did have the benefit of some legal advice, I did separately consider whether the applicant also sought to complain that the Tribunal failed to properly apply the law in considering the entirety of his claims to fear harm on immediate return. That is, whether there was any failure to properly consider whether the interview, and interrogation, by the Sri Lankan authorities on arrival would rise to serious or significant harm, as opposed to considering the outcome of any such interrogation or interview that might befall the applicant.
33. This echoes what was found by Judge Driver in *SZQPA v Minister for Immigration & Anor* [2012] FMCA 123 at [29] (as affirmed on appeal by Gilmour J in *Minister for Immigration and Citizenship v SZQPA* [2012] FCA 1025) that the decision maker had :

*“... focused on the ultimate outcome of interrogation and detention rather than the process of detention and interrogation itself.”*
34. However, even if the applicant were to seek to rely on what Judge Driver said in that case, in the circumstances of his matter it would not raise any arguable case for the relief that he seeks.
35. The Tribunal's decision record reveals it was plainly aware of the distinction raised in *SZQPA*. The Tribunal noted this distinction at the hearing. In setting out the applicant's claims it variously made a number of references to possible treatment at the airport on arrival as distinct from treatment at some later point in time (see for example [69] at CB 163).

36. Importantly, its findings and reasons made plain that it focussed on the process at the airport, as well as the outcome of that process, in considering both serious and significant harm. See for example, the references in the Tribunal decision as follows:

- 1) “With regard to his processing on return... indicates on arrival...” ([69] at CB 163).
- 2) “...during their interviews or through processing of their return...” ([69] at CB 163).
- 3) “...as part of the return procedure...” ([69] at CB 164).
- 4) Further ([69] (at CB164.):

*“...it does not accept that there is a real chance those inquiries would lead to the applicant suffering serious harm or that he would be subjected to serious harm during the interview process or while being processed at the airport...”*

37. I note similar references at [86] (at CB 167) in relation separately to the matter of complementary protection. The Tribunal stated:

*“...With regard to the possibility that he might suffer harm through the interview process on his return...”*

The Tribunal then went on to find that notwithstanding that he would be questioned, in the applicant’s circumstances that would not rise to such a level that it could be satisfied that he would be subject to “significant” harm ([87] at CB 168).

38. In all, therefore, what was found in *SZQPA* does not assist the applicant today.

## **Conclusion**

39. The sole ground of the amended application as supported and, to a limited extent, explained in written and oral submissions does not raise an arguable case for the relief the applicant seeks. I cannot see any other issue that would assist the applicant in showing jurisdictional error or legal error on the part of the Tribunal on the material before the Court let alone raise any arguable case. The application should be dismissed pursuant to r.44.12(1)(a) of the Rules. I will make the appropriate order.

---

**I certify that the preceding thirty-nine (39) paragraphs are a true copy of the reasons for judgment of Judge Nicholls**

Associate:

Date: 5 May 2014