

1400859 [2015] RRTA 167 (1 April 2015)

DECISION RECORD

RRT CASE NUMBER: 1400859
COUNTRY OF REFERENCE: Sri Lanka
TRIBUNAL MEMBER: Antoinette Younes
DATE: 1 April 2015
PLACE OF DECISION: Sydney
DECISION: The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act.

Statement made on 01 April 2015 at 4:13pm

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 431(2) 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] January 2013 and the delegate refused to grant the visa [in] December 2013.
3. The applicant appeared before the Tribunal on 18 March 2015 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Tamil and English languages. The applicant was represented in relation to the [review].

CONSIDERATION OF CLAIMS AND EVIDENCE

4. 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.
5. 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).
6. 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.
7. 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').
8. In accordance with Ministerial Direction No.56, made under s.499 of the Act, the Tribunal is required to take account of policy guidelines prepared by the Department of Immigration –PAM3 Refugee and humanitarian - Complementary Protection Guidelines and PAM3 Refugee and humanitarian - Refugee Law Guidelines – and any country information assessment prepared by

the Department of Foreign Affairs and Trade expressly for protection status determination purposes, to the extent that they are relevant to the decision under consideration.

CLAIMS AND EVIDENCE

9. In support of the application for a protection visa, the applicant provided a statement dated 12 December 2012 in which he made the following claims:
 - a. He is [age] years of age. He was born and lived in [Town 1] in the Northern Province of Sri Lanka. [Town 1] is renowned for being a stronghold for the LTTE.
 - b. He left Sri Lanka because he was constantly harassed and interrogated by the Sri Lankan Army (SLA). Within [Town 1], the LTTE demanded that one person from every household be a member of, and a fighter for the LTTE. In 1995, his [brother] voluntarily joined the LTTE. His brother was a [certain rank] in the LTTE and a close friend of Velupillai Prabhakaran, the leader of the LTTE. His brother was well-regarded in the LTTE and he was acclaimed for an incident during the [war]. His family has a photograph of this incident on the wall. His brother died in action in 2000.
 - c. Prior to his brother's death in 2000, two army officers came to the family home asking about the applicant. They told him that they knew that his brother had occupied an important position in the LTTE. The applicant was requested to report to the [camp] for interrogation the following day. The applicant and his family knew that if he were to report to the army camp as requested, he would never return home, that he would be beaten, and that he would be tortured and killed which was common in the area. For safety reasons, his father took him to Trincomalee to stay with his uncle and aunt. The following day, his father attended the camp and spoke to the officers in Sinhalese trying to convince them that it was his brother who had links to the LTTE and not the applicant who was never an active member of the LTTE.
 - d. Two weeks later, the army came to his parents' home asking about the applicant's whereabouts. His parents told them that he had left for [Country 2]. The applicant remained in Trincomalee for 11 months and during that time he obtained a passport and left to work in [Country 2] where he remained until 2010, apart from a two months trip to Sri Lanka in 2008 when he got married.
 - e. [In] April 2008, he went to Sri Lanka and he was living in Trincomalee because he was too frightened to return home to [Town 1]. Whilst he was out, seven or eight men arrived at the house in a white van and they enquired about the applicant's whereabouts and whether he had returned to Sri Lanka for good. His uncle told them that he was in Sri Lanka for holidays. The following day, seven or eight men returned to the house whilst he was in Jaffna and told his [age]-year-old [cousin] to come out of the house. They took [his cousin] away and he has not been seen since. His uncle filed a missing person report with the police.
 - f. [In] April 2008, three days prior to his wedding celebration, [his other brother] was picked up in an army roundup. His brother was detained by the army. His father bribed the army and his brother was released six or seven days later. His

brother had been brutally beaten. His father took his brother to the hospital because his injuries were so severe but his brother has not recovered from this incident; most of his limbs and joints do not work and he suffers from severe mental illness.

- g. Following the incidents in relation to his cousin and his brother, he knew that it was dangerous for him to remain in Sri Lanka. He returned to [Country 2] until 2010. In April 2010, he went back to Sri Lanka thinking that his actions would not be monitored and the army would no longer harass him.
 - h. A month later, two men who were members of the Eelam People's Democratic Party (EPDP) went to his home and enquired as to whether he had returned for good. He confirmed that he had returned for good. The EPDP is a pro-government paramilitary organisation known to intimidate and mistreat Tamils in the northern part of Sri Lanka.
 - i. In November 2010, the same men returned asking whether he was staying in Sri Lanka and he told them that he was. He was concerned for his well-being and safety because he was under surveillance from the EPDP who monitored his movements.
 - j. In May 2012, the same two men from the EPDP came to his home. They took his ID card and told him to attend the EPDP office [the] following day. He knew he could not hide because they knew where he lived. The following day, he and his wife attended the EPDP office where he was taken to a darkroom and he was interrogated about his brother and the location of the weapons. He told them he knew nothing and he was released an hour later. He was frightened of the potential constant interrogation and harassment. His life had become threatened on a daily basis because the army suspected that he was in some way connected with, and sympathetic to the LTTE.
 - k. Despite the fact that the war officially ended in 2009, the situation for Tamils has not improved. Tamils are still treated as second class citizens and denied many basic rights. Tamils are harassed by the authorities and are afraid to complain or exercise their rights for fear of punishment. He fears that if he were to return to Sri Lanka, as a failed asylum seeker, he would also be severely punished, arrested, tortured and then killed. As a family member of a senior LTTE member, his life is at serious risk from the authorities. He cannot live anywhere else in Sri Lanka and he does not have the money to relocate. He does not speak Sinhalese and it would therefore be difficult for him to settle in other parts of Sri Lanka. He would be harmed by the Sri Lankan authorities, including the military, the army and the police. He would be harmed for reasons of his Tamil race and imputed political opinion due to his brother's leadership in the LTTE.
10. The applicant provided a copy of his Sri Lankan passport, other identity documents relating to himself and members of his family, a letter of support from the Roman Catholic Church in [Town 1] referring to the applicant's strong Catholic family and the applicant's good character.
11. The applicant was interviewed by the Department on two occasions, namely [in] September 2012 and in relation to his protection claims [in] October 2013.

12. In submissions to the Tribunal dated 23 April 2014, the applicant's representative summarised the applicant's background, claims and indicated that:
- a. Credible independent country information from sources¹ such as the UN High Commissioner for Refugees, Amnesty International, Human Rights Watch, the UK Upper Tribunal, the Sri Lanka Campaign for Peace and Justice, former Australian Deputy High Commissioner in Sri Lanka (Mr Bruce Haige) and many others have commented on patterns of abuse visible post-war targeting the Tamil civilian population in the northern province. The Tribunal should therefore find that the applicant is at risk of persecution on return to Sri Lanka for reason of his race as an ethnic Tamil.
 - b. The perceived inconsistencies by the delegate in relation to the brother's LTTE profile are not incongruent; the applicant was simply providing more details regarding his brother when he was afforded the opportunity to do so. The delegate's findings that the applicant's statements are contradictory are not supported. Country information indicates that family members of a person with perceived links to the LTTE are at risk of persecution in Sri Lanka. The applicant's brother was in the position of [rank] and it is not relevant whether he was of high profile or not. Many sources have reported on the Sri Lankan government's treatment of those suspected with links to the LTTE. Country information supports the applicant's claims that he is suspected of having links to the LTTE and if he were to return to Sri Lanka, it is likely that he would face arbitrary detention, torture or death at the hands of the Sri Lankan government due to those suspected links. There is a real chance that he would be subjected to serious harm. There is a vast body of country information which supports the conclusion that failed asylum seekers are mistreated at the hands of the Sri Lankan authorities upon their return. The practice of arbitrary detention and serious mistreatment of Tamil detainees is widespread.
 - c. Whilst the *Immigration and Emigration Act* may appear to be a law of general application, when considered in reference to country information, it cannot be considered that arbitrary arrest and torture of Tamil returnees are appropriate and adaptive means of meeting a legitimate object.
 - d. If forcibly returned to Sri Lanka, the applicant would be arrested, interrogated, imprisoned and tried for charges relating to his illegal departure. The applicant fears that this criminal prosecution would result in torture, or cruel or inhuman treatment or punishment, and/or degrading treatment or punishment. The applicant would be identified as a failed asylum seeker, he would be arrested upon arrival in Sri Lanka and taken into police custody, he would be interrogated by the authorities at the airport, he would be detained at Negombo prison for an unspecified period of time, he would be tried and convicted of charges relating to illegal departure, and he would be required to pay a fine of up to Rs.200,000. The applicant fears that he would be subjected to significant harm in police custody, particularly at the interrogation and detention stages. Amnesty International and other organisations have warned that torture in police custody is rampant in Sri Lanka.

¹ Cited

e. It is unknown for how long the applicant would be interrogated or detained. Brevity of detention however does not mitigate the risk of significant harm. In fact it is the first days in police custody that would present the applicant with the highest risk of significant harm. There is a real risk that the applicant would be subjected to extreme humiliation, sexual violence, torture, cruel, inhuman treatment, or punishment within his first few days of interrogation and detention. The degrading treatment or punishment during imprisonment and interrogation processes is part of a systematic effort to break down, humiliate and degrade individuals in detention.

13. With the submissions, the adviser provided a copy of the applicant's passport, birth certificates, a photograph of the applicant's brother in a uniform, and a translated document titled "[title]" referring to the applicant's brother's death in combat with [soldiers]. (folios 49 - 50).

Country of nationality

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

15. The Tribunal finds that the claims should be assessed against Sri Lanka for the purposes of the Convention in s.36(2)(a) and as the receiving country for the purposes of the complementary protection obligations in s.36(2)(aa).

Has the applicant suffered any of the claimed harm?

16. In consideration of the evidence as a whole, the Tribunal is satisfied that the applicant's evidence in the course of the hearing was generally consistent with his written claims. The Tribunal is satisfied that the applicant's central claims have not changed throughout the process.

17. In the course of the hearing on 18 March 2015, the applicant confirmed that he was born in [Town 1] and that his wife and [child] continued to live in Sri Lanka with his in-laws. He told the Tribunal that his parents and his [brother] remain living in the same home in [Town 1]. The applicant confirmed that in 2000 he went to [Country 2] where he stayed until 2010 and that in 2008 he was in Sri Lanka for a few months during which time he got married. He worked as a fisherman in [Town 1] as well as in [Country 2].

18. The Tribunal asked the applicant about his claims that he had been harassed and interrogated by the Sri Lankan army and the applicant stated that in 2000 and in April 2008, incidents occurred. He said in January 2000, he was asked to go to the army camp but he did not go; instead his father went and told them that the applicant was not associated with the LTTE but his [brother]. Subsequently, the army returned to his parents' home when the applicant was Trincomalee and threatened them. His father reiterated that the applicant has no LTTE connections. In relation to the 2008 incident, the applicant stayed at his aunt's house in Trincomalee and whilst he was out, 3 to 4 people came asking about the applicant. The Tribunal noted that in the statutory declaration provided in support of the application, he mentioned that 7 to 8 people came not 3 to 4 and the applicant stated that it was 7 to 8 men. The applicant stated that he returned to [Town 1] and during that time his cousin was abducted.

19. The Tribunal asked the applicant about other incidents and the applicant stated that [in] April 2008, his [other] brother was taken to a camp in Trincomalee. His father paid about Rs.100,000

and his brother was released after being detained for seven days. The applicant stated that his brother was severely ill-treated and he suffers from mental illness as a result. The applicant discussed with the Tribunal the incident that occurred in November 2010 when he was taken and questioned by the EPDP who wanted to know of involvement he might have had with the LTTE. He said in May 2012, the EPDP detained him, took his ID and kept him in a dark room asking him questions about his brother.

20. The Tribunal asked the applicant about his brother's involvement in the LTTE. The applicant told the Tribunal that his [brother] joined the LTTE in 1995 and he died in 2000. He said his brother was involved in shooting down an army [vehicle]. When asked when that incident occurred, the applicant stated that he could not recall the year. The Tribunal asked the applicant about the position held by his brother with the LTTE and the applicant stated that his brother was a [certain rank] in the LTTE. The Tribunal noted that there appears to be inconsistencies in relation to the position held by his brother and the applicant stated that his brother was a [certain rank] in the LTTE and that he was a friend of Velupillai. The Tribunal asked the applicant how he knows about this friendship and the applicant stated that he had been told that there are photographs of his brother and Velupillai who was the head of the LTTE, as is publicly known.
21. The Tribunal asked the applicant about the photograph that has been provided to the Tribunal of his brother and the applicant stated that the photograph was with his mother who had sent it to the applicant. The Tribunal asked the applicant about the other translated document that has been provided titled "[title]" referring to the applicant's brother's death in combat with [soldiers]. The applicant stated that he obtained the document from the Internet.
22. The Tribunal indicated to the applicant that generally speaking and on balance country information would appear to suggest that being Tamil, an unsuccessful asylum seeker, a returnee from a Western country, and being a person who left Sri Lanka unlawfully, do not necessarily mean that there is a real chance or a real risk of harm. Moreover, the Tribunal indicated that arguably the laws in relation to illegal departure are laws of general application, applied in a non-discriminatory manner and for a legitimate purpose. The applicant stated that he feared returning to Sri Lanka.
23. The adviser informed the Tribunal that she would be providing the Tribunal with publicly available information on the internet relating to the applicant's brother and his role in the LTTE. Subsequently, the Tribunal received submissions and a document from the website [link deleted], **Error! Hyperlink reference not valid.**² providing details about the brother's death. The Tribunal notes that the documents provided referred to the brother's rank as [a different ranking officer], although the applicant is claiming that his brother was [of another rank].
24. Whilst there are some inconsistencies, in consideration of the evidence as a whole, the Tribunal is satisfied that the applicant had a [brother] who joined the LTTE in 1995. Whilst on the basis of the available information, the Tribunal is unable to resolve the inconsistency in relation to the position held by the brother with the LTTE, the Tribunal accepts as being plausible that the applicant's brother was a [certain rank] in the LTTE. The Tribunal considers the position of [the rank] as being a position that would be perceived as being of leadership within the LTTE. The Tribunal accepts as plausible that the applicant's brother knew and was associated with Velupillai, a leader in the LTTE. The Tribunal accepts as plausible that the applicant's brother was involved in an incident that related to the shooting down of a Sri Lankan army [vehicle]. The Tribunal accepts as plausible that the applicant's brother died in action in 2000. On the basis of

² Accessed by the Tribunal subsequent to the hearing and the information was confirmed.

the available information and in consideration of the evidence as a whole, the Tribunal is satisfied that the brother's active involvement in, and connection with the LTTE would have given the applicant and members of his family an adverse profile of being imputed with having pro-LTTE and anti-Sri Lankan authorities political opinions and consequently it is plausible that the applicant and members of his family experienced incidents of harm.

25. On the basis of the available information and given the Tribunal's conclusions in relation to the brother's profile, the Tribunal is satisfied that it is plausible that in 2000 army officers went to the applicant's family home and he was asked to report for interrogation but he did not do so and instead his father went to the camp and spoke to officers. The Tribunal is satisfied that two weeks after that incident, the army returned to the applicant's parents' home asking about his whereabouts, that on his return to Sri Lanka in 2008, the authorities enquired about the applicant from his uncle, that his [cousin] was taken, that [in] April 2008, his [other brother] was picked up in an army roundup and was ill-treated when he was detained, that in 2010 and 2012 on his return to Sri Lanka, men associated with the EPDP went to his home asking about him and detained him for an hour. In essence and whilst the Tribunal has some doubts, the Tribunal accepts as plausible that the applicant has experienced the claimed incidents of harm and that those incidents amount to serious and significant harm.

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

26. For the stated reasons, the Tribunal has accepted that the applicant, through his brother's active involvement and position in the LTTE, has a profile that has been and would be of adverse interest to the Sri Lankan authorities. The applicant does not claim that he personally is, or has ever been, an LTTE member, supporter or sympathiser, however his brother's involvement in the LTTE would have given the applicant an adverse profile.
27. On the basis of the available information, the Tribunal accepts that the applicant is a Tamil from Trincomalee, that he had lived in [Country 2], that he may be considered as a failed asylum seeker and a forced returnee from a Western country, and that he departed Sri Lanka unlawfully. In consideration of the evidence as a whole, the Tribunal is satisfied that cumulatively, those factors do mean that the applicant has an adverse profile, that he would be perceived as having actual links and associations with the LTTE, that he would be perceived as being a sympathiser, that he would be considered to be a dissident, and that he would face more harm when returned to his area, that he would be subjected to more scrutiny than other returnees because of his profile.
28. The Tribunal notes that credible independent country information essentially indicates that it is those who have actual or perceived strong LTTE links/sympathisers who can be targeted. Relevantly, the UNHCR refers to the harm that can be suffered by persons with actual or perceived links to the LTTE *"Information has been published documenting cases of mistreatment and torture of women and men in detention (police custody or other forms of detention), for reason of their or their family members' alleged former links with the LTTE. Killings have been reported which appear to be politically motivated, targeting persons believed to be LTTE sympathizers. Sexual violence, including but not limited to rape, against Tamil men in detention has also been reported recently, including reports of cases perpetrated in the post-conflict period. Sexual harassment of former LTTE combatants in rehabilitation centres has also been reported."*³

³ UN High Commissioner for Refugees (UNHCR) 2012, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka*, 21 December, pp.27-28 (CISLIB Sri Lanka CIS29707)

29. In January 2014, Human Rights Watch (HRW) reported that it had published new evidence in February 2013 *'that rape and sexual violence has been a key element of broader torture of suspected LTTE members and supporters even since the war's end'*. Sri Lanka's *'government rejected these findings and claimed they were fabrications by individuals seeking to embellish their overseas asylum claims'*. HRW was *'unaware of any government investigations into the reported sexual abuse'*.⁴ A November 2013 BBC report also refers to Human Rights Watch reporting cases of sexual violence involving the security forces following the end of the civil war in Sri Lanka, and to other allegations of rape and torture of Tamils suspected of links to the LTTE.⁵
30. In July 2014, Amnesty International commented on Tamil asylum seekers returned to Sri Lanka: *Sri Lankan Tamils remain a target of harassment and arrest upon return because of their ethnicity and suspected links to the Liberation Tigers of Tamil Eelam (LTTE). Asylum seekers have faced torture upon return to Sri Lanka from countries such as the UK and Canada. Amnesty International has interviewed a number of people who were tortured by the Sri Lankan security forces 'on suspicion' of being members of the Liberation Tigers of Tamil Eelam (LTTE) in the last two years. All ethnic groups in Sri Lanka are at risk of torture and other ill-treatment in police custody, including sexual violence, which is pervasive.*⁶
31. An October 2014 background paper by the Human Rights Law Centre⁷ also refers to the treatment of persons suspected of having links to the LTTE who return to Sri Lanka.⁸
32. The Amnesty International briefing on Sri Lanka dated September 2014 indicates that: *Persistent surveillance, intimidation and monitoring of former LTTE members by the security forces continues to restrict their freedom of movement and association, and has, according to witnesses interviewed by Amnesty International and others, inhibited them from reintegrating into the social and economic life of their communities. Amnesty International has received numerous accounts from male and female former LTTE members who describe repeated arrests and mistreatment including sexual harassment, rapes and other violence at the hands of security forces since the end of the conflict. Individuals arrested and detained for their suspected involvement with the LTTE, particularly Sri Lanka's many victims of torture, also face obstacles to reintegration as a result of the physical and psychological harm inflicted on them in detention.*⁹

⁴ Human Rights Watch 2014, *World Report 2014 – Sri Lanka*, 21 January <<http://www.hrw.org/world-report/2014/country-chapters/sri-lanka>> Accessed 29 January 2014 (CISNET Sri Lanka CX317506); *We Will Teach You a Lesson" - Sexual Violence against Tamils by Sri Lankan Security Forces*, 26 February 2013, ISBN: 1-56432-993-3, available at: <http://www.refworld.org/docid/5130850f2.html>

⁵ Harrison, F 2013, *"Tamils still being raped and tortured"* in Sri Lanka, *British Broadcasting Corporation (BBC)*, 9 November <<http://www.bbc.co.uk/news/world-asia-24849699>> Accessed 12 November 2013 (CISNET Sri Lanka (CX315497))

⁶ Amnesty International 2014, *Urgent Action: Asylum Seekers at risk of return to Sri Lanka*, ASA 12/003/2014, 9 July <<http://www.amnesty.org/en/library/asset/ASA12/003/2014/en/8cc91d75-f243-4194-be98-88fcb3d693b9/asa120032014.en.pdf>> Accessed 29 July 2014 (CISLIB Sri Lanka CIS29216)

⁷ The Human Rights Law Centre describes itself as 'an independent and not-for-profit organisation' which 'protects and promotes human rights in Australia and beyond through a strategic mix of legal action, advocacy, education and capacity building'. Human Rights Law Centre 2014, *Can't flee, can't stay: Australia's interception and return of Sri Lankan asylum seekers*, March <http://www.hrlc.org.au/wp-content/uploads/2014/03/HRLC_SriLanka_Report_11March2014.pdf> Accessed 22 August 2014 (CISLIB Sri Lanka CIS29695)

⁸ Human Rights Law Centre 2014, *Torture, rape and ill-treatment suffered by Sri Lankans who return home*, 1 October <<http://hrlc.org.au/wp-content/uploads/2014/10/HRLC-background-brief-on-Sri-Lankan-returnees-update.pdf>> (CISLIB Sri Lanka CIS2F827D91350)

⁹ Amnesty International 2014, *Ensuring Justice: Protecting human rights for Sri Lanka's future*, ASA 37/011/2014, September, p. 11 <<http://amnesty.org/en/library/asset/ASA37/011/2014/en/4c09c88e-a298-4cba-bdee-4b6a077ef55a/asa370112014.en.pdf>> (CISLIB Sri Lanka CIS2F827D91324)

33. In an October 2014 report on Sri Lanka¹⁰, the Department of Foreign Affairs and Trade (DFAT) states that whilst a person's real or perceived links with the LTTE may give rise to protection, this depends on the nature of the links, including:
- a. Persons who held senior positions with considerable authority in the LTTE civilian administration, when the LTTE was in control of large parts of what are now the northern and eastern provinces of Sri Lanka.
 - b. Former LTTE combatants or —cadres. Former LTTE combatants or —cadres who, due to injury or other reason, were employed by the LTTE in functions within the administration, intelligence, —computer branch or media (newspaper and radio).
 - c. Former LTTE supporters who may never have undergone military training, but were involved in sheltering or transporting LTTE personnel, or the supply and transport of goods for the LTTE.
 - d. LTTE fundraisers and propaganda activists and those with, or perceived as having had, links to the Sri Lankan diaspora that provided funding and other support to the LTTE.
 - e. Persons with family links or who are dependent on or otherwise closely related to persons with the above profiles.
34. The Tribunal is satisfied that on balance, credible independent country information fundamentally indicates that it is those who have actual or perceived strong LTTE links/sympathisers who can be targeted. As the Tribunal has found that the applicant through his brother's involvement has a profile of being associated with, or suspected of being involved with the LTTE, the Tribunal accepts that the applicant would be imputed with an adverse political opinion by the Sri Lankan authorities.
35. In consideration of the evidence as a whole and for the stated reasons, the Tribunal is satisfied that when considered cumulatively, there is a real chance that the applicant faces serious harm amounting to persecution on the bases of his Tamil ethnicity and imputed political opinions.

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

36. The Tribunal notes that DFAT has indicated that those arriving in Sri Lanka are subject to the same entry procedures. The advice from DFAT was that returnees, regardless of ethnicity, may be questioned by both the police and the State Intelligence Service and checked against intelligence databases.¹¹ In its Eligibility Guidelines, the UNHCR has referred to questioning of returnees by Immigration officials and the State Intelligence Service.¹²
37. In its 16 February 2015 *Country Reports: Sri Lanka*, DFAT continued to indicate that Sri Lankan returnees are treated according to standard procedures, namely:

¹⁰ Department of Foreign Affairs and Trade 2014, *DFAT Thematic Report - People with Links to the Liberation Tigers of Tamil Eelam*, 3 October, s.4.1-4.2

¹¹ DFAT 2012, *DFAT Report 1446 – RRT Information Request: LKA40999*, 22 October; see also DFAT 2012, *Country Information Report No. 12/67*, 29 November, CX299951

¹² UNHCR 2012, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka*, 21 December

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

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

For returnees travelling on temporary travel documents, police undertake an investigative process to confirm the person's identity, which would address whether someone was trying to conceal their identity due to a criminal or terrorist background, or trying to avoid, among other things, court orders or arrest warrants. This often involves interviewing the returning passenger, contacting the person's claimed home suburb or town police, contacting the person's claimed neighbours and family and checking criminal and court records. DFAT assesses that Sri Lankan returnees are treated according to these standard procedures, regardless of their ethnicity and religion—Tamil, Sinhalese and Muslim returnees are treated the same way on arrival in Sri Lanka. DFAT further assesses that detainees are not subject to mistreatment during their processing at the airport.¹³

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

Most Sri Lankan returnees from Australia are questioned by police on return and, where an illegal departure from Sri Lanka is suspected, are charged under the I&E Act. DFAT understands that in most cases, these individuals have been arrested by the police at Colombo international airport. As part of this process, most returnees will have their fingerprints taken and be photographed. They are transported by police to the Magistrates Court in Negombo at the first available opportunity after investigations are completed, when custody and responsibility for the individual shifts to the courts or prison services. The Court makes a determination as to the next steps for each individual. Those arrested can remain in police custody at the CID Airport Office for up to 24 hours. Should a magistrate not be available before this time—for example, because of a weekend or public holiday—those charged are held at the nearby Negombo Prison.¹⁴

¹³ Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Report Sri Lanka', 16 February 2015.

¹⁴ Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Report Sri Lanka', 16 February 2015

39. In August 2011, the Immigration and Refugee Board of Canada (IRBC) reported on the treatment of those returning to Sri Lanka, including failed asylum seekers. The report cited information provided by the Canadian High Commission in Colombo, which noted that “[t]he screening process is the same for all persons returning to Sri Lanka – whether voluntary or by escort. The process is not impacted by ethnicity”.¹⁵
40. The IRBC report provides information on the process for persons removed to Sri Lanka. Further information on procedures at the airport can also be found in the UK Home Office Country of Origin Information report of March 2012.¹⁶
41. The UNHCR has indicated that returnees may receive further contact from the authorities after arriving in their village of destination:

*UNHCR post-return monitoring data indicate that in 2011, upon arrival in the village of destination, 75% of the refugee returnees were contacted at their homes by either a military (38%) or police (43%) officer for further “registration”. 26% of these returnees were again visited at home for subsequent interviews, with a handful receiving a number of additional visits by the police or military.*¹⁷

42. In advice of November 2012, DFAT stated that it had not received any evidence to support allegations of mistreatment of returning Tamils to Sri Lanka. DFAT stated that it had spoken to NGOs involved in facilitating the voluntary return of former asylum seekers/refugees and that NGOs had told DFAT that they had not witnessed or received any allegations of mistreatment from any of the Tamil Sri Lankans they had facilitated. DFAT referred to advice from the British High Commission in Colombo to the effect that they had received no substantiated cases of mistreatment on return for their returnees.¹⁸ DFAT has also stated that NGOs had not raised specific issues regarding the treatment of Tamils returning to the north and east. It stated that NGOs had not raised with them issues concerning the treatment of Tamils who had lived in other countries where the LTTE was active for extended periods.¹⁹
43. In its *Country Reports: Sri Lanka* of 16 February 2015, DFAT provided the following information on the experience of returnees following return:

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

¹⁵ Immigration and Refugee Board of Canada, ‘Information on the treatment of Tamil returnees to Sri Lanka, including failed refugee applicants; repercussions, upon return, for not having proper government authorization to leave the country, such as a passport’, LKA103815.E, 22 August 2011 [CIS29896](#)

¹⁶ UK Home Office, ‘Sri Lanka: Country of Origin Information (COI) Report’, 7 March 2012, 7 March, pp.202-203 <<http://www.ind.homeoffice.gov.uk/sitecontent/documents/policyandlaw/coi/srilanka12/report-070313.pdf?view=Binary>> Accessed 9 May 2012 [CIS29709](#)

¹⁷ UN High Commissioner for Refugees, ‘UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka’, 21 December 2012, p.8 <<http://www.unhcr.org/refworld/docid/50dla08e2.html>> Accessed 25 August 2014 [CIS29707](#)

¹⁸ DFAT 2012, *Country Information Report No. 12/67*, 29 November, CX299951

¹⁹ DFAT 2013, *MRT/RRT Information Request: LKA41452*, DFAT Report 1478, 28 February and 16/2/15

*Many returnees will have incurred significant expenses to undertake their outward journey and, in some cases, will have incurred debt to do so. Many are apprehensive about finding suitable employment opportunities on return. Those who have skills which are in high demand in the labour market will be best placed to find well-paid employment. Returnees who receive reintegration assistance on their return to Sri Lanka find it easier to resettle.*²⁰

44. Sources such as Human Rights Watch, Freedom from Torture and Amnesty International²¹ have referred to mistreatment of returnees or failed asylum seekers. Sources such as Freedom from Torture and Human Rights Watch identify a risk of harm in particular to persons with certain links to the LTTE. In November 2011, the UK-based Freedom from Torture published a report entitled *Out of the Silence: New Evidence of Ongoing Torture in Sri Lanka, 2009-2011*. Freedom from Torture reported that those at particular risk included Tamils who had an actual or perceived association with the LTTE.²² In September 2012, Freedom from Torture released a further report on cases of reported torture. The organisation concluded that it was a combination of residence in the UK and an actual or perceived association with the LTTE which placed individuals at risk of torture and inhuman and degrading treatment. It stated that those at particular risk included “*Tamils with an actual or perceived association with the LTTE, including those returning from abroad*”.²³ Human Rights Watch has expressed the view that “*Sri Lankan nationals who have been affiliated with or are considered to be supporters of the Liberation Tigers of Tamil Eelam (LTTE), would be at significant risk of persecution if deported back to Sri Lanka*”.²⁴
45. Other sources, including the current United Nations High Commissioner for Refugees (UNHCR) Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka point to a risk for those suspected of certain LTTE connections.²⁵
46. In *GJ and Others (post-civil war: returnees) Sri Lanka* CG [2013] UKUT 00319 (IAC)²⁶, the UK Upper Tribunal (Immigration and Asylum Chamber) found the following categories of persons to be at real risk of persecution or serious harm on return to Sri Lanka:
- (a) Individuals who are, or are perceived to be, a threat to the integrity of Sri Lanka as a single state because they are, or are perceived to have a significant role in relation to post conflict Tamil separatism within the diaspora and/or a renewal of hostilities within Sri Lanka.
 - (b) Journalists (whether in print or other media) or human rights activists, who, in either case, have criticised the Sri Lankan government, in particular its human rights record, or who are associated with publications critical of the Sri Lankan government.

²⁰ Department of Foreign Affairs and Trade (DFAT), ‘*DFAT Country Report Sri Lanka*’, 16 February 2015

²¹ Amnesty International, ‘*Urgent Action: Asylum Seekers at risk of return to Sri Lanka*’, 9 July 2014, <<http://www.amnesty.org/en/library/asset/ASA12/003/2014/en/8cc91d75-f243-4194-be98-88fcb3d693b9/asa120032014en.pdf>> Accessed 29 July 2014 CIS29126

²² Freedom from Torture 2011, *Out of the Silence: New Evidence of Ongoing Torture in Sri Lanka, 2009 – 2011*, 7 November

²³ Freedom from Torture 2012, *Sri Lankan Tamils tortured on return from the UK*, 13 September, pp.1-2 <http://www.tamilnet.com/img/publish/2012/09/Freedom_from_Torture_briefing92012.pdf> Accessed 17 September 2012

²⁴ Human Rights Watch 2011, *Letter to United Kingdom's Home Secretary Theresa May and Foreign Secretary William Hague on Deportation of Rejected Asylum*, 16 June, <http://www.hrw.org/news/2011/06/16/letter-united-kingdom-s-home-secretary-theresa-may-and-foreign-secretary-william-hag>; see also Human Rights Watch 2012, *United Kingdom: Document containing cases of Sri Lankan deportees allegedly tortured on return*, 15 September, <http://www.hrw.org/node/110167>

²⁵ UNHCR 2012, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka*, 21 December

²⁶ <http://www.refworld.org/pdfid/51da951c4.pdf>; this has been upheld on appeal by the Court of Appeal (England and Wales) in *MP and NT (Sri Lanka) v Secretary of State for the Home Department* [2014] EWCA Civ 829 at <http://www.refworld.org/docid/53a463a14.html>

- (c) Individuals who have given evidence to the Lessons Learned and Reconciliation Commission implicating the Sri Lankan security forces, armed forces or the Sri Lankan authorities in alleged war crimes. Among those who may have witnessed war crimes during the conflict, particularly in the No-Fire Zones in May 2009, only those who have already identified themselves by giving such evidence would be known to the Sri Lankan authorities and therefore only they are at real risk of adverse attention or persecution on return as potential or actual war crimes witnesses.
- (d) A person whose name appears on a computerised “stop” list accessible at the airport, comprising a list of those against whom there is an extant court order or arrest warrant. Individuals whose name appears on a “stop” list will be stopped at the airport and handed over to the appropriate Sri Lankan authorities, in pursuance of such order or warrant.
47. In consideration of the evidence as a whole, the Tribunal finds that there is not a real chance that the applicant would suffer harm amounting to persecution simply on the basis of being a Tamil failed asylum seeker from the Northern Province, or a returnee from a Western country. On balance, country information indicates that it is essentially those with an adverse profile, who could encounter harm in Sri Lanka, if returned from a western country as failed asylum seekers. The Tribunal is therefore satisfied that there is a real chance that the applicant would suffer serious harm on the basis of the adverse profile.

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

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

Under Section 45(1)(b) of the Act, it is an offence to depart other than via an official port of entry or exit, such as a seaport or airport. Penalties for leaving Sri Lanka illegally can include custodial sentences of up to five years and a fine of up to 200,000 Sri Lankan rupees (around AUD 1,600)....Returnees are generally considered to have committed an offence under the I&E Act if they depart Sri Lanka irregularly by boat. Where a returnee is travelling voluntarily on their own passport on a commercial flight they may not come to the attention of local authorities if they departed Sri Lanka legally through an official port on the same passport, because they have not committed any offence under the I&E Act.²⁷

49. While there is provision in the law for a custodial sentence, there is information, including advice from DFAT, consistent with the advisor’s submissions, suggesting that in practice fines have been issued to act as a deterrent to joining future boat ventures. DFAT advised in October 2012 that, under Sri Lankan law, people who depart from any place other than an approved port of departure and/or depart without valid travel documents can be charged with an offence under the *Immigration and Emigration Act*. DFAT reported that for offences committed under the Act a prison sentence from one to five years and a fine of LKR 50,000 to LKR 200,000 may be applicable but that this was seldom enforced. DFAT subsequently advised that, since 2 November 2012, Sri Lankan irregular maritime arrivals returned from Australia have been charged under the law for offences related to their irregular departure. Since then Sri Lankan

²⁷Department of Foreign Affairs and Trade (DFAT), ‘DFAT Country Report Sri Lanka’, 16 February 2015.

nationals who arrived in Australia by boat have been charged for offences regarding their illegal departure.²⁸ It was reported in December 2012 that 50 asylum seekers returned from Australia had each spent three nights in prison before being bailed to reappear before the court. The report cited a lawyer as saying that, if found guilty of leaving the country improperly, the people would likely be fined between 50,000 and 100,000 rupees (\$880 and \$1760).²⁹

50. In its *Country Report: Sri Lanka* of 16 February 2015³⁰, DFAT advised:

DFAT was informed in March 2014 by Sri Lanka's Attorney-General's Department, which is responsible for the conduct of prosecutions, that no returnee who was just a passenger on a people smuggling venture has been given a custodial sentence for departing Sri Lanka illegally but fines have been issued to act as a deterrent towards joining boat ventures in the future. The Magistrates Court in Colombo typically levies fines of around 5,000 Sri Lankan Rupees (around AUD 40) for persons attempting to depart Sri Lanka irregularly on boats. However, in Negombo, the magistrate, who handles a large number of these cases, typically levies fines of around 50,000 Sri Lankan Rupees (around AUD 400) to act as a deterrent. In most cases, returnees have been granted bail on personal recognisance immediately by the magistrate, with the requirement for a family member to act as guarantor. Sometimes returnees then need to wait until a family member comes to court to collect them.....DFAT has been advised that no returnees from Australia to Sri Lanka have been charged under the PTA. While credible, DFAT cannot verify this claim.

51. Advice from DFAT and other sources³¹ indicate that returnees charged with offences related to illegal departure may be held on remand for a period before being released on bail. DFAT has advised that returnees are arrested and held at the airport for up to 24 hours. They are then produced before a magistrate to apply for bail. All persons are granted bail on personal recognisance, with the requirement for a family member to stand as guarantor. There is no requirement to pay for bail. If the person needs to be held for more than 24 hours, for instance when a person arrives on the weekend or a public holiday, they are placed in the remand section of the Negombo Prison until the court is in session.³²

52. In December 2013, DFAT advised that '*For bailable offences under the I&E Act [Immigrants and Emigrants Act], post has been informed that, as a matter of practice, bail is granted to almost all people that were passengers on people smuggling ventures. Bail will be granted at the first available instance (and minors will not be charged with any offence)*'.³³ In March 2013 DFAT advised that it "*is not aware of allegations of mistreatment of returnees while on remand. [DFAT] does not monitor the treatment of returnees while on remand.*"³⁴

53. The Tribunal has carefully considered the submissions as well as other material, and is satisfied that the laws in relation to illegal departure are laws of general application, applied in a non-discriminatory manner and serving a legitimate purpose of dealing with people who depart their

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

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

³⁰ DFAT, *Country Report - Sri Lanka* 16 February 2015

³¹ See, for instance, Doherty, B. 2012, "Asylum denied, a penalty awaits at home", *The Sydney Morning Herald*, 8 December

³² DFAT 2013, *MRT/RRT Information Request: LKA41452*

³³ Department of Foreign Affairs and Trade (DFAT), '*Country Information Request No: LKA15326: Personal surety*', 18 December 2013 CX316873

³⁴ Department of Foreign Affairs and Trade (DFAT), '*RRT Country Information Request LKA41955 - Treatment of returned failed asylum seekers*', 28 March 2013 CX305410

country unlawfully. Having considered the relevant country information, the Tribunal is satisfied that the laws regarding unlawful departure, which includes being arrested, charged and fined (irrespective of amount) are not selectively enforced or applied in a discriminatory way for a Convention reason, as they apply to all persons who depart illegally. On the evidence before it, Ogive rise to persecution as contemplated by s.91R(1)(c). This includes processing at the airport, questioning, and being held on remand for a few days awaiting a bail hearing and being fined. With regards to the loss of liberty while on remand, because it arises from the non-discriminatory operation of a law of general application, the Tribunal finds that it does not amount to persecution for the purposes of s.91R(1)(c).

54. Having considered the information before it, the Tribunal is satisfied that whilst the treatment faced by Sri Lankan returnees who have departed Sri Lanka unlawfully, does not normally amount to persecution or give rise to such harm in the reasonably foreseeable future, when assessed cumulatively with what is accepted of the applicant's personal profile and circumstances in Sri Lanka, the Tribunal is satisfied that the process involves and gives rise to differential treatment for Convention reasons. Because of his specific profile, the Tribunal is satisfied that there is a real chance of serious harm occurring as a result of differential treatment the applicant faces during interrogation, questioning, detention, and penalty. Therefore, in consideration of the evidence as a whole, the Tribunal is satisfied that the applicant does now and in the reasonably foreseeable future has a well-founded fear of persecution arising essentially and significantly for one or more of the five Convention reasons if he returns to Sri Lanka.
55. In essence, in consideration of the evidence as a whole, including the applicant's individual circumstances either singularly or cumulatively, the Tribunal is satisfied that the applicant faces a real chance of persecution and that relocation is not reasonable in his circumstances. It follows that the Tribunal is satisfied that the applicant has a well-founded fear of persecution for a Convention reason in Sri Lanka now and in the reasonably foreseeable future. Accordingly, the Tribunal is satisfied that the applicant is a refugee under section 36(2)(a) of the Act. There is nothing to suggest that the applicant has the right to enter and reside in any country other than his country of nationality, namely Sri Lanka, of the kind referred to in subsection 36(3) of the Act.

CONCLUSIONS

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

DECISION

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

Antoinette Younes
Senior Member