

1301660 [2013] RRTA 624 (9 September 2013)

DECISION RECORD

RRT CASE NUMBER: 1301660
DIAC REFERENCE(S): CLF2012/199698
COUNTRY OF REFERENCE: Sri Lanka
TRIBUNAL MEMBER: Paul Millar
DATE: 9 September 2013
PLACE OF DECISION: Sydney
DECISION: The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

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 (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant who claims to be a citizen of Sri Lanka, applied to the Department of Immigration for the visa [in 2012] and the delegate refused to grant the visa [in 2013].

RELEVANT LAW

3. The criteria for a protection visa are set out in s.36 of the Act and Part 866 of 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.

Refugee criterion

4. 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 Refugee as amended by the 1967 Protocol relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
5. 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.
6. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1, *Applicant S v MIMA* (2004) 217 CLR 387, *Appellant S395/2002 v MIMA* (2003) 216 CLR 473, *SZATV v MIAC* (2007) 233 CLR 18 and *SZFDV v MIAC* (2007) 233 CLR 51.
7. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.
8. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.

9. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve 'serious harm' to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). Examples of 'serious harm' are set out in s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.
10. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors.
11. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase 'for reasons of' serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.
12. Fourth, an applicant's fear of persecution for a Convention reason must be a 'well-founded' fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a 'well-founded fear' of persecution under the Convention if they have genuine fear founded upon a 'real chance' of being persecuted for a Convention stipulated reason. A 'real chance' is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.
13. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence. The expression 'the protection of that country' in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.
14. Whether an applicant is a person in respect of whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

Complementary protection criterion

15. 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').

16. 'Significant harm' for these purposes is exhaustively defined in s.36(2A): s.5(1). A person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. 'Cruel or inhuman treatment or punishment', 'degrading treatment or punishment', and 'torture', are further defined in s.5(1) of the Act.
17. There are certain circumstances in which there is taken not to be a real risk that an applicant will suffer significant harm in a country. These arise where it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that the applicant will suffer significant harm; where the applicant could obtain, from an authority of the country, protection such that there would not be a real risk that the applicant will suffer significant harm; or where the real risk is one faced by the population of the country generally and is not faced by the applicant personally: s.36(2B) of the Act.
18. 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 – PAM3 refugee and humanitarian - Complementary Protection guidelines and PAM3 Refugee and humanitarian - Refugee Law Guidelines - to the extent that they are relevant to the decision under consideration.
19. The Tribunal notes the explanation of the 'risk threshold' in the Complementary Protection Guidelines, however, in considering s.36(2)(aa) it has proceeded on the basis that the 'real risk' test imposes the same standard as the 'real chance' test applicable in the context of assessment of the Refugee Convention definition following the Full Federal Court decision in *MIAC v SZQRB* [2013] FCAFC 33.

CONSIDERATION OF CLAIMS AND EVIDENCE

Primary application

20. The following claims were made in the primary application documents. The applicant was born [date] in [Village 1], Sri Lanka. With his application, the applicant lodged a statutory declaration in which he put forward the grounds of his protection claims. They can be summarised as follows:
 - The applicant was made to perform forced labour by the army in 2010 and was sexually assaulted by them.
 - In December 2011 and February 2012 the CID came to the applicant's home on suspicion that his father had been involved with the LTTE and asked the applicant and his brother to report to them.
 - In fear of harm from them, the applicant left [Village 1] and went to stay in [Town 2]. Because the CID again came to the family home, he left Sri Lanka illegally by boat.
21. The applicant lodged various documents with the department (birth certificates; identity cards; pages from a Sri Lankan passport issued to the applicant [in] 2010 (folio 6); certificate

for training completed by 2011; a reference from his school principal and a document not translated but issued by the school principal).

22. On 21 May 2012 an officer of the department interviewed the applicant and a record of that interview appears at folios 74-76 of the department file. The applicant advanced a claim that his father went missing and was being investigated.
23. On 10 July 2012 an officer from the department conducted an Irregular Maritime Arrival Entry Interview ("the entry interview") with the applicant. According to the record of the interview (folios 77 - 84) the applicant advanced his claim about the CID coming to his home looking for him in 2012.
24. On 29 September 2012 the delegate interviewed the applicant with the assistance of a Tamil speaking interpreter. The Tribunal has listened to an audio recording of the interview and the applicant discussed the grounds of his protection claims as summarised above.
25. The delegate found not credible the applicant's claims about the CID going to his home from late 2011 to locate him. The delegate found credible the applicant's account of being sexually abused by army officers but found the risk of this occurring again was remote.
26. The delegate found that the applicant's fear of persecution on the basis that he was a Tamil who left Sri Lanka illegally and would return there as a failed asylum seeker was not well founded. For the same reasons the delegate found the applicant did not meet the complementary protection criterion.

Review application

27. The applicant nominated [name] as his registered migration agent, authorised representative and recipient in relation to the review.
28. By letter 27 March 2013 the representative made submissions on the behalf of the applicant. These submissions have been dealt with below in the Findings section of this decision.
29. The applicant appeared before the Tribunal on 5 April 2013 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Tamil and English languages. The representative attended.
30. The following is a recitation of evidence given by the applicant at the hearing. An assessment of the credibility of the applicant's claims and evidence appears further below in the Findings section of this decision. At the beginning of the hearing the Tribunal put the applicant on notice that it was the task of the Tribunal to decide if his evidence about his protection claims was credible even though the delegate accepted some aspects of his account.
31. The applicant comes from [Village 1]. His parents separated [several years ago] and prior to that time his father worked as a fisherman. His father had not had any difficulties with Sri Lankan authorities or the LTTE. The applicant, his father and his brother had never been involved with the LTTE. His parents separated due to disputes over the father's alcoholism and money. The applicant has not seen or heard from his father since then and does not know where he is.

32. The applicant completed his education up until [a certain year] following which he worked for one year as a mason. After that he worked as a fisherman in [Village 1] on a boat owned by another person. To get to work the applicant had to pass through an army checkpoint and he worked during the fishing season which was from November until April each year. In the other months the applicant stayed at home and did labouring work if it was available.
33. In 2010 the army asked the applicant and others to do labouring work for them in the army camp. He would do this after fishing and it was finished in April 2010. On about ten or fifteen occasions when the applicant did the work, the officers told him to go to a room in the camp where they sexually assaulted him. They placed a burning cigarette on his [body] which he said has left a scar.
34. In December 2011 six officers from the CID came to the family home carrying guns, looking for the applicant's father and asking about him. The applicant was not home at the time because he was working. His mother told him that the officers were asking about his father and alleged that he was involved with the LTTE. They asked how many children he had and ordered that the applicant and his brother report to them at their camp a few kilometres from his home to be questioned about the father.
35. The applicant and his brother did not go to the camp because they were afraid they would be tortured. The applicant said that it was very common for the authorities to torture people when they were investigating something. The applicant and his brother continued to stay at the family home and go to work.
36. The officers next came to the family home in February 2012 at the beginning of the month when the applicant and his brother were again at work. They came in the morning asking for the applicant and his brother but did not direct them to do anything. Two or three days later they came back to the family home asking again for the applicant and his brother. They were not at home at the time and had gone to work as usual. The officers spoke to their mother.
37. The officers returned a third time at night and on this occasion they searched the house. The applicant was still at work at the time and his brother was not there. After this particular visit, they both became afraid for their safety because, up until that time, they thought the officers really only wanted their father. The fact the officers searched the house and came at night put fear into the applicant and his brother and made the applicant decide he should leave [Village 1] immediately which he did one or two days later.
38. He went to [Town 2] where he remained until May 2012 when he left Sri Lanka. He thought the officers would not come and look for him in that town so he was going to try and live there. He thought that he was only at risk from the authorities in [Village 1]. He passed through army checkpoints to get to [Town 2] but did not have difficulty doing so.
39. He ceased living in [Town 2] and left Sri Lanka illegally by boat because while he was in [Town 2] he spoke to his mother on the telephone who told him not to come back to [Village 1] because the officers were looking for him.
40. The applicant is afraid to return to Sri Lanka because he left the country illegally and before he left Sri Lanka the officers were looking for him. He also referred to being sexually assaulted in 2010 and he would not have freedom if living in fear of the authorities in Sri Lanka.

41. The applicant is a Hindu and said he practised his religion by going to a temple in Sri Lanka. When asked if he feared harm because he was Hindu, he said he did not fear harm on that ground but because of language the Sinhalese did things and Tamils had no rights; they could not talk to the Sinhalese; they won't listen to him and they were causing problems.
42. The applicant's mother lives in [Village 1] in the family home. [In] February 2012, after the applicant left [Village 1] and went to live in [Town 2], she stopped living in the family home and went to live with his sister also in [Village 1]. She did that because at the end of February 2012 the authorities twice went to the family home looking for him after he had gone to [Town 2].
43. The authorities did not come back after that and, at some stage after the applicant came to Australia, his mother returned to live in the family home. She supports herself with help from the applicant's sister and an uncle who has a [farm] in [Village 1].
44. The applicant's sister's husband is in Australia having left Sri Lanka approximately three or four years ago. The applicant said his brother-in-law had had difficulties after the authorities asked him to help build a camp in the village and he was beaten. The applicant said he did not have any difficulties with the authorities because of his brother-in-law.
45. The applicant's brother is [age] and he is in Australia. His brother also worked as a fisherman on a different boat. He thought his brother stopped living in the family home in February 2012 and was hiding with friends in [Village 1] because the authorities were coming to the family home looking for him and the applicant. Subsequently he also left [Village 1].
46. To the applicant's knowledge his brother did not have difficulties with the authorities or anyone else in Sri Lanka prior to the authorities coming to the family home in December 2011 looking for their father.
47. The applicant's brother had once travelled to India for approximately one month in 2012 to see some friends. It was before the authorities came to the family home in February 2012 looking for the applicant and his brother. He had no difficulties leaving and re-entering Sri Lanka.
48. However, the applicant's brother told the applicant in Australia that he believes the authorities have been looking for him because he had gone to India and therefore could be involved with the LTTE. The applicant was not aware of the authorities doing that apart from the occasions they came to the family home in December 2011 and February 2012.

Country information

Current political context and risk profiles

49. In 2004, the United People's Freedom Alliance (UPFA) formed a minority government in Sri Lanka, mainly comprised of the Sri Lanka Freedom Party (SLFP) and the *Janatha Vimukthi Peramuna* (People's Liberation Front or JVP). In 2005, Mahinda Rajapaksa of the SLFP narrowly won the Presidential election. In January 2008, President Rajapaksa cancelled the ceasefire agreement with the Liberation Tigers of Tamil Eelam (LTTE) after numerous

violations of the agreement by the LTTE and ordered a new offensive against them. The government claimed final victory of the LTTE in May 2009.¹

50. Since the defeat of the LTTE, President Rajapaksa's UPFA government has been characterised by intransigence regarding long-standing Tamil grievances, and increasing intolerance of persons and groups that criticise or obstruct its agenda. Power in Sri Lanka is increasingly concentrated in the hands of the Rajapaksa family. In this respect, a 2011 *Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka* states that "the government has used its military success to create a discourse of triumphalism, which celebrates its claims to having developed the means and will to defeat 'terrorism.' It is a discourse couched in terms of Sinhala majoritarianism that presents the defeat of the LTTE as the defeat of all Tamil legitimate political aspirations".²
51. Minority Rights Group International (MRGI) stated that "[t]he end of the conflict was marked by a wave of triumphalism on the part of the government" Furthermore, "[t]here have been attacks on opposition politicians and the media, a clampdown on civil society organizations, and growing intolerance of any form of opposition and dissent".³ Writing in 2011, the International Crisis Group argued that "[t]he government's intransigence and triumphalism a full two years after declaring victory over the LTTE has meant the country is yet to see any semblance of compromise or inclusiveness. Instead, President Rajapaksa and his powerful family members have maintained their war-time "with us or against us" mentality and continued to consolidate power and wealth, shaping much of the country as they wish".⁴
52. In this political climate, disappearances, detention without charge, torture, and extra-judicial killings of people with particular profiles are common.⁵ With respect to people being abducted, *BBC News* states that victims are a "mix of Sinhala, Tamil and Muslim", and that while "[a]ll sorts of people are disappearing... many of them appear to have been at loggerheads with the authorities".⁶
53. Taking that further, according to the United Nations High Commissioner for Refugees (UNHCR), "the risks facing individuals with the profiles outlined below require particularly careful examination" and they may be in need of international protection:

¹ Freedom House 2012, *Freedom in the World 2012 – Sri Lanka*, UNHCR Refworld, 22 August <<http://www.unhcr.org/refworld/docid/503c7222b.html>> Accessed 18 September 2012

² United Nations 2011, *Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka*, 31 March, p.111

³ Minority Rights Group International 2011, *No War, No Peace: The Denial of Minority Rights and Justice in Sri Lanka*, 19 January, p.5 <<http://www.minorityrights.org/download.php?id=921>> Accessed 28 March 2011

⁴ International Crisis Group 2011, *Reconciliation in Sri Lanka: Harder than Ever*, Crisis Group Asia Report N°209, 18 July, p.40

⁵ Asian Human Rights Commission 2012, *The State of Human Rights in Sri Lanka in 2012*, AHRC-SPR-011-2012, pp. 8, 13, 31, 43 <http://www.humanrights.asia/resources/hrreport/2012/ahrc-spr-011-2012.pdf/at_download/file> Accessed 19 December 2012; International Crisis Group 2012, *Sri Lanka: Government Promises, Ground Realities*, 1 March <<http://www.crisisgroup.org/en/publication-type/media-releases/2012/asia/sri-lanka-government-promises-ground-reality.aspx>> Accessed 23 March 2012; UN General

Assembly 2012, *Report of the Committee against Torture, Forty-seventh session (31 October-25 November 2011) : Forty-eighth session (7 May-1 June 2012)*, 12 November, UNHCR Refworld, pp.84-85

<<http://www.unhcr.org/refworld/docid/50a0f9b12.html>> Accessed 11 December 2012

⁶ Haviland, C 2012 'Sri Lanka's sinister white van abductions', *BBC News*, 14 March <<http://www.bbc.co.uk/news/world-asia-17356575>> Accessed 22 November 2012

- Persons Suspected of Certain Links with the Liberation Tigers of Tamil Eelam (LTTE) – in particular, those who held senior positions within the LTTE civilian administration, former LTTE cadres, former LTTE supporters who provided material assistance, LTTE fundraisers and propaganda activists, and persons with familial links or are otherwise closely related to individuals with the above profiles.
 - Certain Opposition Politicians and Political Activists – a small number of individuals have allegedly been detained for political reasons.
 - Certain Journalists and Other Media Professionals – reports indicate instances of “harassment, arbitrary detention, threats and physical intimidation of journalists and other media professionals, allegedly perpetrated or condoned by officials or pro-government forces”.
 - Certain Human Rights Activists – human rights defenders, trade union activists and lawyers have reportedly been subject to threats and attacks.
 - Certain Witnesses of Human Rights Violations and Victims of Human Rights Violations Seeking Justice – individuals seeking justice following alleged mistreatment by authorities have reportedly “been harassed and received threats, in an attempt to make them withdraw their cases”.
 - Women in certain circumstances – high-levels of sexual and gender-related violence reportedly continue to be documented “in the post-conflict phase, including in parts of the country not directly affected by the conflict”. Such violence is thought to remain “under-reported and, if reported, inadequately investigated “ Further, different sources indicate that state protection is not necessarily available or accessible to all women in Sri Lanka.
 - Children in certain circumstances – former child soldiers reportedly face difficulty reintegrating in society, child abuse and trafficking are rife throughout the country, cases of underage marriage continue to be reported as do cases of child labour. State protection is not necessarily available or accessible to all children in Sri Lanka.
 - Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Individuals in certain circumstances – while ‘homosexual conduct’ is criminalised in Sri Lanka, few cases have been prosecuted. Despite this, “blackmail, violent threats, employment discrimination, rejection by friends, family, the police and society at large are regularly reported” Further, negative societal attitudes “are reported to affect Sinhala, Muslim and Tamil members of the LGBTI community”.⁷
54. This information indicates that while the government might have a triumphalist attitude following the end of the military conflict and while the list given above is not exhaustive, ordinary Tamils (whatever their religion may be) are not at risk of harm just because they are Tamil.

⁷ UN High Commissioner for Refugees 2012, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka*, 21 December, pp.26-37
<http://www.unhcr.org/refworld/docid/50d1a08e2.html> Accessed 24 December 2012

55. Those at risk of harm are the people who are opposed or perceived as opposing the current regime which includes Tamils suspected of links to the LTTE but not by virtue of being Tamil rather by virtue of what they have done for that organisation. The exceptions to this are LGBTI individuals, women and children in certain circumstances. Further, UNHCR stated that originating from an area that was previously controlled by the LTTE does not in itself result in a need for international refugee protection.⁸
56. The Tribunal is aware of the practice of the government to use informants to target individuals for arrests and interrogation based on their association and therefore the possibility of some returnees having pressure applied to them to collect and provide information to Sri Lankan intelligence and law enforcement services.⁹ However, that has to be considered with the categories of persons described above by UNHCR as being at risk of harm. The Tribunal considers that the pressure to act as an informant will be applied to those with some connection to LTTE as persons of interest to Sri Lankan authorities.

Returnees to Sri Lanka who are failed asylum seekers

Procedure on arrival at the airport in Colombo

57. In August 2011, the Immigration and Refugee Board of Canada (IRBC) reported on the treatment of Tamils 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”. The Canadian High Commission further stated that:

The process for persons removed to Sri Lanka begins with verification of the person’s citizenship by Sri Lankan Immigration. Once a person’s right to enter has been established, clients are then interviewed at the airport by Criminal Investigations Division (CID), followed by an interview by the State Intelligence Service (SIS). Sri Lankan State Intelligence Service’s questions are often in regards to how a client departed the country. They are seeking information about human trafficking and smuggling from the country.

The CID conducts criminal background check[s] of returnees by contacting police stations in all districts that a client may have lived. As criminal records are not accessible through a national databank, the final criminal checks may take 24-48 hours to complete depending on the day of the week a person arrives in Colombo. Generally, police record checks may be completed in a few hours, but if a client arrives on a Saturday or Sunday it may take a bit longer to contact appropriate offices. Following this admission process deported Sri Lankan Nationals are free to enter the country.¹⁰

58. In October 2012, DFAT stated that:

The Government of Sri Lanka now has standardised procedures in place for identity and security checks at the airport for all returnees. These procedures are standard for returnees from all countries regardless of the circumstances round their departure from Sri Lanka. This involves the returnee being interviewed by DIE [Department of Immigration and Emigration], SIS [State Intelligence Services] and Police Airport CID [Criminal Investigation Department] ...Post notes that a returnee returning on a commercial flight and

⁸ Ibid at p26

⁹ US Department of State 2012, *Country Reports on Human Rights Practices for 2012 – Sri Lanka*, 24 May, Section 2.b

¹⁰ Immigration and Refugee Board of Canada 2011, *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

travelling on their own passport may not come to the attention of local authorities if they have departed Sri Lanka legally/lawfully...¹¹

59. In its report of 29 November 2012, DFAT made similar comments about the standardised procedures in place for returnees and added that Tamils returning to Sri Lanka are subject to the same entry procedures as any other Sri Lankan citizen. These procedures are applicable to all Sri Lankan returnees regardless of ethnicity. The checks undertaken by the various agencies occur regardless of ethnicity and those agencies endeavour to complete these checks as quickly as possible and with no unnecessary delays.¹²
60. The above statements about the procedures in place when returnees arrive in Sri Lanka is consistent with that given by other bodies monitoring that process.¹³

Illegal departure - penalties

61. In July 2012 a Sri Lankan Cabinet spokesman stated that failed asylum seekers would be “remanded and detained as they have committed an offence by illegal migration”. The spokesman, however, stated that the legal processes against returnees “would not hamper their future or have any intimidation by way of harassment”.¹⁴
62. In mid-2012, a number of reports indicated that the Government of Sri Lanka intended to “take measures to revise the Immigration and Emigration [sic] Amendment Act of 2006 in a bid to prevent thousands of illegal migrants being smuggled out of the country” Laws would reportedly be amended to gaol people smugglers for up to 20 years, as opposed to the current two-year penalties. The amended penalties, however, would not apply to illegal migrants; according to the Controller of Immigration and Emigration, the government had taken “a sympathetic view on the victims and will not increase the existing prison term of three months where they are concerned”.¹⁵
63. In October 2012, the Department of Foreign Affairs and Trade (DFAT) reported that:

Under Sri Lankan law people who depart from any place other than an approved port of departure (such as an airport or seaport) and/or depart without valid travel documents can be charged with an offence under the Immigration and Emigration Act of 1948 (I&E Act).¹⁶

¹¹ Department of Foreign Affairs and Trade 2012, *DFAT Report no. 1446 – Sri Lanka: RRT Country Advice Information Request LKA40999*, 22 October

¹² CX299951: Sri Lanka: CIS Request Sri Lanka: Questions arising from recent applications, Australia Country Information Report No 12/67 Department of Foreign Affairs and Trade 29 November 2012

¹³ See UK Home Office 2012, *Sri Lanka: Country of Origin Information (COI) Report*, 7 March, p.201 <<http://www.ind.homeoffice.gov.uk/sitecontent/documents/policyandlaw/coi/srilanka12/report-070313.pdf?view=Binary>> Accessed 9 May 2012

¹⁴ ‘Sri Lanka says returned asylum seekers will be dealt with according to law’ 2012. *Xinhua*, 26 July <http://news.xinhuanet.com/english/world/2012-07/26/c_131741269.htm> Accessed 7 November 2012

¹⁵ ‘Sri Lanka tightens laws to curtail human smuggling’ 2012, *Colombo Page*, 1 September <http://www.colombopage.com/archive_12A/Sep01_1346510219CH.php> Accessed 4 January 2013; ‘Sri Lanka to tighten migrant laws to reduce asylum seekers’ 2012, *Xinhua*, 13 August <http://news.xinhuanet.com/english/world/2012-08/13/c_131782512.htm> Accessed 4 January 2013; Library of Congress 2012, *Sri Lanka: Plan in Place to Revise Immigration Law*, Global Legal Monitor, 11 September <http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205403320_text> Accessed 4 January 2013

¹⁶ Department of Foreign Affairs and Trade 2012, *DFAT Report no. 1446 – Sri Lanka: RRT Country Advice Information Request LKA40999*, 22 October

64. At that time, DFAT stated that for offences “committed under the I&E Act, a prison sentence from 1 to 5 years and a fine of 50,000 LKR to 200,000 LKR may be applicable. However, in reality this is seldom enforced”. DFAT stated that no failed asylum seekers returning from Australia “have been charged under the I&E Act Section (1)(a) for offences related to their irregular departure from Sri Lanka on their arrival back in Sri Lanka”.¹⁷ If authorities “consider the person has unknowingly been duped into joining a people smuggling venture, they will not be fined or charged”.¹⁸
65. Then, in November 2012, DFAT stated that commencing from 2 November Sri Lankan “irregular maritime arrivals” non-voluntarily returned from Australia have been charged under the Immigrants and Emigrants Act for offences related to their irregular departure from Sri Lanka and “remanded in custody”.¹⁹ Some have been charged with people smuggling offences and some have had warrants issued for the arrest regarding theft of a vessel used to travel to Australia.²⁰
66. With regard to media reporting in Australia, in December 2012, an article in *The Age* noted that all of the failed Sri Lankan asylum seekers “returned by Australia are investigated by Sri Lanka’s Criminal Investigation Department. Many have been jailed”. No further details were provided. The article also noted that the deportation policy was “failing to deter people from boarding boats, with some even considering trying again after being sent home”.²¹ An earlier report noted that “most people heading to Australia make multiple attempts, and if they lose their money when a boat is stopped by authorities, they will be eligible for a discount the next time around”.²² In November 2012, the *ABC* reported that 32 failed asylum seekers deported from Australia were arrested in Colombo upon their arrival at the airport; most were reportedly released on bail soon after.²³ In the previous month, 14 people deported by the Australian government were arrested after they reportedly hijacked a fishing boat to travel to Australia.²⁴
67. On this issue, on 27 February 2013, DFAT stated as follows:

“As reported [...], since 2 November 2012, Sri Lankan irregular maritime arrivals non-voluntarily returned from Australia have been charged under Immigration and Emigration Act for offences related to their irregular

¹⁷ Department of Foreign Affairs and Trade 2012, *DFAT Report no. 1446 – Sri Lanka: RRT Country Advice Information Request LKA40999*, 22 October

¹⁸ Department of Foreign Affairs and Trade 2012, *DFAT Report no. 1446 – Sri Lanka: RRT Country Advice Information Request LKA40999*, 22 October

¹⁹ CX299951: Sri Lanka: CIS Request Sri Lanka: Questions arising from recent applications, Australia Country Information Report No 12/67 Department of Foreign Affairs and Trade 29 November 2012 p5

²⁰ Ibid

²¹ Doherty, B 2012, ‘Deportation no deterrent to Sri Lankans’, *The Age*, 2 December <<http://www.theage.com.au/national/deportation-no-deterrent-to-sri-lankans-20121201-2anyz.html>> Accessed 20 December 2012

²² Rosenbaum, A 2012, ‘Australia bound at any cost’, *Sydney Morning Herald*, 17 October <<http://www.smh.com.au/national/australia-bound--at-any-cost-20121016-27ovr.html>> Accessed 7 February 2013

²³ Edwards, M 2012, ‘Deported asylum seekers arrested in Sri Lanka’, *Australian Broadcasting Corporation*, source: *Australia Network News*, 16 November <<http://www.abc.net.au/news/2012-11-16/an-sri-lankan-deportees-arrested-back-home/4375304>> Accessed 17 December 2012

²⁴ ‘Sri Lanka arrests deported asylum seekers’ 2012, *SBS World News*, source: AAP, 28 October <<http://www.sbs.com.au/news/article/1705703/Sri-Lanka-arrests-deported-asylum-seekers>> Accessed 6 February 2013; ‘Asylum hijack suspects arrested in Sri Lanka’ 2012, *Radio Australia*, 28 October <<http://www.radioaustralia.net.au/international/2012-10-28/asylum-hijack-suspects-arrested-in-sri-lanka/1037122>> Accessed 6 February 2013

departure from Sri Lanka. Sri Lankans who depart Sri Lanka without proper authority commit a criminal act under Section 45 of the Immigration Act 1998 (1) (b). This is in fact two offences: the first being departure from the country from other than an approved port (Section 34) and departing from the country without a valid passport (Section 35 (a)).

From late November 2012, the Sri Lankan Government started to enforce the law in all cases regardless of whether a person has been returned voluntarily or non-voluntarily. Since then returned Sri Lankan nationals who arrived in Australia by boat (and thus departed Sri Lanka illegally) have been charged and remanded for offences regarding their illegal departure.”²⁵

68. In a further report dated 4 March 2013, DFAT provided the following further information about its previous statements that returnees were held in remand:

“Remand in this sense means physical remand as in the Australian legal context. Those held on remand are held in a prison. For those returning to Colombo International Airport, they would be remanded at the Negombo Prison's Remand Unit.

Post's experience with returnees from Australia is that persons are arrested by the Sri Lanka Police Service Criminal Investigation Department (CID) after being processed back into Sri Lanka by the Department of Immigration and Emigration. They are held in police custody at the CID Airport Office throughout the investigation period, which can last up to 24 hours under relevant legislation.

They are then produced before a magistrate and the Magistrate's Court will determine whether the person is to be released on bail, to appear before the court at a later date, or is remanded into custody.

If a person needs to be held for more than 24 hours as a result of a Magistrates Court not sitting, such as when a person arrives during a weekend or public holiday, arrested persons are transferred to the nearby Negombo Prison (Remand Section) until the Magistrates Court is in session.

We understand the current process for bail is that all persons are granted bail based on personal recognisance (on their own responsibility), with the requirement for a family member to stand as a guarantor. There is no payment required for bail.

However, we note that the court may decide not to grant bail if the returnee is found to be a facilitator/organiser of people smuggling, or the court may grant specific bail conditions if the person is a repeat offender.”²⁶

Finally, in its “Country Information Report Sri Lanka” dated 31 July 2013 DFAT stated as follows with respect to returnees being prosecuted under the Immigration and Emigration Act for illegal departure (verbatim) (at p16):

“For offences committed under the *I&E Act*, a prison sentence of up to five years and a fine of up to 200,000 Sri Lankan Rupees may be applicable. The Attorney-General's Department advises that no one to date 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 Department further advises that the Magistrates Court in Colombo has been handing out fines of around 5,000 Sri Lankan Rupees for persons attempting to depart Sri Lanka irregularly on boats. However, in Negombo, the magistrate, who handles a large number of these cases, has been handing out fines up to 50,000 Sri Lankan Rupees to act as a deterrent.”

Risk as a Tamil returning to Sri Lanka involuntarily after having unsuccessfully applied for asylum abroad

69. In August 2011, the Canadian High Commission in August 2011 noted that:

²⁵ Department of Foreign Affairs and Trade 2013, *DFAT Report 1478 – RRT Information Request: LKA41452*, 28 February

²⁶ Department of Foreign Affairs and Trade 2013, *DFAT Report 1479 - RRT Information Request: LKA41452* 4 March

[t]here have been only four cases of persons having been detained upon arrival of which the Canadian High Commission is aware. Each of these cases involved outstanding criminal charges in-country and were not related to their overseas asylum claims or their ethnicity. Persons of all ethnic backgrounds are returned either under escort or voluntarily to Sri Lanka daily, and the screening and admission process for all these persons remains the same.²⁷

70. In October 2011 Amnesty International alleged that Tamils who were failed asylum seekers were at risk of being detained and maltreated and returned to Sri Lanka. The basis of this claim was an allegation that two Tamil men who were brothers who were returned to Sri Lanka after seeking asylum in Australia were detained and maltreated; one brother claiming to have been arrested and maltreated on arrival and the other person claiming they were both again arrested some months later and he was maltreated.²⁸
71. However, according to the department, one of these men was arrested and charged with a people smuggling offence and, after investigating the allegations that he was mistreated, the department found the allegations could not be substantiated.²⁹ While they also allege that some months after their return they were again arrested that does not demonstrate that a returnee will be arrested and maltreated for no reason other than being a Tamil who sought asylum abroad.
72. A number of groups have made allegations that Tamils who had returned to Sri Lanka from Great Britain had been detained and maltreated.³⁰ The Tribunal has considered the reports in which these allegations were made and notes that, for the most part, they concern people being detained at some stage after arriving in the country and not on arrival at the airport.
73. They also refer to cases where the persons concerned had some link to the LTTE, including through a family member who was in the organisation; where the persons concerned had been arrested and detained by authorities in the past suggesting they had a previous adverse record and where the persons concerned had been politically active abroad. They did not appear to concern Tamils being detained and tortured on arrival at the airport in Sri Lanka (or even after that) for the sole reason that they were involuntarily returning to the country after having sought asylum in another country.

²⁷ Immigration and Refugee Board of Canada 2011, *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

²⁸ Amnesty International 2011, *Sri Lanka: Briefing to Committee against Torture*, October, p.9 <<http://www.amnesty.org/en/library/asset/ASA37/016/2011/en/2bb1bbe4-8ba5-4f37-82d0-70cbfec5bb2d/asa370162011en.pdf>> Accessed 18 September 2012

²⁹ DIAC 2011 *DIAC Advice on Voluntary and Involuntary Return* 15 December

³⁰ See Tamils Against Genocide 2012, *Treatment of Failed Asylum Seekers: An Overview of the Persecution Faced by Failed Asylum Seekers Returning to Sri Lanka*, TamilNet, May <http://www.tamilnet.com/img/publish/2012/05/Failed_Asylum_Seekers_SL_May_2012.pdf> Accessed 20 December 2012; Human Rights Watch 2012, *Sri Lanka: UK: Halt Deportations of Tamils to Sri Lanka*, 25 February <<http://www.hrw.org/news/2012/02/24/uk-halt-deportations-tamils-sri-lanka>> Accessed 10 August 2012; Human Rights Watch 2012, *United Kingdom: Document containing cases of Sri Lankan deportees allegedly tortured on return*, 15 September <<http://www.hrw.org/news/2012/09/15/united-kingdom-document-containing-cases-sri-lankan-deportees-allegedly-tortured-ret>>; 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

74. These allegations were also the subject of investigation by the United Kingdom Home Office which found that they were not substantiated.³¹ In its report of 29 November 2012, DFAT stated that it had not received any evidence to support allegations of mistreatment of returning Tamils to Sri Lanka.³² It had not received any allegations of mistreatment by returnees since 2009 and after investigating an allegation of mistreatment made by a Sinhalese returnee in 2009 no evidence could be found to substantiate it. Non-government organisations consulted by DFAT involved in facilitating the voluntary return of former asylum seekers to Sri Lanka said they had not witnessed or received any allegations of mistreatment.
75. As regards the allegations mentioned above and which were made about the Tamils returning to Sri Lanka from Great Britain being mistreated, DFAT stated that it contacted the British High Commission in Colombo and the Foreign and Commonwealth Office stated no substantiated cases of mistreatment had been received and the claims made by those groups (such as Human Rights Watch) were not supported. This entity further stated that one returnee alleged that in early 2012 he had been tortured on arrival but, after investigation, the allegation turned out to be that he had been kicked under the table but this could not be confirmed.
76. In its report of 29 November 2012 DFAT also referred to a claim that a Tamil British national visiting Sri Lanka in October 2012 had been detained and tortured but, again, after further investigation this was not substantiated. In its guidelines referred to above, UNHCR, in setting out the categories of those considered to be at risk of harm in Sri Lanka, does not say that this includes Tamils returning to Sri Lanka after seeking asylum abroad.

FINDINGS

77. The Tribunal finds that the applicant is a national of Sri Lanka (copies of pages from his Sri Lankan passport appear on the department file).
78. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed. In this respect, the Tribunal had the following concerns about the applicant's credibility.

CID officers searching the house in February 2012 - inconsistent evidence

79. In his statement lodged with his protection visa application, the applicant referred to the CID coming to his home in February 2012 and returning there a second and third time. He said that on both of those second and third visits the officers forced their way into the home and conducted full searches of the house asking for the whereabouts of the applicant and his brother. In the light of these events, the applicant left [Village 1] and fled to [Town 2].
80. In contrast, to the Tribunal, the applicant said that it was only on the third visit to the house in February 2012 that the officers actually searched the house and it was because they searched the house and because they came at night, the applicant then decided to flee from [Village 1].
81. The Tribunal asked the applicant to explain the account in his statement that the house was searched on the second and third visits in February. In response, the applicant maintained

³¹ See UK Home Office 2012, *Country Policy Bulletin – Sri Lanka*, October, pp1-8

³² CX299951: Sri Lanka: CIS Request Sri Lanka: Questions arising from recent applications, Australia Country Information Report No 12/67 Department of Foreign Affairs and Trade 29 November 2012

that he told those who assisted him to prepare that statement that the house was searched only once and that was on the third visit.

82. While he makes that claim, the statement clearly provides otherwise and it does contain a detailed account of the events on which his protection claims are based. This inconsistency is important because the applicant claimed to the Tribunal that it was the search of the house along with the fact that the officers came at night that he decided he could no longer safely remain in his village. His failure to give a consistent account about that was not credible.

Inconsistent evidence as to when in February 2012 the applicant fled from [Village 1]

83. In his statement, the applicant said that “at around the end of February” he fled to [Town 2] after the CID had gone to his home on three occasions that month. At various stages of his initial evidence to the Tribunal the applicant also said that it was at the end of the second month of 2012 (therefore at the end of February) that he left [Village 1].
84. In that respect, he made that claim when asked when it was he stopped living at his home and when asked when it was his mother stopped living in the family home (the applicant stating that she also stopped living there at the end of the second month, leaving immediately after the applicant left [Village 1]).
85. The Tribunal asked the applicant when in February the CID first came to the family home and he said that it was at the beginning of that month. He said that they returned two or three days later and the following day after that. For the following one or two days after that third visit the applicant hid in [Village 1] before then leaving the village and going to [Town 2].
86. According to that account it would have been within a matter of days (six or seven at the most) that he fled from [Village 1] after the first visit made by the CID that month. The Tribunal put this to the applicant and that he was conveying the impression that he left [Village 1] earlier that month and not at the end of that month as he had suggested in his initial evidence to the Tribunal and as he had said in his statement.
87. In response, the applicant again said that he left [Village 1] at the end of February; the CID came to his house at the beginning of that month and he did not know the exact dates. The Tribunal did not ask the applicant to give the exact date of the first visit by the CID in February nor the exact date he left [Village 1]. However, he claims these events occurred only just over one year ago and that they precipitated his eventual flight from Sri Lanka.
88. In the circumstances, the Tribunal considers that the applicant can reasonably be expected to give a consistent and comprehensible account about when the first visit was made and how long after that he left [Village 1]. His claim that, at the beginning of February, the CID came to his home and that, within a period of only days, he fled [Village 1] is inconsistent with his claim that he fled from there at the end of that month. This inconsistency reflects poorly on his credibility.

Inconsistent evidence about the CID going to the home after the applicant left [Village 1]

89. The Tribunal notes that early in his evidence the applicant also said that while he fled from [Village 1] at the end of the second month, after that, but, still in that second month, the CID twice returned to his home to find him and his brother.

90. Further in the hearing, when asked what news he received from his mother after he went to live in [Town 2], he said his mother told him that he should not return to [Village 1] because the CID had been looking for him again. However, when asked where they had gone to find him, the applicant said his mother told him that they may go to the family home.
91. To clarify his evidence, the Tribunal asked the applicant how his mother knew the CID were looking for him but the applicant did not directly respond saying that his mother thought they may come back to the home. When put to him he was suggesting therefore that the CID did not return to the family home after he fled from [Village 1], the applicant said they came once he thought.
92. He then said that according to his mother, the neighbours told her that the CID had come to the family home but he did not know when or how many times. He did not ask his mother about that as he thought it might not be safe to do so and he had not asked her since coming to Australia.
93. The Tribunal asked the applicant to explain why, in his initial evidence, he said that after he fled to [Village 1], but, still at the end of February, the CID had twice gone to his family home, the applicant merely repeated his evidence about his mother being told by neighbours that the CID had gone there and that he did not ask his mother for any more details. That account is inconsistent with his initial evidence on this matter; he has failed to provide an explanation for that and this inconsistency reflects poorly on his credibility.

Evidence about the applicant's reaction to the visits to his home by the CID

94. In his evidence about how he felt after these visits by the CID to his home in December 2011 and February 2012 the applicant indicated that he saw no real threat to his safety; the applicant continuing to stay in the family home at night and go to work each day.
95. Indeed, he claimed that after the visit in December 2011 he did not fear the CID would return to the home and apprehend him and his brother for failing to report. He claimed that, at that stage, he did not think they were in any trouble.
96. While he said that he had a fear after the CID came to his home on the first two occasions in February 2012, he was content to still remain living at his home and it was only after the third visit that he really feared for his safety and decided he had to leave [Village 1].
97. The Tribunal found that evidence incongruous. The CID had gone to his home in December 2011 carrying guns and alleging his father was suspected of involvement with the LTTE; he and his brother had not complied with the request made at that time that they report to a camp to be questioned about that and they had declined to do so out of fear they would be tortured if they did (knowing that had happened to others).
98. In those circumstances, the Tribunal had difficulty accepting the applicant's evidence that he simply remained living at home and went to work as usual, seeing fit to keep doing that until that third visit made to the home in February.
99. When the Tribunal put these concerns to the applicant he put forward various unconvincing responses. He said that his mother did not properly understand the CID who were Sinhalese and so, after the visit in December 2011, he did not know which camp to report to in [Village 1] (there being an army and police camp) and was not certain of what was said to the mother.

100. The Tribunal rejects that response as the applicant clearly told the Tribunal that the CID had come to the home and said the applicant and his brother had to go and report to them at a camp in [Village 1]. Whether or not they knew which particular camp, the applicant would have clearly known that his safety was at risk.
101. The applicant claimed that until the third visit in February 2012, he and his brother thought that the CID were only looking for their father and, on the first two visits in February, the CID did not demand that the applicant and his brother report to any camp. The Tribunal rejects that response as the applicant said they had been requested to report in December 2011 and when the CID returned in February they asked for the whereabouts of the applicant and his brother. The applicant would have well-known that the CID were interested in him and his safety was at risk.
102. He said that after the visit in December 2011, had the CID really wanted to apprehend him and his brother, he thought they would have come back to do that but did not do so until February 2012. The Tribunal does not believe that following the visit to the home in December 2011 and, following the applicant's refusal to go to report to them, he would think there was a possibility the CID would not pursue him as he appeared to claim.
103. Overall, the Tribunal found the applicant's evidence about his reaction to the visits from the CID in December 2011 and in February 2012 to be not credible and a further indication of his overall lack of truthfulness. In the circumstances as he described them, the Tribunal does not believe the applicant would have thought and behaved as he claimed.

Conclusions on credibility

104. The Tribunal's concerns about the applicant's credibility as discussed above, considered cumulatively, lead the Tribunal to find that this applicant is not a witness of truth and the account of events on which his protection claims are based is false.
105. Therefore the Tribunal disbelieves the applicant's claims that the CID came to his home in relation to his father and that they suspected his father was supporting the LTTE. The Tribunal disbelieves the applicant's claims that the CID came to his home a number of times demanding that he and his brother report to them; searching the house and looking for them. The Tribunal therefore disbelieves his claims that he stopped living in [Village 1] in fear of the authorities and that they came to the family home after he went to live in [Town 2].
106. The Tribunal finds that there is no credible evidence of the applicant or anyone in his family were of adverse interest to Sri Lankan authorities and there is no credible evidence that the Sri Lankan authorities or anyone else in Sri Lanka wish to harm applicant. The Tribunal therefore disbelieves claims made by the applicant at the entry interview that his father went missing and was being investigated.
107. While the credibility concerns discussed above relate to the claimed interest taken in the applicant and his family by the CID, as the Tribunal finds the applicant is not a witness of truth, the Tribunal also disbelieves his claims about being maltreated by the army between January and April 2010. The Tribunal finds not credible the applicant's claims that the army made him perform work for them and that he was sexually assaulted by them.
108. The Tribunal also disbelieves the applicant's claim that the authorities are pursuing his brother and because his brother had been to India. The brother was not called as a witness at

the hearing and as the Tribunal finds the applicant is not a witness of truth it disbelieves his claim that Sri Lankan authorities have any interest in him or his brother (including because the brother went to India).

109. The applicant said he had a scar on his [body] caused by the army officers forcing a cigarette onto it when they made him do forced labour. The applicant may well have such a scar but the Tribunal finds there is no credible evidence as to how that was sustained. The Tribunal disbelieves the applicant's claim about being made to do forced labour and maltreated by the army.
110. In written submissions received prior to the hearing, the representative stated that it was because of the harm he received from the army in 2010 that the applicant obtained a passport and undertook a training course to be able to travel to the Middle East. The Tribunal accepts the applicant obtained a passport and undertook a training course but disbelieves the claims that this was due to a fear of the army or Sri Lankan authorities.
111. The applicant mentioned borrowing money from his employer but said nothing more about that and did not claim to fear harm in Sri Lanka on that ground. Similarly, the applicant said he had a brother-in-law who left Sri Lanka some years ago and now lives in Australia due to problems with the authorities related to being asked to do work and being beaten.
112. The applicant did not claim to have experienced difficulties with the authorities because of his brother-in-law but, at any rate, as the applicant is not a witness of truth the Tribunal disbelieves the evidence he advanced about his brother-in-law having difficulties with the authorities.
113. The Tribunal accepts that the applicant is a young Tamil man from [Village 1] who works as a fisherman there. The Tribunal accepts he has a brother in Australia but there is no credible evidence about his family in Sri Lanka. Also the Tribunal does not believe the applicant's claims that his brother left Sri Lanka due to visits from the CID and in fear of harm from them given the Tribunal does not believe any such visits were made. There is no credible evidence before the Tribunal as to why the applicant (or his brother) left Sri Lanka and why he does not wish to return there.

The assessment of risk

114. The country information mentioned earlier in this decision indicates that since the end of the conflict between the Sri Lankan government and the LTTE, the primary victims of human rights abuses by the government or those acting on its behalf, are people perceived as opponents. This is reflected in the profiles described by UNHCR in its guidelines as people requiring careful examination, namely, opposition politicians and activists; human rights activists and journalists.
115. The Tribunal infers from this country information that Tamils, including those who come from areas that were previously controlled by the LTTE, do not suffer harm for those reasons alone. The Tribunal considers that the risk of a Tamil, including a Tamil who comes from an area previously controlled by the LTTE, suffering harm for those reasons alone is remote.
116. As stated earlier in this decision, the Tribunal is aware of the practice of the government to use informants but considers that this would only be applied to those who come within the risk profiles described by the UNHCR, in particular, those persons with some connection to

the LTTE as described by UNHCR for that particular profile. The Tribunal considers that the risk of this occurring to a Tamil without such connections is remote.

The risk for returning to Sri Lanka as a failed asylum seeker and after leaving the country illegally

117. Based on the country information mentioned earlier in this decision, the Tribunal finds that there is no substantiated reliable information that Tamils who return to Sri Lanka after seeking asylum abroad, including those who left the country illegally, suffer harm solely on those grounds alone.
118. Further, the country information mentioned earlier in this decision indicates to the Tribunal that on arrival in Sri Lanka, returnees will be interviewed at the airport to establish identity and as soon as possible brought before a magistrate in relation to departing the country illegally.
119. Depending on the day on which the returnee arrives at the airport in Colombo, that person may be briefly detained in remand before being brought to the court. In the Tribunal's view, country information indicates that for departing the country illegally, the returnee will be granted bail and will, eventually, receive a fine.
120. The Tribunal notes that according to country information Tamils are treated the same way as anybody else in this process. Further, there is no reliable substantiated evidence that Tamils suffer harm or maltreatment in this process.
121. The Tribunal acknowledges that, according to DFAT, penalties for illegal departure can be a fine and a prison sentence. However, the Tribunal considers on the basis of the country information set out above, prison sentences are more likely to be imposed on those involved in people smuggling as it appears that it is the people organising those ventures who the government is really concerned about.
122. In this respect, the Tribunal notes the statement of DFAT in its report of March 2013 that the court may not grant bail where the returnee is the facilitator or organiser of people smuggling. According to DFAT, prior to 2 November 2012 the Sri Lankan government were not even charging returnees from Australia for leaving the country illegally.
123. Further, according to the DFAT country information report of 31 July 2013 the Sri Lankan government stated that no one had been given a custodial sentence for departing Sri Lanka illegally only fines. Magistrates courts had been handing out fines on those attempting to leave illegally as a deterrent in the range of 5,000 Rupees to 50,000 Rupees.
124. DFAT stated that the report did not represent an exhaustive country overview and was not intended as the sole basis for decisions; the decision maker was not precluded from considering other relevant information about the country.
125. However, on the information before it about this issue, the Tribunal is satisfied that, while the government has, from November 2012, begun charging people for offences relating to illegal departure, the risk of any Tamil returnee, who unsuccessfully sought asylum abroad, being given a jail sentence for their illegal departure is remote. The Tribunal is satisfied that a fine is the most likely outcome and the imposition of a fine within the range of amounts set out

above in country information (or what appears to be the lesser range actually being imposed by magistrates on those who attempt to leave illegally) does not amount to serious harm.

126. Accordingly, the Tribunal considers that the risk of a Tamil suffering harm in Sri Lanka as a returnee after seeking asylum abroad and leaving the country illegally (and suffering harm solely due to those factors) is remote.

Submission and claims from and on behalf of the applicant

127. The country information mentioned earlier in this decision was discussed with the applicant and the representative at the hearing. The representative relied on submissions made by letter dated 27 March 2013 but the applicant made comments at the hearing. By letter dated 26 August 2013 country information was also provided to the applicant for comment and the representative responded on his behalf by letter dated 4 September 2013. These submissions and comments along with submissions made by the representative at the interview with the delegate have all been considered by the Tribunal and dealt with below.
128. It was claimed that the applicant will suffer harm in Sri Lanka because he is Tamil; political opinions will be imputed to him that he is a supporter of the LTTE and he belongs to a particular social group of failed Tamil asylum seekers.
129. Country information was submitted about the prevalence of human rights violations including abductions, disappearances, torture, arbitrary arrest and detention carried out by Sri Lankan authorities and related groups often in areas where Tamils live and a disproportionate number of the victims being Tamils.
130. This country information asserted that violations take place because the government wants to consolidate its power and to do this has allowed an expanded role for the military which undermines the rule of law. Those suspected of involvement with the LTTE would be harmed. Because the violations are carried out by the government or on its behalf, Tamils cannot access effective protection and are at a disadvantage when dealing with the authorities where they cannot speak Sinhalese.
131. Country information was referred to and submissions were also made about the presence of the military in the north and east of Sri Lanka putting the security of Tamils at risk because they distrust the military. This information referred to the military taking on commercial activities in these areas, controlling aspects of daily life and the existence of checkpoints.
132. Also submitted was information asserting that Tamils suffer discrimination; there has been no ethnic reconciliation and tensions between Tamils and Sinhalese run high. At the hearing the applicant referred to Sinhalese not talking to Tamils; the language barrier and Tamils not having rights. The applicant also referred to not wanting to live in fear of the authorities in Sri Lanka.
133. The Tribunal acknowledges that human rights violations are prevalent in Sri Lanka; that they are committed by the government and related agencies and that the Sri Lankan government wants to consolidate its power over the country. While country information asserts that a disproportionate number of the victims of these violations are Tamils, the Tribunal finds that these people are most likely to be those who come within the risk profiles specified by UNHCR and set out earlier in this decision. It is those described in the risk profiles for whom there is a real chance of suffering serious harm in Sri Lanka.

134. The Tribunal does not accept that just for being a young Tamil man from [Village 1] (who left the country illegally and will return there as a failed asylum seeker) the applicant will be imputed with political opinions of support for the LTTE and suffer serious harm on that ground. The Tribunal considers that for suspicion of support for the LTTE to arise the person concerned needs to have had actual involvement with the group or to have had a family member who has had such involvement as indicated in the relevant risk profile by UNHCR.
135. The Tribunal acknowledges the submissions and country information about the presence of the military in Tamil areas; tensions between the ethnic groups and discrimination suffered by Tamils. There is no credible evidence that the applicant was harmed by the military in Sri Lanka and no evidence overall that these factors led to him suffering serious harm.
136. While he claimed that Tamils did not have rights and he did not want to live in fear, the applicant was able to undertake education at school and he was employed initially as a mason and then as a fisherman until he left Sri Lanka. While the applicant had to pass through checkpoints he did not claim to have actually been harmed in doing so and the Tribunal considers the risk of him suffering serious harm on this ground is remote.
137. The Tribunal put to the applicant country information that Hindus were able to practice their religion in Sri Lanka and were not harmed for doing so.³³ The applicant said he agreed with that assertion.
138. The representative submitted that for leaving Sri Lanka illegally and going back there as a failed asylum seeker the authorities will suspect the applicant of involvement with the LTTE. Country information was referred to that UNHCR did not monitor what happened to persons forcibly returned to Sri Lanka. Sources similar to those mentioned earlier in this decision were referred to in which it was alleged that some Tamils who had returned to Sri Lanka after spending time in Great Britain or abroad were maltreated on arrival or at some stage after that.
139. The applicant himself said that he knew of someone who was from [Village 1] and had returned to Sri Lanka two years ago after being abroad for a period of time and although he had no difficulties for two months after his return, subsequently, the authorities apprehended and tortured him and so he came back to Australia.
140. The Tribunal has already set out earlier in this decision reports from DFAT in which it investigated the risk of harm for returnees to Sri Lanka on the basis of leaving the country illegally and going back there as failed asylum seekers. As already stated above, the Tribunal finds there is simply no reliable substantiated information that Tamils who are sent back to Sri Lanka after seeking asylum abroad including those who left the country illegally are harmed on or after arrival on those grounds alone.
141. The Tribunal could not conclude otherwise from the example given by the applicant when there is no other information about that person's background to enable the Tribunal to know that the only reason that person was harmed was because they sought asylum abroad and had left the country illegally (if that is what that person did).
142. Country information was referred to asserting that some people sent back to Sri Lanka from Australia were held in poor conditions on remand for up to two weeks before being brought

³³ United States Department of State 2011 International Religious Freedom Report for Sri Lanka.

before a magistrate. Country information was also referred to about the prevalence of torture used by the authorities on those held in detention. It was submitted therefore that this should be considered in relation to the applicant being readmitted to the country on arrival from Australia.

143. For the reasons given above, the Tribunal finds that on arrival at the airport in Colombo, the applicant will be questioned about his identity; enquiries will be processed as quickly as possible and, depending on the day he arrives in Sri Lanka, there is the possibility of the applicant being held in remand briefly before being brought before a magistrate.
144. The Tribunal finds that the possibility of the applicant being held briefly in remand in poor conditions before being brought before a magistrate does not equate with a real chance of suffering serious harm. As stated above, there is no reliable substantiated country information demonstrating that Tamils sent back to Sri Lanka after seeking asylum abroad suffer harm at the airport or after their arrival because they have been abroad and sought asylum.
145. The representative submitted country information about poor conditions in prisons in Sri Lanka; the maltreatment of prisoners and submitted that Sri Lankan law provides a prison sentence for illegal departure. At the hearing the applicant said he knew of a person from his native area who had attempted to leave the country illegally, was apprehended by the authorities and given a three year jail sentence.
146. Country information set out earlier in this decision indicates that no returnee is receiving a jail sentence for leaving the country illegally. The Tribunal remains of that view notwithstanding the example put forward by the applicant. The Tribunal finds the risk of the applicant receiving a jail sentence for illegal departure is remote. He will most likely receive a fine and the amount of that fine is most likely to be the same as or slightly more than the fines mentioned in country information as being imposed on those caught attempting to leave illegally.
147. The imposition of a fine including a fine within the range mentioned does not amount to serious harm. No claim was made nor any evidence advanced that the applicant could not pay the fine or that having to do so would lead to him suffering serious harm (including serious harm based on a convention ground).
148. The representative claimed that the Tribunal could not rely on information provided by DFAT regarding the penalty for illegal departure because it quoted the Attorney General's Department of Sri Lanka. While the Tribunal can acknowledge that the Sri Lankan government may deny or downplay allegations about its human rights practices, the Tribunal does not accept that a statement by one of its departments that custodial sentences are not being imposed on returnees for illegal departure is in some way false or misleading.
149. It was also submitted the applicant would receive a severe punishment for his illegal departure because of his father's suspected links to the LTTE and the applicant's failure to report to the camp of the CID when told to do so. For the reasons given above, the Tribunal disbelieves the applicant's claims that his father was suspected of supporting the LTTE and that the CID wanted the applicant to report to them.
150. Whether considered separately or cumulatively, there is not a real chance the applicant will suffer serious harm in Sri Lanka on the grounds advanced by the applicant and his

representative (that is his ethnicity and age; his place of residence in Sri Lanka; his illegal departure and the fact he will return there as a failed asylum seeker).

151. There is no need for the Tribunal to determine whether there is a particular social group of failed Tamil asylum seekers because, for the reasons given above, the Tribunal finds that there is not a real chance the applicant will suffer serious harm because he is a Tamil failed asylum seeker. The Tribunal finds for the reasons given above that the applicant does not have a well founded fear of persecution based on any conventional ground.

Complementary protection

152. The representative made submissions about how the various terms of the complementary protection criteria should be interpreted. The representative submitted that the applicant met the complementary protection criterion on the same grounds his fear of persecution was well founded.
153. The Tribunal has dealt with above all of those grounds and, for the same reasons it finds the applicant's fear of persecution is not well founded, it also finds that there is not a real risk the applicant will suffer significant harm in Sri Lanka.
154. For the reasons given above, the Tribunal finds the risk of the applicant suffering harm because he is a Tamil man from [Village 1] who left Sri Lanka illegally and will return there as a failed asylum seeker from Australia is remote.
155. For the reasons given above, the Tribunal finds that the possibility of the applicant being held in remand before being brought before a magistrate does not equate with a real risk of the applicant suffering significant harm (as defined in the Act). The risk of the applicant receiving a jail sentence because of his illegal departure is remote. The imposition of a fine within the range discussed above and having to pay that fine does not amount to significant harm (as defined in the Act).
156. Accordingly, the Tribunal finds that there are not substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant's removal from Australia to the receiving country, Sri Lanka, there is a real risk that he will suffer significant harm.

CONCLUSIONS

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

DECISION

160. The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

Paul Millar
Member