

CATCHWORDS:

APPEAL - finding of no evidence - whether indication of a failure to consider essential integer - consideration of country information - whether there was a failure to refer to evidence - where Tribunal Decision comprehensive – APPEAL DISMISSED

APPEARANCES:

Appellant: J.F. Gormley
Respondent: R. O’Shannesy

JUDGMENT

Introduction to the Statutory Framework

1. This is an appeal from a decision of the Refugee Status Review Tribunal (**Tribunal**) pursuant to section 43 of the *Refugees Convention Act 2012* (Nauru) (**the Act**) which relevantly provides:

“43 Jurisdiction of Supreme Court

- (1) *A person may appeal to the Supreme Court against a decision of the Tribunal on a point of law.*
...
- (2) *The parties to the appeal are the appellant and the Republic.*
- (3) *The notice of appeal shall be filed within 42 days after the person receives the written statement of the decision of the Tribunal.*
- (4) *The notice of appeal shall:*
 - (a) *state the grounds on which the appeal is made; and*
 - (b) *be accompanied by the supporting materials on which the appellant relies.”*
...

2. Section 44 of the Act provides that the Court may make the following orders, on such an appeal:

“44 Decision of Supreme Court on Appeal

(1) In deciding an appeal, the Supreme Court may make either of the following orders:

(a) an order affirming the decision of the Tribunal; or

(b) an order remitting the matter to the Tribunal for reconsideration in accordance with any directions of the Court.

(2) Where the Court makes an order remitting the matter to the Tribunal, the Court may also make either or both of the following orders:

(a) an order declaring the rights of a party or of the parties; and

(b) an order quashing or staying the decision of the Tribunal.”

3. Section 3 of the Act defines the Tribunal as the Refugee Status Review Tribunal established under section 11 of the Act. Part 3 of the Act establishes the Tribunal. Pursuant to section 31 of the Act, “*a person may apply to the Tribunal for merits review of any of the following*”:

“(a) A determination made under section 6(1) of the Act; or

(b) A decision to cancel a person’s recognition as a refugee made under section 10(1) of the Act.”

4. Pursuant to section 5 of the Act, a person may apply to the Secretary, being, at the relevant time, the Secretary of the Department of Justice & Border Control (**Secretary**) to be recognised as a refugee. Pursuant to section 6, the Secretary shall determine an application made pursuant to section 5 of the Act. Section 3 of the Act defines ‘*refugee*’ as a person who is a refugee under *Refugees Convention* as modified by the *Refugees Protocol* (each of which is relevantly defined in section 3 of the Act). A refugee is defined by Article 1A(2) of the *Convention Relating to the Status of Refugees 1951*

(Refugees Convention) as modified by the *Protocol Relating to the Status of Refugees 1967 (Refugees Protocol)*, 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 to, 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 to or, owing to such fear, is unwilling to return to it.”

5. The Act also defines *complementary protection* as:

“means protection for people who are not refugees as defined in this Act, but who also cannot be returned or expelled to the frontiers of territories where this would breach the Republic’s international obligations;”

6. Without being exhaustive, the following provisions regarding the Tribunal, as comprising part of the relevant statutory framework, are also relevant. Division 1 Part 3 of the Act provides for the establishment and membership of the Tribunal. Section 13 provides for the appointment of members. Section 13(2) provides that a person is eligible for appointment as the Principal Member or as a Deputy Principal Member if that person is qualified to be appointed a Judge of the Supreme Court, has been member of the Tribunal and has been admitted as a barrister or solicitor or legal practitioner (of various jurisdictions), for not less than five years and has not been struck off. Section 13(3) provides that the Regulations may prescribe eligibility requirements for appointment as a member. Section 4 of the *Refugees Convention Regulations 2013* (Nauru) provides, in relation to section 13(3) of the Act, that a person is eligible for appointment as a member of the Tribunal if the person has at least two years’ experience in refugee merits review matters at a tribunal or equivalent level and a proven capacity to conduct administrative review, has a thorough knowledge of the UNHCR Refugee Status and Guidelines and has demonstrated skills in:

- (a) research;
- (b) clear oral and written communication; and
- (c) the use of word processing software.

7. Division 2 of Part 3 provides for the constitution, sittings and powers of the Tribunal. Section 19 requires that the constitution of the Tribunal for merits review will be by the Principal Member or a Deputy Principal Member who will preside and two other members. Pursuant to section 20 the Principal Member has a discretionary power to be able to reconstitute the Tribunal if one or more of the three members who constitute the Tribunal stops being a member or for any reason is not available for the purposes of the review, or the Principal Member thinks the reconstitution is in the interests of achieving the efficient conduct of the review.

8. Section 20(2) states:

“20 Reconstitution if necessary

(1) ...

(2) *The Tribunal as reconstituted is to continue to finish the review and may have regard to any record of the proceedings of the review made by the Tribunal as previously constituted.”*

9. Section 22 of the Act provides for the overarching way that the Tribunal is to operate, as follows:

“22 Way of Operating

The Tribunal:

(a) *is not bound by technicalities, legal forms or rules of evidence; and*

(b) *shall act according to the principles of natural justice and the substantial merits of the case.”*

10. The Tribunal is expressly required to act in accordance with the principles of natural justice.

11. Pursuant to section 34 of the Act the Tribunal may, for the purposes of a merits review of a determination or decision, exercise all the powers and discretions of the person who made the determination or decision. Section 34 allows the Tribunal, on a merits review, to:

“(a) affirm the determination or decision;

- (b) *vary the determination or decision;*
 - (c) *remit the matter to the Secretary for reconsideration in accordance with directions or recommendations of the Tribunal;*
 - (d) *set the determination or decision aside and substitute a new decision or determination; or*
 - (e) *determine that a dependant, of the person in respect of whom the determination or decision was made, is recognised as a refugee or is owed complementary protection.”*
12. In conducting a review pursuant to section 35, an applicant may give a statutory declaration in relation to a matter of fact that the applicant wishes the Tribunal to consider and may give written arguments as well. Further, the Tribunal may invite a person to provide information pursuant to section 36 of the Act. Where such an invitation is made by the Tribunal, but not responded to, pursuant to section 39 the Tribunal may make a decision on the review without taking further action to obtain information, comment or a response.
13. *“The Tribunal shall invite the applicant to appear before it to give evidence and present arguments relating to the issues arising in relation to the determination or decision under review”* pursuant to section 40 of the Act. Such an invitation is not necessary where the Tribunal considers it should decide the review in the applicant’s favour on the basis of the material before it or the applicant consents to the Tribunal deciding the review without the applicant appearing before it. Where the applicant is invited to appear before the Tribunal and does not so appear, the Tribunal may make a decision on the review without taking further action to allow or enable the applicant to appear before it, pursuant to section 41 of the Act. However, section 41(2) expressly provides that the section does not prevent the Tribunal from rescheduling the applicant’s appearance or from delaying its decision on the review to enable the applicant to appear.

Procedural Background

14. The Appellant first arrived in Nauru on 2 August 2014 and participated in a Transfer Interview on Nauru on 16 September 2014.

15. On 2 October 2014, the Appellant applied to the Secretary for Refugee Status Determination (**RSD**) for recognition as a refugee and for complementary protection pursuant to the Act. As part of that process, the Appellant was interviewed about his RSD application and he submitted additional documents before and after that interview.
16. On 10 October 2015, the Secretary made a decision (**Secretary's Decision**) on the Appellant's RSD application and determined that the Appellant was not a refugee within the meaning of that term in the Act and was also not a person to whom Nauru owed complementary protection obligations.
17. On 22 October 2015, the Tribunal received an application for merits review of the Secretary's Decision.
18. On 16 May 2016, the Tribunal invited the Appellant to appear before it on 9 June 2016 at 9.30am to give evidence and present arguments. The Appellant made a further statement in support of his application and review before the Tribunal dated 26 May 2016 (**Further Statement**). On 8 June 2016, the Appellant's representatives provided written submissions to the Tribunal (**Tribunal Submissions**), together with the Further Statement, in support of the Appellant's review application. The Appellant appeared before the Tribunal on 9 June 2016.
19. On 19 June 2016, after the Tribunal hearing, the Appellant's representatives provided copies of certain medical records relevant to the Appellant's health.
20. On 31 August 2016, the Tribunal affirmed the determination of the Secretary that the Appellant is not recognised as a refugee and is not owed complementary protection under the Act (**Tribunal Decision**).
21. On 30 September 2016, the Appellant acknowledged notification of the Tribunal Decision.
22. The Appellant sought to file an appeal to the Supreme Court of Nauru on 22 November 2016. On 23 May 2017, the Court granted the Appellant an extension of time to appeal.
23. That original Notice of Appeal was subsequently amended by the Appellant on 5 June 2017. The Amended Notice of Appeal sought to advance three grounds of appeal. However, during the hearing of the appeal the Appellant, by his Counsel, confirmed the position in the written submissions in reply, that he expressly abandoned grounds 2 and 3 of the Amended Notice of Appeal.

24. Therefore, the Appellant only seeks to advance the first ground of the Amended Notice of Appeal which is as follows:

"1. The Tribunal erred on a point of law by stating at D[69] that "there is no evidence before the Tribunal to indicate Sri Lankan Tamils who were previously resident [in] India would be targeted for harm" (emphasis added). However, the Tribunal failed to consider the Appellant's oral evidence, written submissions and independent country information of the Sri Lankan government publicly expressing its suspicions on the LTTE's operations in India.

Particulars

- i. Various reports have referred to suspicions of the LTTE regrouping in India and training in southern India to carry out attacks in Sri Lanka. Accordingly, the Appellant fears that if he returns to Sri Lanka the authorities will perceive he had links with the LTTE while living in India."*

Background to the Appellant's Refugee Status Determination Application

25. The Appellant is a citizen of Sri Lanka and is from Pesalai, Mannar District. He is of Tamil ethnicity and practices Hindu religion.
26. In the Secretary's Decision dated 10 October 2015, the Appellant's claims that he feared harm were summarised as follows (Secretary's Decision, page 6):
- He is a Tamil from North Sri Lanka.
 - He was suspected of being involved in the smuggling of goods for the Liberation Tigers of Tamil Elam (LTTE).
 - His brother was suspected of being involved in the smuggling of goods for the LTTE.
 - He will be imputed with the political opinion as a supporter of the LTTE.
 - He is a member of the particular social group of 'failed asylum seekers'.

27. Further, the Appellant submitted that he feared persecution throughout Sri Lanka, on the following bases, which the Secretary summarised as (Secretary's Decision, page 6):

- Race (Tamil).
- Imputed political opinions (support for the LTTE; opposition to the government of Sri Lanka).
- Membership of particular social groups (*'failed asylum seekers'*).

28. The Secretary did not find the Appellant to be a credible witness (Secretary's Decision, page 9) however, the Secretary did accept that:

- The Appellant is an ethnic Tamil, born and raised in Mannar in the northern province of Sri Lanka.
- The Appellant departed Sri Lanka legally in June 2014.
- The Appellant was present when the Sri Lankan Navy (SLN) interrupted a LTTE smuggling operation in 2007. The Appellant was questioned and beaten by SLN officers on this occasion, before being released as it was accepted he was not involved.
- The Appellant's brother was subjected to an ongoing legal process which resulted in him being detained and subject to violence and harsh treatment.
- The Appellant departed Sri Lanka legally in 2014. He no longer holds a valid Sri Lankan travel document and as such if he were to return to Sri Lanka, he would do so on an emergency travel document and could possibly be considered to be a failed asylum seeker.

29. The Secretary did not accept that (Secretary's Decision, page 10):

- The Appellant and his family were continually harassed by authorities on account of suspicions that he or his brother was involved in smuggling operations.
- The Appellant was of adverse interest to the SLN, the CID or any other person or party in Sri Lanka at the time of his departure from Sri Lanka.

30. The Appellant applied to the Tribunal for merits review and provided the Further Statement and the Tribunal Submissions. The Appellant stated in the Further Statement that the main reason (at [5]) he fled Sri Lanka and why he fears return is that he

believes that upon his return he will be persecuted, meaning killed, tortured or physically harmed by the Sri Lankan authorities for the following reasons:

- ethnicity as a Tamil person from the north of Sri Lanka;
- actual or imputed political opinion, as being linked to the LTTE and as holding anti-government sentiments; and
- being a member of the particular social group '*failed asylum seekers*'.

31. In the Further Statement, under the heading "New Information" the Appellant provided new information regarding the Appellant's brother's claimed involvement with the LTTE. The Appellant stated that he had suspected his brother was involved in the LTTE. The Appellant claimed his brother was transporting petrol which was commonly done for a higher price for the LTTE because he knew his brother was receiving a lot of money for this. The Appellant also sought to explain why he had not mentioned this previously.
32. In addition to the Further Statement, the Tribunal Submissions were also provided to the Tribunal on behalf of the Appellant. Those submissions detailed the Appellant's claims to fear harm for reasons of his:

"(a) Race:

(i) (the Appellant) fears that he will be persecuted if removed to Sri Lanka because of his Tamil ethnicity, particularly as a young Tamil man originating from the north.

(b) Perceived political opinion:

(i) (the Appellant) fears that he will be persecuted if removed to Sri Lanka because of perceived ties to the LTTE and/or perceived views supporting Tamil nationalism or against the Sri Lankan government. This perception is due to his race, the past accusations of his LTTE involvement, his brother's LTTE involvement and persecution, the time he has spent living in India and his attempts to seek asylum in Australia and Nauru.

(c) *Membership of particular social groups:*

(i) *(the Appellant) fears that he will be persecuted if removed to Sri Lanka because of his membership of the following 'particular social groups':*

1. *failed Tamil asylum seekers in Sri Lanka;*
2. *Tamils who return to Sri Lanka without valid documentation; and*
3. *Tamil men who have lived for prolonged periods in India."*

33. Relevantly, the Tribunal Submissions advanced the following (footnotes omitted):

"[147] Tamil refugees returned from India

[148] Similarly, we believe recent information does support the ongoing risks faced by Tamils returning from abroad, particularly those who have spent prolonged periods living within the refugee camps in India.

[149] For example, a July 2015 report published by the International Truth & Justice Project (ITJP) provided details obtained from "witnesses who sought asylum after the war ended in Norway, Holland, Australia, France, Finland, Tanzania, another unknown Africa country, the UK and several in Switzerland who were rejected and then, when they returned to Sri Lanka, detained, tortured and/or sexually abused, and had to pay a ransom to escape abroad a second time."

[150] This same report observed in respect to these witnesses, that:

"[s]ome had spent periods in hiding in southern India and it was clear their interrogators regarded this with great suspicion when they returned home. The report went on to make the following recommendation to Tamils living abroad who were considering of returning home: 'Be aware that the Sri Lankan authorities are closely monitoring Tamils in India and Malaysia and their contact with their families in Sri Lanka'."

- [151] *We believe information suggesting young Tamil returnees who have spent lengthy periods in refugees camps in Tamil Nadu are facing greater scrutiny is very realistic considering that the Sri Lankan and Indian governments have been reported as publicly expressed (sic) their suspicions as to the LTTE's operations in India.*
- [152] *A (sic) was observed by the International Crisis Group ("ICG") in a report titled: India and Sri Lanka after the LTTE published in June 2011:*
- "On 9 March 2011, in a parliamentary debate on the renewal of Sri Lanka's state of emergency, Prime Minister D.M. Jayaratne announced that remnants of the LTTE were being trained in camps in southern India to carry out attacks in India and Sri Lanka".*
- [153] *The same report went on to quote from statements made as part of a May 2010 Home Ministry notification that acknowledged despite the LTTE having "been decimated in Sri Lanka, recent reports reveal that remnant cadre and leaders are regrouping in Tamil Nadu." The report also referred to comments made in November 2010 by Indian's Additional Solicitor General (ASG) A.S. Chandhikok who testified at a tribunal that the "The LTTE remnant is regrouping in India", and "the possibility of these remnant cadres using India, especially Tamil Nadu, as a rear base for the re-grouping activities thus cannot be ruled out."*
- [154] *The ICG went on further in this same report to detail its own opinion on this issue noting that: "It is no secret that India, specifically Tamil Nadu would be the most likely and logistically convenient place for the Tigers to regroup and rearm, given the unanimity that its Tamil population provides, as well as its proximity to Sri Lanka. It is clear that some LTTE leaders escaped to India before the end of the war while others bribed their way out of Sri Lankan detention camps and into India afterwards .."*
- [155] *We submit that, according to the above information and **Appendix 1: Persecution of Tamils in Sri Lanka**, there is a chance, supported by*

reliable and independent country information, that (the Appellant's) absence from Sri Lanka and residency in India will lead to his persecution on the part of the authorities. It is a factor he fears will increase suspicions by the authorities as to his perceived links with Tamil separatist groups, including the remnants of the LTTE suspected to have been re-grouping and training fighters within camps in Tamil Nadu during the periods (the Appellant) was living there."

34. The Tribunal considered, in making the Tribunal Decision, the convention claims by the Appellant under the headings, "LTTE supporter", "failed asylum seeker", "returnee" and on a cumulative basis.
35. In relation to the claim of being an LTTE supporter, the Tribunal noted the "major shift" from his original claims concerning his brother's involvement with the LTTE. The Tribunal was satisfied that the Appellant was never arrested or detained, apart from being held and questioned for five hours by the SLN on the beach after the incident in 2007.
36. The Tribunal was satisfied that at the time of the Appellant's departure, he was not of interest to the Sri Lankan authorities for reason of his actual or imputed political profile as a Tamil supporter and he was not arrested or detained during his return (D[40]). The Tribunal found that the Appellant did not have an actual or imputed LTTE profile at the time of his departure from Sri Lanka in 2014 (D[40]).
37. The Tribunal gave weight to the UNHCR's 2010 assessment that due to the improved human rights and security situation, there was no longer a need for group-based protection mechanisms or for the presumption of eligibility for Sri Lankans of Tamil ethnicity originating from the north of the country (D[50]). The Tribunal also recorded that it had regard to the independent sources referred to in the Tribunal Submissions but observed that some of those reports were several years old (D[51]). The Appellant had told the Tribunal he had not been involved in Tamil separatist's activities since departing Sri Lanka and living in India. The Tribunal again stated that it did not accept that he or his brother were suspected of assisting the LTTE (D[54]).¹

¹ Although the Tribunal refers to the Appellant's brother-in-law at [54], this appears in the context of the Tribunal Decision to be a typographical error. The Appellant did not submit that this means that the Tribunal had misunderstood or failed to properly consider the Appellant's claims, on this basis.

38. The Tribunal found that there was no reasonable possibility that the Appellant would be subjected to serious harm in the reasonably foreseeable future because of his Tamil ethnicity. The Tribunal also found there was no reasonable possibility that the Appellant would be targeted for harm because of any political opinion imputed to him as a consequence of his Tamil race or ethnicity, nor his place of origin (D[57]). The Tribunal accepted that the Sri Lankan authorities would become aware that the Appellant left Sri Lanka in 2014 on a valid passport and travelled to India. The Tribunal observed that the Appellant's travel to India had no impact on his return in 2013 or when he subsequently departed using his passport in 2014. This, the Tribunal held, was because the authorities would have no record that he went to India without formal exit papers or documentation from October 2012 to October 2013. The Tribunal also accepted that the Appellant no longer had a valid travel document and if he was returned to Sri Lanka he may be identified as a failed asylum seeker from Australia and/or Nauru and one who has travelled to India. The Tribunal found (D[58]):

"...However, on the evidence before it, the Tribunal does not accept there to be a reasonable possibility that he will be imputed with a political opinion that is supportive of the LTTE because of his departures - legal or illegal - or because of his status as a failed asylum seeker who has resided in India and sought international protection in Australia and Nauru. Accordingly, the Tribunal finds that the (Appellant) does not have a well-founded fear of persecution on this basis."

39. The Tribunal found that the Appellant did not have a well-founded fear of persecution for reason of his Tamil ethnicity either alone or in combination with any political opinion imputed to him as a Tamil from a formerly LTTE-controlled area. Further, the Tribunal also found that the Appellant did not have a well-founded fear of being persecuted for reason of his membership of a particular social group comprised of Sri Lankan Tamils from the northern province (D[63]-[64]).

40. In relation to the claim of being a failed asylum seeker, the Appellant claimed that if he was returned to Sri Lanka, he would face a well-founded fear of persecution due to his membership of a particular social group being Sri Lankan Tamils, Sri Lankan Tamil asylum seekers and Sri Lankan asylum seekers previously resident in India. In the Tribunal Decision, it outlined the discussions it had at the hearing with the Appellant

concerning the UNHCR reports and DFAT's advice (D[67]-[68]). Following those references, the Tribunal stated:

“[69] As noted above, the Tribunal does not accept that the (Appellant) had an LTTE profile in Sri Lanka or India. On the Applicant's own evidence he was never arrested or charged with an offence in Sri Lanka. There is no evidence before the Tribunal to indicate Sri Lankan Tamils who were previously resident in India would be targeted for harm. The Tribunal does not accept there is a reasonable possibility that the Appellant would face harm for reasons of his former periods of residence in India.”

41. In relation to the claim of being a returnee, the Appellant had submitted to the Tribunal that because he had sought asylum in Nauru that would increase his risk of harm if he was returned to Sri Lanka. In this context, various country reports were provided and referenced (D[70]). The Tribunal accepted that upon return to Sri Lanka the Appellant is likely to face questioning at the airport and may also face questions about any links he may have with the LTTE. However, such questioning, the Tribunal held, would quickly establish that the Appellant has no criminal or other adverse record in Sri Lanka and he comes from Mannar district. As such, the Tribunal did not consider that the Appellant had the kind of risk profiles identified in the UNHCR guideline 2012. Therefore, the Tribunal did not accept he is at risk for any of those identified profiles (D[72]). As such, although the Tribunal accepted that the Appellant may be identified as a failed asylum seeker returning from Nauru, it did not accept there was a reasonable possibility he will be imputed with a political opinion that is supportive of the LTTE because of his previous residence or his status as a failed asylum seeker returning from Nauru (D[73]).
42. Given those findings, the Tribunal did not accept there to be a reasonable possibility that the Appellant would be targeted for serious harm by Sri Lankan authorities on the separate or cumulative bases of his Tamil ethnicity, his actual or imputed political opinion, his prior residence in India, the fact that he sought asylum in Australia and Nauru or his membership of various particular social groups of failed asylum seekers (D[76], [81]-[83]).

43. The Tribunal concluded that the Appellant was not a refugee within the meaning of the Refugees Convention.

The Ground of Appeal

44. As set out in full above, the only ground of appeal now advanced by the Appellant, can be summarised as the Tribunal erred by making an unequivocal statement in its decision that there was no evidence before it to indicate Sri Lankan Tamils who were previously resident in India would be targeted for harm was factually incorrect. According to the Appellant, this must mean that the Tribunal has failed to address an essential aspect or integer of his claim that his stay in India would raise suspicions and supported his claim that Tamils who have returned from India would be targeted for harm.

The Appellant's Submissions

45. The Appellant submitted that as a factual proposition, the Tribunal's statement at D[69] was incorrect. Particularly the sentence "*There is no evidence before the Tribunal to indicate Sri Lankan Tamils who were previously resident in India would be targeted for harm.*" The Appellant submits that the Tribunal had the Appellant's own evidence, being an account of his circumstances after he returned from India in 2013 and there was also country information before the Tribunal in relation to this issue. The Appellant refers to the Tribunal Submissions prepared by his representatives before the Tribunal dated 8 June 2016 and the section headed, "*Tamil Refugees Returned from India*", particularly from [147]-[154]. That submission, according to the Appellant, cited country information that supports ongoing risks faced by Tamils who have returned from refugee camps in India, including the following:

- International Truth & Justice Project (ITJP), July 2015: "*Be aware that the Sri Lankan authorities are closely monitoring Tamils in India and Malaysia and their contact with their families in Sri Lanka*".
- The International Crisis Group (ICG) in June 2011 reported that: "*in a parliamentary debate the Sri Lankan prime minister announced that*

'remnants of the LTTE were being trained in camps in southern India to carry out attacks in India and Sri Lanka' ”.

- Sri Lankan Home Ministry notification acknowledged that despite the LTTE having *“being decimated in Sri Lanka, recent reports reveal that remnant cadre and leaders are regrouping in Tamil Nadu”*.
- India’s Additional Solicitor General testified in a tribunal that the *“LTTE remnant is regrouping in India”* and *“the possibilities of these remnant cadres using India, especially Tamil Nadu, as a rear base for regrouping activities thus cannot be ruled out”*.
- In the ICG’s opinion: *“[i]t is no secret that India, specifically Tamil Nadu, would be the most likely and logistically convenient place for the Tigers to regroup and rearm, given the anonymity that its Tamil population provides as well as its proximity to Sri Lanka. It is clear that some LTTE leaders escaped to India before the end of the war while others bribed their way out of Sri Lanka detention camps and into India afterwards”*.

46. The third and fourth points above are derived from the Tribunal Submissions at [153] and are also a reference to the ICG report in June 2011.
47. This country information, the Appellant submits, was some evidence before the Tribunal to indicate that Sri Lankan Tamils who were previously resident in India would be targeted for harm. Hence, the Appellant submits that insofar as the Tribunal held that there was *“no evidence”* to indicate Sri Lankan Tamils who were previously resident in India would be targeted for harm that is not only incorrect but indicates a failure to consider or address an essential aspect or integer of the Appellant’s claim because it overlooked or ignored the evidence going to that issue.
48. As such, the Appellant’s position can be summarised that by the Tribunal finding that there was *“no evidence”* (D[69]) it was effectively failing to address an essential aspect or integer of the Appellant’s claim because it dismissed the claim without further consideration. This was in circumstances, according to the Appellant, where there was

in fact evidence on that matter. Therefore, the Appellant submits that the finding was done on the flawed premise that there was no evidence to support the claim.²

The Respondent's Submissions

49. The Respondent contends that the reading of the Tribunal Decision at paragraph [69] advanced by the Appellant is incorrect. On a proper reading of the Tribunal Decision, according to the Respondent, those reasons are directed to conveying the meaning that the Tribunal found that there was no evidence that Sri Lankan Tamils who have been in India are targeted in Sri Lanka for the reason of being Sri Lankan Tamils who have been in India, and no other reason (as emphasised in the Respondent's submissions).
50. The Respondent submitted that there was evidence suggesting a concern about the re-emergence of the LTTE in circumstances where the obvious, but not necessary, place for any such re-emergence to occur was India. However, the Respondent submits that such recognition does not undermine or prove the error of law advanced by the Appellant, in the Tribunal's decision at [69] because it was a limited and qualified statement.
51. Further, in relation to the listed material relied on by the Appellant, the Respondent submits that the first reference to the ITJP July 2015 report is limited to "monitoring" and not directed to "harm". The Respondent submits that the balance of the matters in the listed material are directed to the possible re-emergence of the LTTE in India, not ordinary persons who had spent time in India (that is, without any LTTE links).
52. In any event, the Respondent submits there is no basis to infer that the Tribunal overlooked this material. This is with direct reference to the Tribunal Decision at [11], [20], [38], [44], [51]-[52], [70] and [79]. In addition, the Respondent observes the specific mention of the reports relied upon by the Appellant in the Tribunal's reasons at [51] and [70].

² With reference to *ETA080 v Republic of Nauru* [2017] NRSC 45 at [39]-[45] and *ETA067 v Republic of Nauru* [2017] NRSC 99 at [43]-[45] these decisions applying *Minister for Immigration and Border Protection v MZYTS* (2013) 230 FCR 431 and *Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99.

Relevant Legal Principles

53. It is generally open for the Tribunal to select the country information it chooses to rely upon and what weight to put on that evidence. Khan ACJ observed in *DWN111 v Republic of Nauru* [2017] NRSC 56 at [33]-[34] (footnotes omitted):

[33] The respondent in response submits "as to country information, what the Tribunal chooses to rely on is a question of fact for the Tribunal". The respondent also relies on NAHI v Minister for Immigration and Multicultural Affairs and submits at [18(a)] of its written submission "the assessment of country information, and the weight to be given it, is entirely a matter for the Tribunal in the discharge of its merits review task".

[34] ... In any event, as discussed above, the country information that the Tribunal chooses to rely on is a question of fact for the Tribunal."

54. Similarly, Crulci J in *WET 071 v Republic* [2017] NRSC 94 at [39] observed (footnotes omitted):

"[39] This Court has also approved of the Full Court of the Federal Court authority of NAHI v Minister for Immigration and Multicultural Affairs, which clarifies that the country information relied upon is a matter for the Tribunal. Gray, Tamberlin and Lander JJ said:

'The appellants also complained that the Tribunal made an incorrect assessment of the foreseeable future, by making a 'mere guess' and by relying on 'country information' that did not present a true picture. It is clear from its reasons for decision that the Tribunal did not rely on 'country information' in making its assessment of the future, and that the conclusion it reached was open to the Tribunal on the basis of the material it used. Both the choice and the assessment of the weight of such material were matters for the Tribunal. The Court cannot substitute its own view of that material, even if it had a different view from that reached by the Tribunal.'"

(emphasis added)

55. It is also not necessary for the Tribunal to refer to each and every piece of evidence submitted by an applicant, on the review by the Tribunal. Crucci J in *ETA080 v Republic* [2017] NRSC 45, put it in these terms, at [46] (footnotes omitted):

“[46] It is not necessary for the Tribunal to refer to every single piece of evidence submitted by the Appellant. The Tribunal has considered the Appellant’s claims as required by the authorities set out above and did not fail to take into account relevant considerations. The ground of appeal fails.”

56. Also relevant to the ground of appeal as framed, are the following two observations from Freckelton J. The first from *QLN 107 v Republic* [2018] NRSC 23 at [48]-[49] (footnotes omitted):

“[48] The Tribunal is not required to refer in its written reasons to every piece of evidence and every contention made by an applicant. There is an important distinction between the Tribunal failing to advert to evidence which, if accepted, might have led it to make a different finding of fact and a failure by the Tribunal to address a contention which, if accepted, might establish that the applicant had a well-founded fear of persecution for a Convention reason. This goes to the significance of evidence and its role in the reasoning process of the Tribunal in any given case.

[49] The failure by the Tribunal to make a finding on a “substantial, clearly articulated argument relying upon established facts” has the potential to amount to a failure to accord procedural fairness and can also constitute a constructive failure to exercise jurisdiction. If the task of the Tribunal cannot be undertaken “without a consciousness and consideration of the submissions, evidence and material advanced by the visa applicant”, that may constitute an appealable error.”

57. The second from *TTY 073 v Republic* [2018] NRSC 53 at [42]-[43] (footnotes omitted):

“[42] There is an issue of construction arising from these paragraphs, regarding whether the paragraphs reflect a finding that the Appellant did not attend the protest at all or whether the Appellant merely did not

attend and participate in the protests in the manner claimed. As to the issue of construing a Tribunal's reasons in the event of ambiguity, the Appellant took the Court to SZCBT v Minister for Immigration and Multicultural Affairs, in which Stone J referenced Minister for Immigration and Ethnic Affairs v Wu Shan Liang, where the Full Court of the Australian Federal Court found that the reasons of the delegate were 'entitled to a beneficial construction', and noted in particular paragraph [26]:

"The phrase 'beneficial construction', as used in Wu Shan Liang has a specific meaning, and was certainly not intended to mean that any ambiguity in the Tribunal's reasons be resolved in the Tribunal's favour. Rather, the construction of the Tribunal's reasons should be beneficial in the sense that the Tribunal's reasons would not be over-zealously scrutinised, with an eye attuned to error. In this sense, a 'beneficial' approach to the Tribunal's reasons does not require this Court to assume that a vital issue was addressed when there is no evidence of this and, indeed, the general thrust of the Tribunal's comments suggest that the issue was overlooked."

[43] *In response, the Respondent relied on Applicant WAEE v Minister for Immigration & Multicultural & Indigenous Affairs at [47]:*

"The inference that the Tribunal has failed to consider an issue may be drawn from its failure to expressly deal with that issue in its reasons. But that is an inference not too readily drawn where the reasons are otherwise comprehensive and the issue has at least been identified at some point."

58. In this context, the High Court of Australia, when it was the ultimate appellate Court in this jurisdiction, observed the following in *ETA067 v Republic of Nauru* [2018] HCA 46 at [13]-[14] (footnotes omitted):

"[13] The absence of an express reference to evidence in a tribunal's reasons does not necessarily mean that the evidence (or an issue raised by it) was not considered by that tribunal. That is especially so

when regard is had to the content of the obligation to give reasons, which, here, included referring to the findings on any “material questions of fact” and setting out the evidence on which the findings are based. There was no obligation on the Tribunal to refer in its reasons to every piece of evidence presented to it.

[14] Further, there is a distinction between an omission indicating that a tribunal did not consider evidence (or an issue raised by it) to be material to an applicant's claims, and an omission indicating that a tribunal failed to consider a matter that is material: including one that is an essential integer to an applicant's claim or that would be dispositive of the review.”

59. That passage from the High Court of Australia, refers to a number of authorities, including, relevantly, *Minister for Immigration and Border Protection v SZSRS* [2014] FCAFC 16; (2014) 309 ALR 67 (*SZSRS*) at [34] and *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 236 FCR 593 (*WAEE*) at [47]. In the context of this appeal, it is worth setting out these passages in full (and although not expressly referred to in that judgment by the High Court, the applicability of *WAEE* at [46] should also be noted, that the reasons of the Tribunal are not to be scrutinized “with an eye keenly attuned to error”).
60. The Full Court of the Federal Court in *SZSRS* at [34] (footnotes omitted) stated the following:

“[34] The fact that a matter is not referred to in the Tribunal's reasons, however, does not necessarily mean the matter was not considered by the Tribunal at all: SZGUR at [31]. The Tribunal may have considered the matter but found it not to be material. Likewise, the fact that particular evidence is not referred to in the Tribunal's reasons does not necessarily mean that the material was overlooked. The Tribunal may have considered it but given it no weight and therefore not relied on it in arriving at its findings of material fact. But where a particular matter, or particular evidence, is not referred to in the Tribunal's reasons, the findings and evidence that the Tribunal has set out in its reasons may be used as a basis for inferring that the matter or

evidence in question was not considered at all. The issue is whether the particular matter or evidence that has been omitted from the reasons can be sensibly understood as a matter considered, but not mentioned because it was not material. In some cases, having regard to the nature of the Applicant's claims and the findings and evidence set out in the reasons, it may be readily inferred that if the matter or evidence had been considered at all, it would have been referred to in the reasons, even if it were then rejected or given little or no weight: MZYTS at [52]."

61. In *WAEF* the Full Court stated:

"[47] The inference that the tribunal has failed to consider an issue may be drawn from its failure to expressly deal with that issue in its reasons. But that is an inference not too readily to be drawn where the reasons are otherwise comprehensive and the issue has at least been identified at some point. It may be that it is unnecessary to make a finding on a particular matter because it is subsumed in findings of greater generality or because there is a factual premise upon which a contention rests which has been rejected. Where, however, there is an issue raised by the evidence advanced on behalf of an applicant and contentions made by the applicant and that issue, if resolved one way, would be dispositive of the tribunal's review of the delegate's decision, a failure to deal with it in the published reasons may raise a strong inference that it has been overlooked."

Consideration

62. The initial reference relied upon by the Appellant to support the ground of appeal is from the Tribunal Submissions which referred to the July 2015 report published by the ITJP. That referred to details said to be obtained from "*witnesses who sought asylum*" and when they returned to Sri Lanka they were detained, tortured and/or sexually abused and had to pay a ransom to escape abroad a second time. In the Tribunal Submissions, the Appellant also referred in this section to Appendix 1 to those

submissions. That Appendix was headed, Appendix 1: “*Persecution of Ethnic Tamils and LTTE Sympathisers*”. The introduction to that Appendix commenced with:

“Tamils and perceived supporters of the Liberation Tigers of Tamil Eelam (“LTTE”) continue to suffer violence and discrimination in contemporary Sri Lanka. We submit that our client, as a Tamil from northern province who has been alleged to support the LTTE, will be persecuted if he is removed to Sri Lanka.”

63. The introduction from Appendix 1 continues and contains references to Sri Lankan Tamils with alleged ties or support for the LTTE and the harm claimed to be suffered. The Appendix is then divided into several sections regarding, first, an analysis and response to the Department of Foreign Affairs and Trade’s Country Information Report – Sri Lanka dated 18 December 2015. Secondly, a survey of Independent Country Information, thirdly matters regarding the election of Maithripala Sirisena, fourthly a short submission regarding case law and then it ended with some conclusionary remarks.
64. Included in that survey of Independent Country Information were references to the ITJP March 2014 report and its July 2015 report and several reports of the ICG.
65. The first point referred to and relied on in the Appellant’s submissions, appears to be a reference to [149]-[150] of the Tribunal Submissions. However, paragraph [149] of the Tribunal Submissions does not refer to those who have returned from India. Given the absence of the reference to India in paragraph [149], this does not support the Appellant’s ground of appeal. The claim by the Appellant in terms of a membership of a particular social group was one concerning “*Tamil men who have lived for prolonged periods in India*”. In the absence of an express reference to those returning from India, this does not support the Appellant’s contention that the Tribunal erred or failed to consider an essential integer of the claim as this material does not support the claim as made.
66. Secondly, in relation to this first point, insofar as it is a reference to paragraph [150] of the Tribunal’s Submissions, this part of the submission and reference to the ITJP Report is an observation that the Sri Lankan authorities are closely monitoring Tamils in India and Malaysia and their contact with their families in Sri Lanka. This is not evidence or material regarding a risk of harm or persecution that may be suffered by

Tamils in Sri Lanka who have returned from refugee camps in India, it is in relation to monitoring. Given the absence of a reference to harm, this also does not support the Appellant's ground of appeal.

67. As such, the submission sought to be advanced by the Appellant on this first point by reference to the ITJP report which is submitted to have not been considered by the Tribunal because it provides contrary evidence to the finding that there is no evidence before the Tribunal to indicate Sri Lankan Tamils who were previously resident in India would be targeted for harm is not accepted.
68. The remaining four points are all references to reports by the ICG. Each of these references contains involvement with, or actual or perceived links to, the LTTE. That does not support the ground of appeal as advanced.
69. The Appellant's submission or claim to the Tribunal in this respect, was that the Appellant feared that he would be persecuted if removed to Sri Lanka because of his membership of a particular social group, being Tamil Men who have Lived for Prolonged Periods in India. That claim did not contain any limb or involvement or links (actual or perceived) to the LTTE. The Appellant made separate claims in relation to his perceived ties or perceived views in relation to the LTTE. This was on the basis of his own race, past accusations, his brother's involvement in the LTTE and on the basis of having spent time living in India. Such that, the Appellant did make claims based on his time living in India, together with perceived ties, links, views or involvement with the LTTE (and these were considered). The country information which the Appellant now seeks to rely upon and submit is contrary to the Tribunal's finding at D[69] each contain references to the LTTE. Such that while such matters may have provided support for claims of the Appellant which included perceived ties, links, views or involvement with the LTTE, that material does not support the Appellant's submission that those aspects of the country information mean that there was evidence (contrary to the Tribunal's finding) and hence the Tribunal failed to address an essential aspect or integer of the Appellant's claim.
70. Further, insofar as the Appellant's submission is that the Tribunal failed to consider Independent Country Information, that submission cannot be accepted. The Tribunal's decision includes many references to the Appellant's supporting materials, Tribunal Submissions and details from those documents which is manifest of a consideration of

and engagement with those materials. There are express references to particular documents and reports provided, including Independent Country Information. This includes express references to the ICG's reports and materials, UNHCR Reports, DFAT Reports and various other sources including reports by the Immigration and Refugee Board of Canada and the ITJP report, amongst others.

71. The Tribunal preferred the evidence from the UNHCR Reports and gave weight to that material. In accordance with the principles outlined above, it was open for the Tribunal to do so.
72. In the Tribunal Decision, the Tribunal also made relevant findings. The Tribunal commenced observing that the conflict between the LTTE and the Sri Lankan authorities was well-documented between 1983 and May 2009 when the Sri Lankan government announced its military victory of the LTTE. The Tribunal accepted the Appellant's claim to have lived in Pesalai village in the Mannar district apart from the period between, October 2012 to October 2013 when he went to India illegally by boat. The Tribunal also accepted that he lived in his village from October 2013 until June 2014 when he departed on a valid passport and returned to India where he has no legal status. The Tribunal accepted that the Appellant's brother was caught by the SLN on one occasion in 2007, but that his brother convinced the SLN that the Appellant had no involvement. His brother was detained and sentenced. The Tribunal was satisfied that the matter involving his brother had been finalised. The Tribunal considered the Appellant's claim that his brother was involved in the LTTE, noting that this claim was first made to the Tribunal and was a significant departure from his original claims, that he and his brother were innocent bystanders when the SLN intercepted an LTTE smuggling operation. The Tribunal was satisfied that the Appellant was never arrested or detained apart from being questioned for five hours by the SLN on the beach. The Tribunal considered the Appellant's reason for returning to Sri Lanka in 2013, which led it to conclude he did not hold any subjective fear of harm to return. The Tribunal did not accept that the Appellant was in hiding when he returned to Sri Lanka and found he was not arrested or detained during his return and then he departed legally on a valid passport in June 2014. The Tribunal was satisfied that at the time of his departure the Appellant was not of interest to the Sri Lankan authorities for reason of his actual or imputed political profile as a Tamil supporter. The Tribunal expressly

found that the Appellant “*did not have an actual or imputed LTTE profile at the time of his departure from Sri Lanka in 2014*”.

73. The Tribunal noted the improvements in Sri Lanka since the end of the conflict in May 2009. That impacted on the assessment of whether the Appellant’s fears of returning are well-founded at the time of the Tribunal Decision. The Tribunal set out all of the bases upon which the Appellant claimed to face a well-founded fear of persecution and accepted, for the purposes of its decision, that the groups advanced were each capable of constituting a particular social group.
74. The Tribunal accepted that the Appellant is a Tamil from Mannar, northern province and that that area was formerly controlled by LTTE. The Tribunal observed from the UNHCR report that Tamils living in LTTE-controlled areas in the northern and eastern provinces during the conflict necessarily had contact with the LTTE however those guidelines indicate that persons who remain at risk had stronger links to the LTTE, such as those holding senior positions or who were combatants or cadres. The Tribunal observed that DFAT’s advice was that Tamils in the northern province were no longer required to be registered and that monitoring and harassment of Tamils has reportedly decreased under the Sirisena government. The Tribunal also observed the UK Home Office’s assessment that the focus of the Sri Lankan government since 2009 are on those perceived to be a threat to the integrity of Sri Lanka as a single state. The Tribunal gave weight to the UNHCR’s 2010 assessment that due to the improved human rights and security situation there is no longer a need for group based protection mechanisms or the presumption of eligibility for Sri Lankan Tamils originating from the north of the country. This was also consistent with DFAT’s advice and similar to the UK Home Office assessment that Tamil ethnicity does not, on its own, warrant international protection. The Tribunal observed that some of the independent sources referred to in the Appellant’s representatives’ submissions were from several years ago and some prior to the election of the Sirisena government. The Tribunal preferred the more recent Country Information.
75. The Tribunal accepted that Tamils in Sri Lanka faced a degree of harassment, discrimination and in some cases persecution during the time of conflict between the LTTE and the Sri Lankan authorities on account of their ethnicity. However, the Tribunal stated it had considered sources referred to and the war ending in May 2009, and found that Tamils, including young male Tamils living in or originating from

northern Sri Lanka, do not face a reasonable possibility of suffering persecution solely on account of their Tamil ethnicity. The Tribunal did not accept that the Appellant's Tamil ethnicity or the fact he originates from the northern province will mean that he will be imputed to be a sympathiser or supporter of the LTTE or opponent of the Sri Lankan government if he returns to Sri Lanka now or in the foreseeable future, nor that there is a reasonable possibility that he will be targeted for harm on that basis. The Tribunal expressly found that there was no reasonable possibility that the Appellant would be subject to serious harm in the reasonably foreseeable future because of his Tamil ethnicity. For the same reasons, the Tribunal found there was no reasonable possibility that the Appellant would be targeted for harm because of any political opinion imputed to him as a consequence of his Tamil race or ethnicity, nor his place of origin.

76. The Tribunal accepted that the Sri Lankan authorities would be aware that he left in 2014 on a valid passport and travelled to India. However, the Tribunal found that the authorities would have no record that he went to India from October 2012 to October 2013 as he did so without formal exit papers or documentation. The Appellant's travel to India had no impact on his return in 2013 or when he subsequently departed using his passport in 2014. The Tribunal observed that given the large numbers of Tamils who fled India during and after the war and returned without incident, the Tribunal was satisfied that this would not adversely impact if he now returned to Sri Lanka. The Tribunal did accept that the Appellant no longer had a valid travel document and if returned to Sri Lanka he may be identified as a failed asylum seeker and one who has travelled through India. However, the Tribunal did not accept, on the evidence before it, that there is a reasonable possibility that the Appellant will be imputed with a political opinion that is supportive of the LTTE because of his departures, legal or illegal, or because of his status as a failed asylum seeker who has resided in India and sought international protection in Australia and Nauru. Accordingly, the Tribunal found that the Appellant did not have a well-founded fear of persecution on this basis.
77. The Tribunal considered and accepted that the Appellant may be subjected to a moderate level of societal discrimination because of his profile as a Tamil from the north. In this context the Tribunal considered the Nauru Refugee Status Determination Handbook to consider whether persons who receive less favourable treatment are victims of persecution. The Tribunal stated that there was no evidence before it to

indicate that the Appellant would be unable to obtain work or that he would be refused work for a convention reason. The Tribunal found the Appellant does not have a well-founded fear of persecution for reason of his Tamil ethnicity, either alone or in combination with any imputed political opinion to him as a Tamil from a formerly LTTE-controlled area. Further, the Tribunal found the Appellant does not have a well-founded fear of being persecuted for reason of his membership of a particular social group comprised of Sri Lankan Tamils from the northern province.

78. The Tribunal also considered separately the Appellant's claim that having sought asylum in Nauru will expose him to increased risks of harm if returned to Sri Lanka. The Tribunal referred to a variety of the reports that had been put before it and accepted there was no systematic monitoring of the treatment of Sri Lankan returnees and that there are reports that some former Sri Lankan asylum seekers have been detained and ill-treated. The Tribunal accepted that upon return the Appellant is likely to face questioning and given that he is a Tamil, may face questioning about any links with the LTTE. However, the Tribunal considered that such questioning, in conjunction with intelligence, would quickly establish that the Appellant had no criminal or other adverse record in Sri Lanka and comes from Mannar district. The Tribunal considered that the Appellant's brother's record would probably be referred to in this context. Having carefully considered the risk profiles identified in the UNHCR Guideline of 2012, the Tribunal did not accept that the Appellant is at risk of falling into any of those identified profiles. Although the Tribunal accepted that the Appellant may be identified as a failed asylum seeker, it did not accept there to be a reasonable possibility that he will be imputed with a political opinion that is supportive of the LTTE. The Tribunal did not accept there was a reasonable possibility that the Appellant would be targeted for harm at the airport for any of the convention reasons claimed now or in the reasonably foreseeable future nor, given his profile, that the process of questioning would itself involve any serious or significant harm. On the basis of the Tribunal's findings, it did not accept there to be a reasonable possibility that the Appellant would be targeted for serious harm by Sri Lankan authorities on the separate or cumulative basis of his Tamil ethnicity, his actual or imputed political opinion, his prior residence in India, or the fact that he has sought asylum in Australia and Nauru.
79. The Tribunal did accept that the Appellant would be questioned at the airport and after identity and security checks would be released. The Tribunal did not accept that there

was a reasonable possibility that the Appellant would face torture during his questioning at the airport.

80. The Tribunal expressly considered the Appellant's claims of a well-founded fear of persecution for membership of a particular social group being "*Sri Lankan Tamils*", "*Sri Lankan Tamil asylum seekers*" and "*Sri Lankan asylum seekers previously resident in India as refugees*". The Tribunal observed that the UNHCR had assisted thousands of Tamil refugees living in India return to Sri Lanka since 2009 and had monitored their experience and any problems encountered. The Tribunal observed that the UNHCR reported that in general the returnees had a positive experience with few ranking security as the main challenge. Similarly, DFAT's advice that significant numbers of Sri Lankan Tamils had been returned involuntarily from Australia and other countries and that the independent sources did not indicate a returnee identified as someone who had sought asylum in Australia or other countries would face a reasonable possibility of harm on that basis alone. It is in this context and with the express reference to finding that the Tribunal did not accept that the Appellant had an LTTE profile in Sri Lanka or in India, it made the statement which the Appellant criticises that "*(t)here is no evidence before the Tribunal to indicate Sri Lankan Tamils who were previously resident in India would be targeted for harm*". This was open to the Tribunal.
81. What is clear from the above outline of the Tribunal's considerations and findings is that the Tribunal, in a comprehensive decision, has considered all of the claims made by the Appellant and it has not failed to address an essential aspect or integer of the Appellant's claims. There are several references to the Tribunal considering the Appellant previously being resident in India either of itself or together with the possible imputed links or involvement with the LTTE. This consideration reflects the recognition by the Tribunal of the separate claims made by the Appellant. Further, and in the context of the Tribunal's decision as a whole, where it has referred to there being 'no evidence' noting the commencement of that paragraph in relation to the finding that the Appellant did not have an LTTE profile in Sri Lanka or in India, that is the Tribunal's observation that there was no evidence before it to indicate Sri Lankan Tamils who were previously resident in India would be targeted, that is, without any LTTE profile (actual or imputed). Again, this was open to the Tribunal.
82. The sentence which is the focus of the Appellant's submissions (at D[69]) does not indicate, because of a flawed premise that there was no evidence to support the claim,

that the Tribunal failed to address an essential aspect or integer of the Appellant's claim or that the Tribunal ignored or overlooked the evidence going to that issue. The Tribunal Decision is comprehensive and contains express references to the particular claim that the Appellant submits was overlooked.

83. Further, to the matters outlined above, the only way to accept the ground as contended by the Appellant, would be to engage in an overzealous reading of the Tribunal's reasons, one with an eye keenly attuned for error, or to have the Court embark on a merits review. None of these bases is a proper way to approach the reasons of the Tribunal.
84. As such, I do not accept the ground of appeal as advanced, establishes error on the part of the Tribunal. The appeal must be dismissed.

Conclusion

85. Under section 44(1) of the Act, I make an order affirming the decision of the Tribunal dated 31 August 2016 and make no order as to costs.

JUSTICE AMELIA WHEATLEY

Dated: 6 December 2022



